

Southern Methodist University

**SMU Scholar**

---

Faculty Journal Articles and Book Chapters

Faculty Scholarship

---

2016

## **Cognitive Bias, the 'Band of Experts,' and the Anti-Litigation Narrative**

Elizabeth G. Thornburg

*Southern Methodist University, Dedman School of Law*

---

### **Recommended Citation**

Elizabeth G. Thornburg, Cognitive Bias, the 'Band of Experts,' and the Anti-Litigation Narrative, 65 DePaul L. Rev. 755 (2016)

This document is brought to you for free and open access by the Faculty Scholarship at SMU Scholar. It has been accepted for inclusion in Faculty Journal Articles and Book Chapters by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# COGNITIVE BIAS, THE “BAND OF EXPERTS,” AND THE ANTI-LITIGATION NARRATIVE

*Elizabeth Thornburg\**

## INTRODUCTION

It must be daunting to have the power to amend the Federal Rules of Civil Procedure, especially when considering the discovery rules. Dogged by conflicting arguments that the procedural system is dysfunctional, rulemakers are faced with a host of difficult decisions. Some are normative. For example, in assessing the cost of process, how much cost is *too much* cost? Others are empirical but devilishly difficult to assess. For example: (1) How do litigation costs compare to monetary and nonmonetary stakes? (2) Would a rule change impede the successful assertion of valid claims? and (3) What impact would lessening private enforcement through litigation have on societal compliance with legal norms? Even for variables that can be measured, empirical research sometimes provides answers that the rulemakers simply do not believe. Faced with these challenges, it is not surprising that members of the Advisory Committee<sup>1</sup> on the Federal Rules of Civil Procedure often fall back on opinion surveys that are consistent with its members' own political views and professional experiences.

Professor Richard Marcus, Associate Reporter for the Advisory Committee, has suggested it acts as a “Band of Experts.” In this role, “a small number of knowledgeable and experienced individuals identify the first principles and work out what procedures should be

---

\* Richard R. Lee Endowed Professor of Law, SMU Dedman School of Law.

1. Proposals to amend the Federal Rules of Civil Procedure begin with the Advisory Committee on Civil Rules (Advisory Committee), which transmits its recommendations to the Committee on Rules of Practice and Procedure (Standing Committee). The Standing Committee independently reviews the findings of the Advisory Committee and if satisfied, recommends changes to the Judicial Conference, which in turn recommends changes to the Supreme Court. The Court considers the proposals and, if it concurs, officially promulgates the revised rules by order before May 1, to take effect no earlier than December 1 of the same year unless Congress enacts legislation to reject, modify, or defer the pending rules. 28 U.S.C. §§ 2071–77 (2012). This Article refers to the Advisory Committee and Standing Committee collectively as the Rules Committees. See generally *How the Rulemaking Process Works*, U.S. Courts, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> (last visited Mar. 8, 2016).

adopted to accomplish them.”<sup>2</sup> It is understandable that Advisory Committee members would like to see themselves in that light, but this idealization of the rulemakers’ role can lead to a false sense of neutrality and omniscience. Moreover, recent “Bands” have made rulemaking choices that consistently favor corporate interests in the gradual, but inexorable, quest to limit discovery.

This may be politics consciously in action; rulemakers may be committed to systemic changes that result in less regulation of business through less effective private litigation. Many recent amendments to the Federal Rules of Civil Procedure would be consistent with that philosophy. Even if that is not the case, sincerity does not create some kind of neutral Socratic template for procedural choices. No matter how knowledgeable and experienced Committee members may be, individually and collectively they lack the ability to arrive at first principles that do not favor one type of litigant over another. First, the principles that underlie civil procedure are in tension with each other, such that most changes will redistribute procedural advantages. Second, the Chief Justice’s appointment choices have resulted in Rules Committee leadership and membership that is overly homogeneous and inclined toward a particular type of political perspective and litigation experience.<sup>3</sup> Third, pressure on the Rules Committees—including the Supreme Court’s own discourse about discovery, corporate lobbying, and communications from Congress—undermines any sense of viewpoint neutrality. And, fourth, Rules Committee members, as normal human beings, are operating under the combined influence of a decades-long anti-litigation lobbying effort reinforced by a collection of heuristic biases that tend to make them both overly sensitive to corporate complaints and underappreciative of the concerns of litigants who need discovery to gain access to information that is crucial to their cases.

Cognitive psychologists have long researched the limits of human minds, including psychological phenomena that make us unaware of our own limits. These heuristic biases cause us to draw flawed inferences based on incomplete and unevenly weighted sources of information. Phenomena such as the availability heuristic and confirmation bias can lead us to see and believe some claims and fail to see, or to credit, others. Worse, the operation of these heuristics is affected by the experiences and beliefs of the person making decisions, so a Band

---

2. Richard Marcus, *Confessions of a Federal “Bureaucrat”: The Possibilities of Perfecting Procedural Reform*, 35 W. ST. U. L. REV. 103, 112 (2007).

3. See Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1159, 1571–76 (2015).

of Experts with similar backgrounds and beliefs will tend to reinforce rather than challenge each other's biases.

Part II of this Article uses the December 2015 discovery rule amendments as a case in point, highlighting the ways in which the changes will tend to favor the interests of large entities resisting discovery.<sup>4</sup> This Part also argues that the amendments are not reasonably calculated to accomplish their stated goals, thus supporting a fear that they are either purposely crafted to limit litigation or based on a mistaken view of federal litigation realities. First, the amendments claimed to be aimed at controlling excessive costs in the small percentage of large cases in which they occur, but the changes included in the amended rules are unlikely to affect those cases. Second, the Advisory and Standing Committees' expressed justifications for the rule amendments relied heavily on opinion surveys while discounting more reliable closed-case data and the recommendation of the Federal Judicial Center's (FJC) own empirical experts.

The remaining Parts of the Article ask why this would be true: Why do the December 2015 rule amendments consistently favor discovery resisters over discovery seekers? Part III examines the influence of the Supreme Court itself in shaping the composition of the committee and providing rhetorical signals about the role of discovery and of civil litigation more generally.<sup>5</sup> This Part concludes by noting other sources of political pressure that lurk in the background of the Rule Committees' work. Pressure like this is not surprising in light of the political implications of decisions that impact whether, and to what extent, the courts and lawsuits effectively enforce legal norms. Part IV describes the contours of the extremely effective, decades-long public relations campaign designed to convince all of us that litigation is pathologically abusive.<sup>6</sup> Part V explores the ways in which predictable heuristic effects blind the Band of Experts to the possibilities of solutions that would expand, rather than contract, information sharing.<sup>7</sup>

---

4. See *infra* notes 8–34 and accompanying text.

5. See *infra* notes 35–55 and accompanying text.

6. See *infra* notes 56–86 and accompanying text.

7. See *infra* notes 87–105 and accompanying text.

## II. HELPING THE “HAVES”<sup>8</sup> AGAIN: THE 2015 DISCOVERY AMENDMENTS

The Advisory Committee claims that the 2015 discovery amendments arise out of the “Duke Conference,” a May 2010 invitation-only meeting sponsored by the Advisory Committee, at which panels addressed assumed issues of cost and delay. That description of the provenance of the amendments is true to some extent, but the report to the Chief Justice after the Duke Conference did not call for rule change. “The extent of the actual change effected by [the 2000 amendment to Rule 26(b)(1)] continues to be debated. But there was no demand at the Conference for a change to the rule language; there is no clear case for present reform.”<sup>9</sup> In addition, the Duke Conference itself resulted, in part, from ongoing pressure from corporate America to amend the Federal Rules of Civil Procedure in ways that make it more difficult for plaintiffs to succeed. For example, a powerful group of defense interests submitted a White Paper to the Duke Conference with a discovery-curtailed wish list. Lawyers for Civil Justice (LCJ),<sup>10</sup> DRI—The Voice of the Defense Bar, the Federation of Defense and Corporate Counsel, and the International Association of Defense Counsel asked the Advisory Committee to:

- incorporate the proportionality factors into the definition of relevance, coupled with an amendment of the proportionality factors, which would make clear that discovery costs should be considered excessive if they are not proportional to the claims at issue;
- redefine the scope of discovery to eliminate “subject matter” relevance; and
- impose the costs of discovery on the discovering party: “A party submitting a request for discovery is required to pay the reasonable costs incurred by a party responding to a discovery request . . . . Such costs include the costs of preserving, collecting, review-

---

8. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 103–04 (1974); see also Elizabeth G. Thornburg, *Giving the “Haves” a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 249–62 (1999) (critiquing the discovery amendments that went into effect in 2000 because they created a one-sided advantage that favors defendants over plaintiffs).

9. See JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 8 (2010), <http://www.uscourts.gov/file/reporttothechiefjusticepdf>.

10. On its website, LCJ explains that it “promotes the corporate and defense perspective on proposed changes to the Federal Rules of Civil Procedure and works proactively to achieve specific rule reforms by galvanizing corporate and defense practitioners and legal scholars to offer consensus proposals to the rule makers.” LAW. FOR CIV. JUST., <http://www.lfcj.com> (last visited Jan. 11, 2016).

ing and producing electronic and paper documents, producing witnesses for deposition and responding to interrogatories.”<sup>11</sup>

The 2015 discovery rule amendments include significant changes in these areas and bear strong resemblances to this corporate wish list. The changes: (1) incorporate the proportionality factors into the definition of relevance; (2) eliminate “subject matter” relevance; and (3) tiptoe in the direction of shifting discovery costs to the discovering party.

#### A. “Proportionality” as a Tool To Limit Discovery

If there is a single word that captures the branding of the amendments to the discovery rules it is “proportionality.”<sup>12</sup> In the abstract, the concept sounds benign—who would argue in favor of *disproportionate* discovery? More seems to be at work in the discovery amendments, however. Admonitions promoting proportionality have been explicitly included in Rule 26 since 1983, they were broadened in 1993, and the fear that parties and judges were failing to implement those principles brought about an explicit cross-reference to those rules in the 2000 discovery amendments. No one could have overlooked their existence. Nevertheless, the 2015 amendments incorporated the proportionality principles into the very definition of discovery relevance.

The call for proportionality arises out of a belief that discovery costs are consistently too high, but that belief is contrary to reliable empirical data. There is, in fact, evidence that costs in most cases are both modest and proportional. One might infer from this that the existing proportionality provision is working or that there was never a problem to begin with.

Closed case data paints a different picture from the Committee’s claims of runaway costs. The FJC’s careful 2009 study of thousands of closed cases found that at the median the reported cost of discovery, including attorneys’ fees, was just 1.6% of case stakes for plaintiffs and only 3.3% for defendants. These findings are consistent with earlier empirical studies of discovery costs. A RAND study of practice after the 1993 amendments, for example, revealed that lawyer work hours on discovery were zero for “38% of general civil cases and low

---

11. LAWYERS FOR CIVIL JUSTICE ET AL., RESHAPING THE RULES OF CIVIL PROCEDURE FOR THE 21ST CENTURY: THE NEED FOR CLEAR, CONCISE, AND MEANINGFUL AMENDMENTS TO KEY RULES OF CIVIL PROCEDURE 23–24, 56 (May 2, 2010) [hereinafter LCJ WHITE PAPER], <http://www.uscourts.gov/file/document/reshaping-rules-civil-procedure-21st-century-need-clear-concise-and-meaningful>.

12. Although the Advisory Committee also listed the promotion of cooperation among litigants and early case management as goals, rule changes to promote these goals were, in fact, quite modest.

for the majority of cases.”<sup>13</sup> A parallel FJC study found that the median reported proportion of discovery costs to stakes was 3% and that the proportion of litigation costs attributable to problems with discovery was about 4%.<sup>14</sup>

As the Advisory Committee noted in explaining its rule changes, studies have also consistently shown that a very small percentage of cases—between 5%–10%—do generate high-discovery costs. Referring to the unquantified incidence of these cases as “worrisome,” the Committee also accurately pointed out that the high-discovery cases tend to be “complex, involve high stakes, and generate contentious adversary behavior.”<sup>15</sup> Law firm economics also have an important impact on litigation costs. When other variables are controlled for, law firm size alone can more than double discovery costs, and hourly billing also tends to raise costs.<sup>16</sup>

Those in attendance at the Duke Conference witnessed the disbelief among corporate panelists of the closed-case numbers. Those numbers, although supported by a long line of earlier studies, were inconsistent with the “cost and delay” narrative that they have internalized after years of repetition.<sup>17</sup> The Advisory and Standing Committees, too, have tended to focus on opinion surveys that are not grounded in actual costs, and those surveys disproportionately represent the complaints of corporate and defense interests. These opinions are quite likely skewed, consciously or unconsciously, by the self-interest of the

---

13. James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 636 (1998). Although discovery costs grow with the size and complexity of the case, the proportion of total costs they represent does not dramatically increase: the median percent of discovery hours for the bottom 75%, top 25%, and top 10% of cases by hours worked were 25%, 33%, and 36% respectively. *Id.* at 639–40, 650 tbl.2.10.

14. 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, 531–32 (1998). See PAUL R. CONNOLLY ET AL., FED. JUDICIAL CTR., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 1–2 (June 1978); WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 71 tbl.6, 73, 196 tbl.49 (1968); and Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 790 (1998), for summaries of the results of earlier studies.

15. Memorandum from David G. Campbell, Chair, Advisory Comm. on Civil Rules, to Jeffrey S. Sutton, Chair, Comm. on Rules of Practice & Procedure (May 8, 2013 as supplemented June 2013), reprinted in COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 259, 265 (2013) [hereinafter Rule Memorandum], <http://www.ediscoverylaw.com/files/2013/11/Published-Rules-Package-Civil-Rules-Only.pdf>.

16. Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 784 (2010).

17. Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1091–92 (2012).

person surveyed and are also likely to be impacted by the ways in which litigation and its costs have been portrayed in the media for decades.<sup>18</sup> Nevertheless, these self-proving complaints have found a receptive ear, and the Advisory Committee informed the Standing Committee that “[t]he previous amendments have not had their desired effect.”<sup>19</sup>

What, then, changed in December 2015? Under amended Rule 26(b)(1), the definition of discovery relevance reads like this:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.<sup>20</sup>

Note that this amendment may well leave discovery costs untouched in the “worrisome” cases because those cases tend to involve situations in which costs are high but not disproportionate. Nor is it clear how the changes, if they merely relocate existing standards, are supposed to decrease costs unless one believes that the judges overseeing contentious, high-stakes litigation were unaware of the presence of the factors in Rule 26(b)(2)(c). The Advisory Committee commendably abandoned the parts of its original proposal that would have lowered the presumptive limits on depositions and interrogatories, and these numbers (six depositions and fifteen interrogatories) were so low that they were clearly never aimed at complex high-stakes litigation.

Make no mistake: this change is intended to decrease the volume of discovery and not just in the “worrisome” cases. Nor is proportionality analysis intended merely to winnow out discovery of marginally relevant information. Rather, as Professor Marcus noted, a “tricky but central problem is to determine when discovery that seems ‘reasonable’ in terms of providing needed evidence is nonetheless too

---

18. See *infra* notes 56–86 and accompanying text (examining media depictions).

19. Memorandum from David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Jeffrey Sutton, Chair, Standing Comm. on Rules of Practice & Procedure B-8 (June 14, 2014), <http://www.uscourts.gov/file/18218/download>.

20. *Id.* at B-5. In response to comments, the Advisory Committee did move the “importance of the issues” factor to the front and added the factor about the parties’ relative access to relevant information. See *id.* The rule amendments as adopted added a Committee Note clarifying that discovering parties do not bear the burden of addressing all proportionality considerations. *Id.* at B-39.



costly or burdensome given the small stakes involved.”<sup>21</sup> Analogizing this issue to the English debates related to cost-shifting, Marcus pointed to Lord Justice Jackson’s recent conclusion: “Disproportionate costs do not become proportionate because they were necessary . . . . The fact that it was necessary to incur certain costs in order to prove or disprove a head of claim is obviously relevant, but it is not decisive of the question whether such costs were proportionate.”<sup>22</sup> As Marcus astutely pointed out, “American judges will increasingly be called upon to make such judgments in deciding what discovery should be ordered.”<sup>23</sup>

The ultimate impact of this rule change will only slowly be revealed as discovery disputes arise. That impact may stay largely under the radar because published opinions will be rare, discovery opinions are very case-specific, and the incidence of unmade requests will be hard to determine. Judges will have discretion to apply balancing factors and decide what is proportionate, and those decisions will require the judges to evaluate what the probable out-of-pocket costs of the proposed discovery would be and the importance of the litigation. In considering the worth of the requested discovery, judges will also need to consider how significant or convincing they find the information being sought. Ultimately, the proportionality balance will require normative decisions.<sup>24</sup> Who will be the opinion leaders in this effort? Duke University School of Law’s Judicial Center Advisory Council (whose membership is numerically slanted in favor of corporations (12) and defense lawyers (5) over plaintiffs’ lawyers (5))<sup>25</sup> held an invitation-only conference in November 2014 (under Chatham House rules), with the ultimate goal of developing a “best-practices docu-

---

21. Richard Marcus, “*Looking Backward*” to 1938, 162 U. PA. L. REV. 1691, 1719 (2014).

22. *Id.* at 1720 (quoting RUPERT JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT 37 (2009)); see also ENG. CIV. P.R. 44.3(2)(a) (“Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred . . . .”).

23. Marcus, *supra* note 21, at 1721.

24. Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery* 13 (Univ. of Pa. Law Sch., Penn Law: Legal Scholarship Repository, Paper No. 1521, 2014), [http://scholarship.law.upenn.edu/faculty\\_scholarship/1521](http://scholarship.law.upenn.edu/faculty_scholarship/1521).

25. The Council includes general counsel or litigators from Altec, Inc., Bank of America, Bayer Corporation, Boston Scientific Corporation, Crawford and Company, ExxonMobil, GE’s Power & Water, Home Depot, Merck, Microsoft, Pfizer, Inc., and State Farm Insurance Company, plus partners from ten major law firms (evenly split between plaintiff and defense practices). See *Advisory Counsel: Duke Law Distinguished Lawyers Series: General Counsels, Litigation Department Heads, and Law Firm Partners*, DUKE L., <http://law.duke.edu/judicialstudies/conferences/advisorycouncil> (last visited Aug. 26, 2015).

ment, which [would] provide authoritative guidance on implementing the proportionality standard.”<sup>26</sup>

### B. Eliminating “Subject Matter” Relevance

The rule amendments also narrowed the definition of discovery relevance in another way: they removed the option to seek judicial approval of discovery that goes beyond the “claims and defenses” pleaded by the parties. Eliminating the category of “subject matter” relevance not only narrows discovery but also leaves the unclear “claims and defenses” language as the only test.<sup>27</sup> The meaning of that language, which its drafters always conceded to be murky, has become all the more unclear because of the uncertainty about pleadings created by the Supreme Court’s opinions in *Bell Atlantic Corp. v. Twombly*<sup>28</sup> and *Ashcroft v. Iqbal*.<sup>29</sup> A party resisting discovery has every incentive to object to the discovery of anything broader than the narrowest pleaded facts, claiming that “conclusions” do not count as “claims” for discovery relevance just as they are ignored in assessing the adequacy of complaints.

The Advisory Committee discussions leading up to this set of discovery rule amendments demonstrated that some judicial members of the Committee already imposed limits on discovery that were even more stringent than the proposals. For example, the Briefing Book for the November 7–8, 2013 meeting included Judge Paul Grimm’s standard discovery order. That order limits initial discovery to material that is admissible in evidence, potentially followed by a second phase of “relevant to the claims and defenses” discovery—only on a showing of good cause. Further, “[i]f the Court determines that additional discovery is appropriate, *the Requesting Party will be required to show cause why it should not be ordered to pay all or a part of the cost*

---

26. *Implementing Discovery Proportionality Standard Conference (Invitation Only)*, DUKE L., <https://law.duke.edu/judicialstudies/conferences/november2014> (last visited Aug. 26, 2015).

27. The drafters of the 2000 amendments explained that the standard was meant to be flexible. “[T]he actual scope of discovery should be determined according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.” Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Alicemarie H. Stotler, Chair, Comm. on Rules of Practice & Procedure 34 (May 18, 1998), <http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-1998>. Plaintiffs and defendants also have predictably divergent views as to how broadly or narrowly claims and defenses should be interpreted. See Thornburg, *supra* note 8, at 255–58.

28. 550 U.S. 544 (2007).

29. 556 U.S. 662 (2009).

of the additional discovery sought.”<sup>30</sup> This approach was cited in the 2010 defense bar White Paper,<sup>31</sup> and it would not be surprising if future amendment proposals raise this possibility once again.

### C. *Cost Shifting*

Another antidiscovery provision is located in Rule 26(c)’s new permission to shift the cost of discovery to the discovering party. Currently cost shifts are rare, occurring mostly in e-discovery of material that is not reasonably accessible. Cost shifting more generally would be a fundamental change in discovery philosophy and practice. Although the Advisory Committee Notes emphasize that these shifts should not be the norm,<sup>32</sup> the result will surely be to encourage parties to request, and judges to allocate, costs to the discovering party more frequently.

### D. *Summary*

Cumulatively, the discovery rule amendments are likely to decrease the sharing of information. This impact is not aimed at, and will not primarily affect, the large “worrisome” cases. Rather, the decrease will be felt most strongly by individuals and small businesses suing large entities. When those “one shot players” have the burden of proof, lessened discovery can impact case outcomes. Reduced system costs are not beneficial if the tradeoff is substantive justice. Although all policy making involves tradeoffs, reducing the amount of discovery trades cost reductions for access to the truth.<sup>33</sup>

As Professor Stephen Yeazell pointed out in his comments on the rule proposals that became the December 2015 amendments:

The asymmetrical limits will be most likely to have an adverse effect on cases involving claims against large institutions—public or private. Such cases will often involve information critical for the development of the claim that lies only in the hands of the defendant, information that frequently can be garnered only with the use of the full array of discovery tools. . . . [I]n a legal system that prides itself on access to justice and good fact-finding, it is important not to

---

30. Discovery Order (D. Md.), *reprinted in* ADVISORY COMMITTEE ON CIVIL RULES 197, 198 (Nov. 7–8, 2013) (emphasis added), <http://www.uscourts.gov/file/15485/download>.

31. LCJ WHITE PAPER, *supra* note 11, at 56.

32. See FED. R. CIV. P. 26 Advisory Committee Notes to the 2015 amendments (“Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.”). In this sense, the Rules Committees have stopped far short of the sea change requested by corporate interest groups.

33. Alan B. Morrison, *The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System*, 90 OR. L. REV. 993, 994 (2012).

stack the deck against such claimants—as I believe many of the proposed amendments do.<sup>34</sup>

### III. WHY THE PREFERENCE FOR LIMITS? THE ROLE OF SCOTUS

It is not easy for the Supreme Court to directly influence discovery policy. Decisions about discovery issues are rarely reviewable. They are mostly interlocutory orders<sup>35</sup> and only rarely make it to appellate courts through the appeal of a collateral contempt order (generally when a claim of privilege has been rejected)<sup>36</sup> or occasionally through a writ of mandamus.<sup>37</sup> It would be extraordinarily unusual for an issue of proportional cost to come before the Court. But there are at least two ways in which the Court can have an indirect impact on the evolution of discovery practices: (1) through use of the Chief Justice's power to appoint the members of the Advisory and Standing Committees that make the rules; and (2) through its discourse on discovery and related doctrines.

#### A. *Appointing Committee Members*

Professors Steven Burbank and Sean Farhang have documented a significant shift in the composition of the federal rulemaking committees during the last several decades. They note that

beginning in 1971, when a succession of Chief Justices appointed by Republican Presidents have chosen committee members, the committee shifted toward being dominated by federal judges, that those appointments shifted in favor of judges appointed by Republican Presidents, that practitioner appointments shifted toward corporate and defense practitioners, and that the committee's proposals became increasingly anti-plaintiff (and hence anti-private enforcement).<sup>38</sup>

The current chair of the Advisory Committee is a judge who is enthusiastic about discovery limits,<sup>39</sup> and a majority of the Standing Com-

---

34. Letter from Stephen C. Yeazell, David G. Price & Dallas P. Price Distinguished Professor of Law Emeritus, to Jeffrey S. Sutton & Colleagues, Comm. on Rule of Practice & Procedure of the Judicial Conference of the U.S. 2 (Nov. 26, 2013), <http://www.regulations.gov/content-Streamer?documentId=USC-RULES-CV-2013-0002-0342&attachmentNumber=1&disposition=attachment&contentType=pdf>.

35. See, e.g., *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009) (holding that a pre-judgment disclosure order does not qualify for an immediate appeal).

36. See, e.g., *Hickman v. Taylor*, 329 U.S. 495 (1947).

37. See, e.g., *Schlagenhauf v. Holder*, 379 U.S. 104 (1964).

38. Burbank & Farhang, *supra* note 3, at 1159.

39. For example, Advisory Committee Chair Judge David Campbell's standard case-management order sets presumptive limits of twenty-five for both document requests and requests for admission, neither of which are subject to limits in the Federal Rules of Civil Procedure. See, e.g., Case Management Order at 1 (D. Az.), <http://www.azd.uscourts.gov/sites/default/files/judge->

mittee's and Advisory Committee's judges responsible for the 2015 discovery amendments were appointed by Republican Presidents. Many of them also served as law clerks to Justices appointed by Republican Presidents. The increased predominance of judges may itself be significant. Some scholars posit that a number of factors have caused the judiciary to be increasingly politicized and that, on average, judges are more politically conservative than lawyers.<sup>40</sup>

To the extent that the lawyers (and judges before they were judges) tended to represent corporate clients, one should also be concerned that they have come to identify with those clients in a way that colors their judgment about the benefits and burdens of litigation. For example, Professor Robert Gordon suggests:

In recent years many lawyers have taken on the values of and completely identified with their business clients, some of whom see law as an enemy or a pesky nuisance. Such lawyers say things like, "Helping our clients is good because they create wealth, innovation, and jobs; while their adversaries, the people we help them fight, small-minded vindictive bureaucrats and greedy plaintiffs' lawyers, create nothing and destroy innovation and enterprise. We help our clients work around the constraints on their autonomy and wealth-maximizing activities."<sup>41</sup>

In a similar vein, Professors Marc Galanter and William Henderson argue that the decreased stability of the tie between law firms and corporate clients, along with increased competition within large law firms, has led to very instrumental lawyer roles that focus above all on satisfying clients' wishes.<sup>42</sup>

One need not claim a conscious political agenda behind rules that tend to favor business interests. The judicial and practitioner members of the Advisory and Standing Committees share something perhaps more influential: a common background and experience as

---

orders/DGC%20Case%20Management%20Order%20with%20blanks.pdf. He also made comments like this in preparation for the Duke Conference: "[T]he point of the 2010 Conference is to think about possible solutions to what everyone seems to agree is too much and too expensive discovery, and so I throw it out for consideration." PAUL W. GRIMM & ELIZABETH J. CABRASER, *THE STATE OF DISCOVERY PRACTICE IN CIVIL CASES* 31 (2011) (quoting Judge Campbell) (recommending hard numeric limits on discovery devices), <http://www.nycla.org/PDF/Winning%20Cases%20in%20Federal%20Court%20-%202006.16.14%20-%20202.pdf>.

40. See, e.g., Adam Bonica & Maya Sen, *The Politics of Selecting the Bench from the Bar: The Legal Profession and Partisan Incentives To Politicize the Judiciary* 16 (Harvard John F. Kennedy Sch. of Gov't, Faculty Research Working Paper Series, Paper No. RWP15-001, 2015), <https://research.hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=9544&type=WPN>.

41. Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1191 (2003).

42. Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1907-13 (2008).

lawyers. The judges, before they were judges, and the practitioners on the Rules Committees tend to come from elite law firms whose primary clients are large corporations. Even the lawyer-members who do mostly plaintiff-side litigation operate in the rarified world of complex litigation—where discovery may be extensive and high stakes make it unlikely to be significantly affected by proportionality limits. The following chart contains basic information about the members of the committees that approved the 2015 discovery rule amendments.

**COMMITTEE ON RULES OF PRACTICE & PROCEDURE  
(STANDING COMMITTEE)<sup>43</sup>**

<b>Member</b>	<b>Nominator or Employer</b>	<b>Other</b>
Judge Jeffrey Sutton (6th Cir.)	George W. Bush	Law clerk for Justice Scalia; formerly practiced at Jones Day
James M. Cole, Deputy Attorney General (ex officio)	Barack Obama	Formerly practiced at Bryan Cave
Dean C. Colson	Colson Hicks Eidson	Law clerk for Justice Rehnquist
Judge Brent E. Dickson (Ind. Supreme Court)	Appointed to the Indiana Supreme Court in 1986	Bonica/Woodruff Campaign Finance Score indicates conservative ideological leaning
Roy T. Englert, Jr.	Robbins Russell Englert Orseck Untereiner & Sauber	Partner at a litigation boutique whose clients include numerous Fortune 500 companies, financial institutions, hedge funds, defense contractors, technology companies, and major accounting firms
Gregory Garre	Latham & Watkins	Law clerk for Justice Rehnquist; former U.S. Solicitor General
Judge Neil Gorsuch (10th Cir.)	George W. Bush	Law clerk for Justice White-Kennedy; mother was President Reagan's Environmental Protection Agency Administrator
Judge Susan P. Graber (9th Cir.)	Bill Clinton	Previously an Oregon state court judge

43. Committee membership changes as terms expire and people filling designated slots change jobs. In addition, the proposals that became the December 2015 discovery amendments were considered over the course of multiple years. The official charts of committee membership generally reflect membership as of October 1 but are sometimes revised. The charts in the text for the Rules Committees reflect those listed in either 2012 or 2013 (or both). COMMITTEES ON RULES OF PRACTICE AND PROCEDURE CHAIRS AND REPORTERS (2012 & 2013), <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/past-members-rules-committees>.

Justice Wallace Jefferson (Tex. S. Ct.)	Originally appointed by Former Governor Rick Perry (R)	Current partner at Alexander Dubose Jefferson Townsend
Dean David Levi (former judge)	George H.W. Bush	Law clerk for Justice Powell; Dean, Duke Law School; former judge for the Eastern District of California
Judge Patrick Schiltz (D. Minn.)	George W. Bush	Former Law Professor at Notre Dame University and the University of St. Thomas
Judge Amy J. St. Eve (N.D. Ill.)	George W. Bush	Formerly practiced at Davis Polk
Larry D. Thompson	Executive Vice President, Pepsico	Formerly practiced at King & Spaulding; Former Deputy Attorney General under George W. Bush
Judge Richard C. Wesley (2d Cir.)	George W. Bush	Former Associate Justice of the N.Y. Court of Appeals (appointed by Gov. Pataki)
Judge Jack Zouhary (N.D. Ohio)	George W. Bush	Former Senior Vice President and General Counsel at S.E. Johnson Companies

ADVISORY COMMITTEE<sup>44</sup>

Member	Nominator or Employer	Other
Judge David Campbell (Chair) (D. Ariz.)	George W. Bush	Law clerk for Justice Rehnquist
John M. Barkett	Shook, Hardy & Bacon	Practices in the areas of commercial litigation, environmental litigation, and international alternative dispute resolution; e-discovery expertise
Elizabeth Cabraser	Lief, Cabraser, Heimann & Bernstein	Court-appointed lead, co-lead, or class counsel in over eighty federal multi-district and state coordinated proceedings
Stuart F. Delery	Department of Justice Acting Associate Attorney General	Law clerk for Justice O'Connor
Judge Paul S. Diamond (E.D. Pa.)	George W. Bush	Formerly practiced at Obermayer Rebmann Maxwell & Hippel
Judge Robert Michael Dow Jr.	George W. Bush	Formerly practiced at Mayer Brown

---

44. *Id.*

Parker C. Folse	Susman Godfrey	Law clerk for Justice Rehnquist; antitrust and patent litigator representing both plaintiffs and defendants
Judge Paul W. Grimm (D. Md.)	Barack Obama	Former U.S. Magistrate Judge (2006–2012)
Peter D. Keisler	Sidley Austin LLP	Law clerk for Justice Kennedy; cofounder of The Federalist Society
Robert H. Klonoff	Professor and former Dean, Lewis & Clark Law School	Formerly practiced at Jones Day
Judge John G. Koeltl (S.D.N.Y.)	Bill Clinton	Law clerk for Justice Stewart; formerly practiced at Debevoise & Plimpton
Judge Scott M. Matheson, Jr. (10th Cir.)	Barack Obama (with support from Orrin Hatch)	Former dean at the University of Utah S.J. Quinney College of Law
Judge Michael Mosman (D. Or.)	George W. Bush	Law clerk for Justice Powell
Judge David E. Nahmias (Ga. S. Ct.)	Initially appointed by Republican Governor George Ervin “Sonny” Perdue III	Law clerk for Justice Scalia; formerly practiced at Hogan & Hartson
Judge Solomon Oliver, Jr. (N.D. Ohio)	Bill Clinton	Former Assistant States Attorney; former professor at Cleveland-Marshall College of Law
Judge Gene E. K. Pratter (E.D. Pa.)	George W. Bush	Former general counsel at Duane Morris LLP

As a group, these Committee members are likely to have overexperienced that small sliver of litigation in which discovery costs are extremely high. The FJC’s study of discovery costs prepared for the Duke Conference, which was mentioned *supra*, found a correlation between those costs and lawsuit stakes, lawsuit processing time, lawsuit complexity, and representation by larger law firms<sup>45</sup>—all of which are qualities apt to be common in the litigation experience of the members of the Rules Committees. As Professor Linda Mullenix has pointed out, empirical studies of discovery have consistently shown that “complex, high-stakes litigation, handled by big firms with corpo-

45. EMORY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1 (Mar. 2010), [http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/\\$file/costciv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf).



rate clients, are the cases most likely to involve the problematic discovery that skews the discovery debate.”<sup>46</sup>

### B. Signaling Desired Outcomes

Although the Supreme Court decides few discovery cases, it has nevertheless sent clear signals that it sees little value in discovery. A search for discussions of discovery in Supreme Court cases from the date John Roberts became Chief Justice yielded a few examples.<sup>47</sup> Most noteworthy was the dismissive treatment of discovery in the pleading cases, *Twombly* and *Iqbal*. Both cases rejected the concept that judicial case management could sufficiently cabin the presumed burden of discovery. Citing a nonempirical article by (now) Judge Frank Easterbrook, the majority in *Twombly* stated:

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through “careful case management,” given the *common lament* that the success of judicial supervision in checking discovery abuse has been on the modest side. And it is self-evident that the problem of discovery abuse cannot be solved by “careful scrutiny of evidence at the summary judgment stage,” much less “lucid instructions to juries,” the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no “‘reasonably founded hope that the [discovery] process will reveal relevant evidence’” to support a [Sherman Act] claim.<sup>48</sup>

*Iqbal* followed suit, quoting the first sentence of the *Twombly* excerpt above and also referring to the “burdens of discovery.”<sup>49</sup> Other mentions of discovery include a comment that the Private Securities Litigation Reform Act aimed to limit “vexatious discovery requests”<sup>50</sup> because extensive discovery would “allow plaintiffs with weak claims to extort settlements from innocent companies.”<sup>51</sup> Further, Justices Kennedy and Alito’s dissent in a 2010 case expresses a fear that the

---

46. Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 683 (1998).

47. Research Memorandum from Christopher Cornell to author (Nov. 1, 2014) (on file with author). John Roberts became Chief Justice on September 29, 2005.

48. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (second alteration in original) (emphasis added) (citations omitted) (quoting *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005)); see *id.* at 560 n.6 (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989)).

49. *Ashcroft v. Iqbal*, 556 U.S. 662, 685–86 (2009) (quoting *Twombly*, 550 U.S. at 559).

50. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006).

51. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008).

costs of discovery and litigation would force settlement even absent fault or injury.<sup>52</sup> There are no majority opinions during this time period that praise the role of discovery in any way.

The Court is not the only institution sending signals to the Rules Committees. Congress has tried to influence the direction of the rules. For example:

[I]n December 2011, a subcommittee of the House Judiciary Committee held a hearing on the “Costs and Burdens of Civil Discovery.” Before the next meeting of the Advisory Committee on Civil Rules, the Chairman of this subcommittee wrote to the judges who head the Advisory Committee and the Standing Committee on Rules of Practice and Procedure expressing hope that the committees “will recommend enacting rule reforms to address the principal concerns discussed at the hearing.”<sup>53</sup>

Another method for nudging Committee action is the actual introduction of legislation. The Chairs of the Advisory and Standing Committees have recently tried to fend off congressional proposals<sup>54</sup> to enact legislation that proposes sharp discovery limits and other procedural roadblocks for patent litigation.<sup>55</sup>

The Chief Justice and SCOTUS majority, then—with a little help from Congress—can, through the nomination process and the power of suggestion, indicate to rulemakers a desired direction for procedural choices. The Advisory Committee, however, has a fair degree of independence and a process that allows transparent input from a wide array of sources. On this discovery rules package in particular, the Advisory Committee heard from over 100 witnesses and received more than 2,300 comments, which the Reporter summarized for the Committee. Why has this Band of Experts tended to give more

---

52. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 559 U.S. 573, 612 (2010) (Kennedy, J., dissenting).

53. Marcus, *supra* note 21, at 1723 (footnote omitted) (quoting Letter from Rep. Trent Franks, Chairman, Subcomm. on the Constitution of the H. Comm. on the Judiciary, to Mark R. Kravitz, Chairman, U.S. Judicial Conference Comm. on Rules of Practice & Procedure, and David G. Campbell, Chairman, Civil Rules Advisory Comm. (Mar. 21, 2012)) (citing *Costs and Burden of Civil Discovery: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. (2011)).

54. See Todd Ruger, *Judges Warn Congress About Patent Bill Provisions*, BLT: BLOG LEGAL TIMES (Nov. 11, 2013, 12:35 PM), <http://legaltimes.typepad.com/blt/2013/11/judges-warn-congress-about-patent-bill-provisions.html>.

55. This phenomenon is not unique to the Roberts Court. Before the 2000 rule amendments, a former Chief Counsel of the Senate Judiciary Committee warned: “[W]hen interests come to the Hill, like the business community, or the trial bar, and say you should look at this, they will look at it. . . . So they’re definitely going to be looking over your shoulder . . . because people outside the Hill are going to be sure they do.” Thornburg, *supra* note 8, at 261 (first alteration in original) (quoting Mark Gitenstein, who was the Chief Counsel of the Senate Judiciary Committee when the Civil Justice Reform Act was adopted).

credence to stories of disproportionate discovery costs? The next two Parts of this Article point to some sociological and psychological forces that strongly reinforce a tendency to distrust and limit discovery.

#### IV. MEDIA DEPICTIONS: DEVALUING LITIGATION

All of us, including the members of the Rulemaking Committees, have been living in a society drenched with accounts of litigation. These accounts, inadvertently and on purpose, contribute to a misperception of the role of lawsuits in the U.S. legal system. News stories emphasize dramatic and bizarre suits, and advocacy groups wanting to influence legislators, voters, judges, and juries have carried out a very effective decades-long public relations campaign attacking plaintiffs and their lawyers. In a process referred to as “social production of knowledge,” when people hear something often enough, they believe it to be true.<sup>56</sup> If they have been exposed to these campaigns, members of the public “know” that litigation is slow and expensive, often frivolous, and brought primarily to benefit lawyers rather than clients. Although members of the Rules Committees are more sophisticated than the average citizen in their understanding of litigation, they cannot help but be affected by this pervasive portrayal.

##### A. *Stories and Reports*

In a world in which news outlets fight for attention, it is not surprising that large verdicts are more likely to be reported than small ones, that plaintiff victories are more likely to be reported than defense verdicts, and that cases with odd facts will get more attention than a plain vanilla claim. Professor Galanter has documented these tendencies and the ways in which media coverage skews public perception of the legal system.<sup>57</sup> Others have also researched this phenomenon. For example, Professor Oscar Chase compared *New York Times* and *New York Newsday* coverage of personal injury litigation with the actual flow of litigation reflected in the *New York Jury Verdict Reporter* over a six-year period of time. He found that the trials that made the news

---

56. See Richard A. Brisbin, Jr. & John C. Kilwein, *The Future of the West Virginia Judiciary: Problems and Policy Options*, W. VA. PUB. AFFAIRS REP., Oct. 2007, at 2, 5–6, <http://ipa.wvu.edu/r/download/43223>. Other scholars refer to this phenomenon as using aggressive marketing to create a pervasive reality that influences the format of ideas covered by U.S. media. See, e.g., DAVID M. RICCI, *THE TRANSFORMATION OF AMERICAN POLITICS: THE NEW WASHINGTON AND THE RISE OF THINK TANKS* 200–07 (1993).

57. Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 744–47 (1998).

had damage awards that were far larger than the average award, and punitive damages increased the odds of a case being reported.<sup>58</sup> The “McDonald’s Coffee Case” is another example of media attention spotlighting (and distorting) an unusual case.<sup>59</sup>

News media trends, however, are only a small part of the picture. For purposes of this Article, a good place to start is the year 1971 with the “Powell memo,” written by Justice Powell before he was nominated to the Supreme Court.<sup>60</sup> In this memo, written to the chair of the Education Committee of the U.S. Chamber of Commerce, Powell warned of an attack on the free enterprise system, and he recommended that the Chamber mobilize businesses to counteract the liberalism of university social science faculties, monitor television news, create a flow of conservative scholarly articles, advertise in a way intended to modify public opinion, and selectively target court cases with business-oriented amicus briefs.<sup>61</sup> One can trace the implementation of the Powell memo over the next four decades in the pervasive media campaign attacking certain types of litigation.

Some of the narrative is discovery specific. Only a few years after Powell wrote his memo, then Chief Justice Warren Burger convened the Pound Conference to address presumed, but not documented, problems of cost and delay. The follow-up report of the ABA called for discovery rule changes, alleging that discovery could be abused and used to “escalate the cost of litigation, to delay adjudication unduly and to coerce unfair settlements.”<sup>62</sup>

Politically orchestrated critiques of discovery blossomed in the early 1990s, most dramatically with Vice President Dan Quayle’s Council on Competitiveness. Quayle’s speech to the ABA claimed that “dis-

---

58. *Id.* at 745 (citing Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763 (1995)).

59. See Michael McCann et al., *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113, 113 n.9 (2001) (citing *Liebeck v. McDonald’s Rest., P.T.S. Inc.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Ct. Aug. 18, 1994)) (analyzing the ways in which the institutional practices of news media, trial procedure, and popular culture transformed the complaint of a badly burned grandmother into an icon for runaway litigiousness).

60. Not only is it historically significant, but also two of the members of the Rules Committees clerked for Justice Powell.

61. Memorandum from Lewis F. Powell, Jr., to Eugene B. Snyder, Chairman, Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971), <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumPrinted.pdf>. Subsequently, Justice Powell sounded a warning that still echoes in the arguments of corporate defense organizations: incremental changes in the discovery rules are insufficient, and only dramatic changes will solve the problems of cost and delay. See Amendments to the Fed. Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting).

62. AM. BAR ASS’N, REPORT OF THE POUND CONFERENCE FOLLOW-UP TASK FORCE, reprinted in 74 F.R.D. 159, 191 (1976).

covery is 80 percent of the problem,” that it “too often becomes an instrument of delay and even harassment,” and that unnecessary discovery “can disrupt or put on hold a company’s entire research and development program.”<sup>63</sup> Advisory Committee Chair Judge Paul Niemeyer rallied the Committee to advocate discovery limits, and he repeated the 80% claim even while admitting that he knew of no data to support it—and while the research commissioned by the Committee contradicted it.<sup>64</sup>

The antidiscovery narrative is just a piece of the overall campaign to portray litigation as dysfunctional and paint plaintiffs and their lawyers as the bad guys.<sup>65</sup> The industry campaign to transform the way Americans think about litigation began in the 1980s. Insurance companies and industry trade groups brilliantly invoked fundamental cultural images and associated them with individual lawsuits against corporate defendants. Thus personal injury claims got blamed for a litigation “explosion,” involving “skyrocketing” damage awards by “runaway” juries. Collectively, these images became a “crisis” in immediate need of a return to “balance.”<sup>66</sup>

The campaign was bolstered with false or misleading horror stories and fabricated or misleading numerical data (made more effective through eye-catching charts and graphs).<sup>67</sup> The strategists realized that the media and the public pay attention to horrific-sounding anecdotes with catchy details like psychics, day care centers, and the death of high school football. The stories came complete with victims and villains. Workers and other plaintiffs were portrayed as whiners who failed to take personal responsibility for their own problems rather than injured victims trying to enforce the law and deter misbehavior. Plaintiffs’ lawyers were an even better scapegoat—portrayed as greedy parasites trying to make an easy buck by scaring companies into settling frivolous claims.<sup>68</sup>

Part of the brilliance of this campaign was its effort to convince members of the public that they, personally (not just corporations and

---

63. Reda, *supra* note 17, at 1096 (quoting Vice President Dan Quayle, Address to the Annual Meeting of the American Bar Association (Aug. 13, 1991)).

64. Thornburg, *supra* note 8, at 245 n.97 (quoting Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 518 (1998)).

65. The following discussion is adapted from Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates, and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. 1097, 1098–1100 (2008).

66. See generally STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 4–9, 37–51 (1995) (discussing in detail the rhetorical devices used to sway public opinion).

67. See generally *id.* at 51–56 (describing the misuse of statistics and visual displays).

68. *Id.* at 38–39.

their insurers), were being hurt by litigation. In 1986, the Insurance Information Institute launched its initial public relations effort: “We All Pay the Price.” A series of vivid print advertisements featured titles such as “The Lawsuit Crisis Is Bad for Babies,” “The Lawsuit Crisis Is Penalizing School Sports,” and “Even the Clergy Can’t Escape the Lawsuit Crisis.”<sup>69</sup> Once again a catchy phrase brought home the message: everyone is paying a “lawsuit tax,” an increase in the price of goods and services that exists only because of the cost of defending and insuring against tort litigation and workers’ compensation claims. The possibility that the defendant might have prevented the injuries or that the costs could have been assessed against the shareholders’ profits is not discussed.

The antilawsuit rhetorical messages were repeated over and over by business-funded institutes and Fortune 500 companies, and these messages are now omnipresent in popular culture. Business executives themselves may believe the hype—they, too, have been listening to the campaign for more than thirty years.<sup>70</sup> One interesting result is that CEOs are significantly more likely to believe in the existence of litigation risk than are their risk managers—the people who deal with the actual risk data on a day-to-day basis.<sup>71</sup> In the context of attacks on medical malpractice litigation, Professor Tom Baker notes that the outrage stories are “repeated so often that even the mythmakers forget the exaggeration, half truth, and outright misinformation employed in the service of their greater good.”<sup>72</sup>

Starting in the early 2000s, a couple of additional organizations joined the publicity campaign against litigation, most notably the American Tort Reform Association (ATRA) and the Institute for Legal Reform (ILR), a U.S. Chamber of Commerce entity. ATRA’s campaign, which labeled courts as “judicial hellholes,” began in 2002, and it falls squarely within this tradition of belittling litigation—suggesting that there is no “benefit” in a cost–benefit analysis of lawsuit expenses. Judicial Hellholes, they say, are jurisdictions that are “fre-

---

69. See *Even the Clergy Can’t Escape the Lawsuit Crisis*, TIME, Mar. 31, 1986, at 69; *No One Is Immune from the Lawsuit Crisis*, NEWSWEEK, June 9, 1986, at 87; *No One Is Immune from the Lawsuit Crisis*, TIME, June 9, 1986, at 32; *The Lawsuit Crisis Is Bad for Babies*, NEWSWEEK, June 30, 1986, at 27; *The Lawsuit Crisis Is Bad for Babies*, TIME, Mar. 31, 1986, at 67; *The Lawsuit Crisis Is Penalizing School Sports*, NEWSWEEK, Apr. 28, 1986, at 37; *The Lawsuit Crisis Is Penalizing School Sports*, TIME, Apr. 28, 1986, at 25; *We All Pay the Price: An Industry Effort To Reform Civil Justice*, INS. REV., Apr. 1986, at 58.

70. John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers’ and Executives’ Opinions*, 3 HARV. NEGOT. L. REV. 1, 3–4 (1998).

71. Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 741–43 (1998).

72. TOM BAKER, THE MEDICAL MALPRACTICE MYTH 1 (2005).

quently identified by members of the American Tort Reform Association (ATRA) and other individuals familiar with litigation.”<sup>73</sup> The reports (which continue today) use ATRA’s collection of anecdotal information and stories reported in the media to justify each jurisdiction’s hellhole status. The reports are primarily a collection of seemingly outrageous stories of frivolous claims. Closer study often shows the accounts to be partial and misleading,<sup>74</sup> but they are vivid and memorable.

Like ATRA, the ILR is not concerned with basing its “lawsuit climate” campaign on data that a social scientist would find convincing. Instead, the ILR hired Harris Interactive, a market research firm, to poll selected corporate in-house counsel and senior corporate litigators who represent companies with annual revenues of at least \$100 million. The report has a clear, memorable model: the report card. Lawyers are asked to grade states (A–F) on issues like treatment of mass torts, punitive damages, noneconomic damages, judges’ impartiality, and juries’ predictability and fairness.<sup>75</sup> Discovery is one of the issues the ILR raised in its surveys. As the ILR’s website informs readers:

discovery has developed into one of the most hostile and burdensome civil litigation procedures in the United States. Originally designed to prevent trials by ambush and to ensure fairness in litigation, the process is now routinely abused by plaintiffs’ attorneys to burden defendants in hopes of forcing them into a quick, costly settlement.<sup>76</sup>

Opinions about a state court system’s discovery rules will thus play a role in the state’s report card.

The lawsuit climate reports, while not filled with memorable horror stories, were beautifully produced, full of alarming (yet deceptive) graphics, and gave the outward appearance of being reliable empirical data (even though they were essentially opinion polls, and opinions were included so long as the interviewee claimed to be “somewhat

---

73. AM. TORT REFORM FOUND., JUDICIAL HELLHOLES at ii (2006), <http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2006.pdf>. The first report, in 2002, used a survey of ATRA members as a basis for its ratings. AM. TORT REFORM ASS’N, BRINGING JUSTICE TO JUDICIAL HELLHOLES (2002), <http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2002.pdf>.

74. Thornburg, *supra* note 65, at 1122–32.

75. HARRIS INTERACTIVE INC., LAWSUIT CLIMATE 2007: RATING THE STATES 2 (2007), [http://www.instituteforlegalreform.com/uploads/sites/1/2007climate\\_report.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/2007climate_report.pdf).

76. *Discovery*, U.S. CHAMBER COMM., <http://www.instituteforlegalreform.com/issues/discovery> (last visited Aug. 27, 2015).

familiar” with the state in question). Respondents were also primed with copies of the prior year’s report card.<sup>77</sup>

Just as is true of opinion surveys that merely claim that discovery is too expensive, the story of abusive litigation contained in the public relations campaigns is not supported by hard data. Empirical research conducted by neutral scholars consistently shows that the claims are false or exaggerated. Studies of actual reported cases and court statistics—including caseloads, trials, awards, and settlements—show that:

- There is no “litigation explosion,” especially not of product liability and medical malpractice claims.<sup>78</sup>
- In cases that go to trial, plaintiffs win a moderate number of cases and both mean and median awards are modest. The same is true of settlements made “in the shadow” of jury awards.<sup>79</sup>
- Punitive damages awards are rare, and, even when they do occur, they are often small in both absolute terms and relative to actual damages.<sup>80</sup>
- Many of the oft-repeated horror stories are merely urban myths, others are distorted through omission of important information, and some are outrageous claims that were immediately dismissed by the trial courts.<sup>81</sup>
- Numbers used to show growth in caseloads assume, rather than prove, causation and often ignore other important variables. Worse, some are merely fabricated and then repeated until they seem to be factual.<sup>82</sup>

---

77. See Theodore Eisenberg, *U.S. Chamber of Commerce Liability Survey: Inaccurate, Unfair, and Bad for Business* 5–9 (Cornell Law Sch., Legal Studies Research Paper Series, Research Paper No. 09-029, 2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1470872](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1470872).

78. See, e.g., Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1103–09 (1996). In fact, only a very small percentage of grievances result in litigation. See David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 85 (1983).

79. Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433, 437 (1996) (discussing jury verdicts in various types of cases); see Frank Cross & Charles Silver, *In Texas, Life Is Cheap*, 59 VAND. L. REV. 1875, 1898–1901 (2006) (noting that an insurance payout database reflected generally modest payments in death cases). Results in the courts of appeals are even less friendly to plaintiffs. See Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 948–50 (analyzing a database of all federal trials and appeals since 1988 and concluding that that a defendant’s advantage exists, probably because of appellate judges’ misperceptions that trial level adjudicators are pro-plaintiff).

80. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1411–17 (1993); Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 36–73, 38 tbl.3 (1992).

81. Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 726–33 (1998).

82. See DANIELS & MARTIN, *supra* note 66, at 57–58.



Despite the efforts of social scientists to debunk pseudo-factual claims with statistics, the stories stick. Empirical data do not capture the imagination, and some of the most important issues (such as the benefits of litigation) cannot easily be measured. For example, can you, without looking back, remember the statistics in Part II of this Article? The stories, on the other hand, are both vivid and memorable. At their most powerful, they tap into deeply embedded cultural beliefs (like individualism) and fears (like loss of control).

If people believe that litigation has this little value, small wonder that calls for proportional costs resonate. When procedure rule amendments are proposed, one crucial question is always whether there is “a problem that needs to be solved.” Because the public has been bombarded with suggestions that lawsuits have no benefit, even minimal expenses are too high and hopes of cost savings feel compelling. The “worrisome” cases experienced by Advisory Committee members appear to them to be part of a larger trend.

### *B. Pictures*

For more than forty years, then, we have been bombarded by a compelling but misleading visceral narrative. Repeatedly confronted with emotive words (such as crisis, explosion, and skyrocketing) as well as dramatic stories, we remember and believe that litigation is often frivolous and largely out of control. But that’s not all—the institutions creating the narrative understand the value of imagery and have employed it to add layers of drama and memorability to the anti-litigation campaign.

There are several types of images that aim for an emotional response. Consider Figure 1, depicting an image of lawyer greed from an ILR advertisement, which appeared in *USA Today* and was also used as a billboard:<sup>83</sup>

FIGURE 1



83. *Don't You Think This Billboard Is Ugly and Obnoxious?*, EVAN SCHAEFFER's LEGAL UNDERGROUND BLOG (Apr. 11, 2006), [http://www.legalunderground.com/2006/04/the\\_obnoxious\\_b.html](http://www.legalunderground.com/2006/04/the_obnoxious_b.html).

Images have also dramatized the claim that lawsuits are taking money out of the pockets of all citizens. No retirement for you or college for your kids—you have to pay that lawsuit tax as depicted in Figure 2:

FIGURE 2



**What Is Lawsuit Abuse Costing Your Family?**

You work hard and try to save each year for important things like medical bills, college tuition and retirement -- maybe even a vacation.

But you probably didn't know that lawsuits are forcing an average family to pay an additional \$3,520 each year<sup>1</sup>, just for everyday goods and services.

Some trial lawyers are exploiting our courts, using frivolous lawsuits to make millions -- and every family pays the price.

Some would say it's almost criminal. A recent non-partisan Harris Poll ranked the lawsuit climate of all fifty states. If your state is near the bottom, it means plaintiffs' lawyers are abusing your court system.

Demand that your elected officials take action to fix the broken lawsuit system -- so you can spend your hard-earned dollars on your family -- not on lawsuit abuse.

To find out more about the costs of lawsuit abuse, or to read the full Harris poll results, please visit: [www.InstituteForLegalReform.com](http://www.InstituteForLegalReform.com)

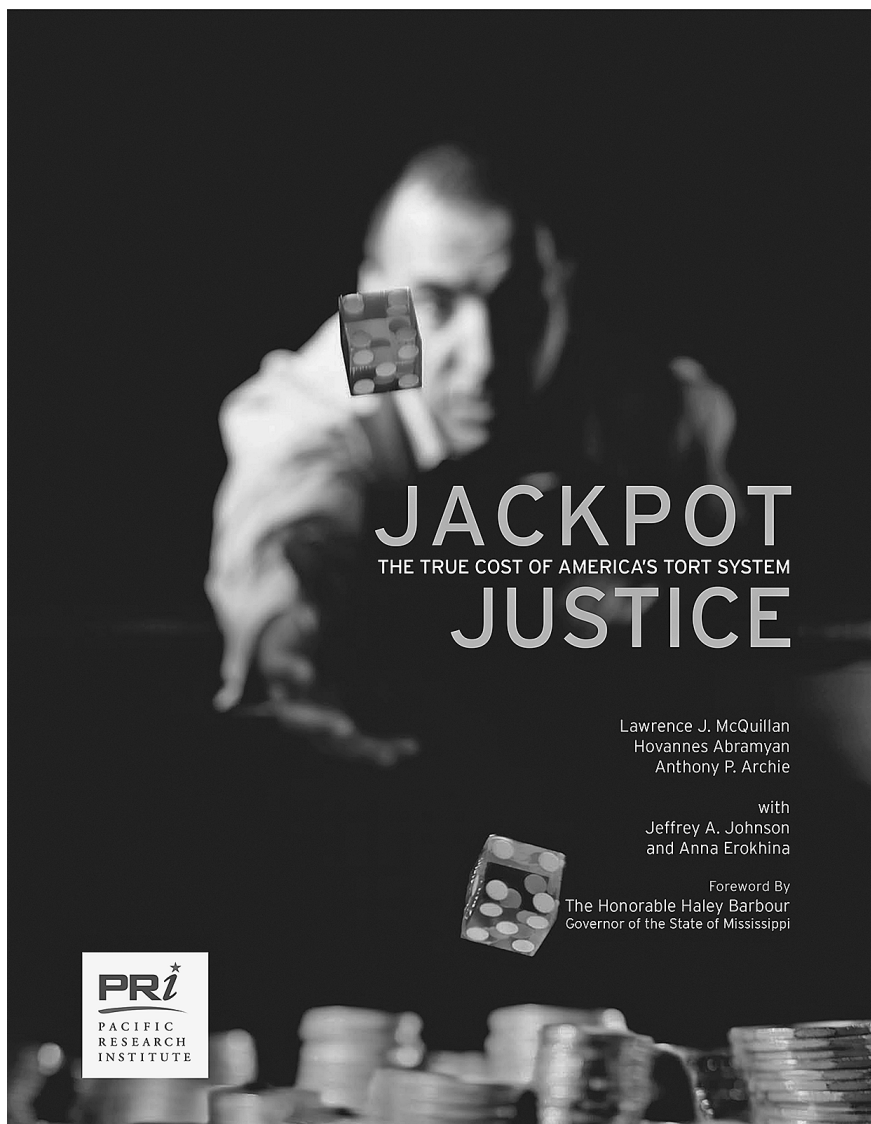
**2007 STATE RANK**

DE.....1	NH.....6	SD.....11	NC.....16	CO.....21	NJ.....26	GA.....31	FL.....36	AR.....41	IL.....46
MN.....2	TN.....7	VA.....12	OR.....17	WV.....22	VT.....27	PA.....32	SC.....37	HI.....42	AL.....47
NE.....3	IN.....8	KS.....13	MA.....18	MI.....23	NV.....28	KY.....33	OK.....38	AK.....43	LA.....48
IA.....4	UT.....9	CT.....14	NY.....19	OH.....24	MO.....29	MD.....34	NMA.....39	TX.....44	MS.....49
ME.....5	WI.....10	AZ.....15	ND.....20	WA.....25	ID.....30	RI.....35	MT.....40	CA.....45	WV.....50

<sup>1</sup> A December 2006 Gallup/Harris Research study estimated the cost of the U.S. legal system to be \$461 per capita or \$3,520 for the average family of four. Paid for by the U.S. Chamber Institute for Legal Reform, 1015 11 Street, NW Washington, DC 20004-2000

Further, a number of images portray plaintiffs playing a game of chance with potentially gigantic, unpredictable, and undeserved rewards as in the Jackpot Justice report cover depicted in Figure 3:<sup>84</sup>

FIGURE 3



84. See Baker, Kritzer, & Vidmar on *Jackpot Justice*, PAC. RESEARCH INST. (July 4, 2008), <http://www.pacificresearch.org/article/baker-kritzer-vidmar-on-jackpot-justice> (providing the cover image of the report). See Tom Baker et al., *Jackpot Justice and the American Tort System: Thinking Beyond Junk Science* 1–19 (William Mitchell Coll. of Law, Legal Studies Research Paper Series, Paper No. 95, 2008), for an academic debunking of the “Jackpot Justice” report.

The succession of covers for ATRA's "Judicial Hellholes" reports are also noteworthy. The very first, which appeared in 2002, portrayed an unusual Lady Justice, a courthouse frieze, and a riflescope bullseye.<sup>85</sup>

FIGURE 4



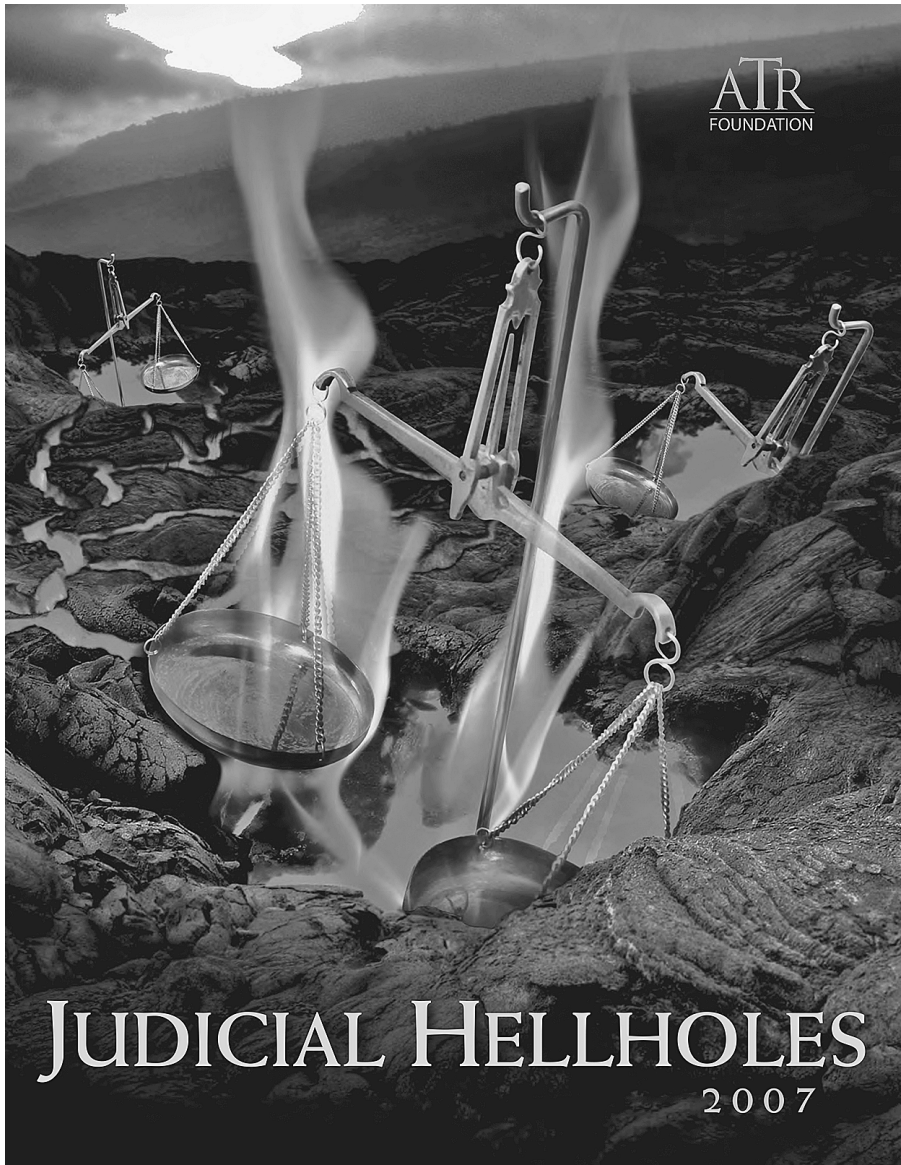
The bandana and modern clothing on the judicial icon is very unusual—this statue from the federal courthouse in the U.S. Virgin Islands is, in fact, an almost unique depiction of “justice” as a person of color.<sup>86</sup> Is a subliminal attack on minority jurors intended? Later Hellholes reports did more with the hellfire theme; the 2007 cover was particularly dramatic:

---

85. See AM. TORT REFORM ASS'N, *supra* note 73.

86. For more information and a digital image of the statue, see *Lady of Justice*, YALE L. SCH.: LILLIAN GOLDMAN L. LIB., <http://documents.law.yale.edu/representing-justice/lady-justice-0> (last visited Jan. 19, 2016).

FIGURE 5



Visuals of these types reinforce the anti-litigation narrative. They are dramatic, memorable, and strongly underline the print advertisement’s messages: litigation is dangerous, unfair, bad for business, and bad for the reader. And most members of the Rules Committees have heard the stories and seen the images since they were children.

## V. THINKING FAST ON THE RULES COMMITTEES

Members of the Band of Experts, when deciding what to do about the procedure rules, are making decisions that require the calculation of probabilities: How common is disproportionately expensive discovery? They are also predicting the likelihood of future events: What impact would rule changes have on federal civil suits? Because they are human beings with human brains, both judges and lawyers on the Rules Committees will use well-documented methods of cognition when making those predictions. They will bring to the decisions their own personal and professional experiences, the lenses through which they see the world. It is unlikely that doing so will involve a purely logical deduction from first principles.

Cognitive psychologists use a number of different labels to describe how humans think, but they recognize distinct roles for intuition and deliberation.<sup>87</sup> Intuitive processes (sometimes called System 1) operate quickly, utilize heuristics, are relatively effortless, and are susceptible to emotional influences. “System 1 is radically insensitive to both the quality and quantity of the information that give rise to impressions and intuitions.”<sup>88</sup> Deliberative processes (System 2), on the other hand, move more slowly because they require conscious work and the application of rules. The two systems interact, and at times the intuitive inferences, which are automatically gathered, affect more deliberative decisions in a number of ways. Despite the intervention of System 2 thinking, the influence of System 1 rarely ceases.<sup>89</sup> In a recent bestselling book summarizing a lifetime of research, Nobel Prize winning economist Daniel Kahneman described this duality as “Thinking, Fast and Slow.”

The “fast” intuitive thinking is essential for survival and often accurate. However, it can easily lead us unwittingly astray, and there are contexts in which “slow” deliberation needs to become conscious of its fast partner’s weaknesses and override it. I am concerned that the Rules Committee members think of themselves as expert logicians because that self-image does not adequately account for the heuristic biases to which we all succumb, and the homogeneity of the Advisory and Standing Committees’ political and professional experience exacerbates the problem. Rulemaking choices that consistently reflect the

---

87. See Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 6 (2007) (discussing the judicial decision-making process); see also DANIEL KAHNEMAN, THINKING, FAST AND SLOW 4 (2011) (discussing the mental process of impression, intuition, and decision).

88. KAHNEMAN, *supra* note 87, at 86.

89. *Id.* at 85–86.

influence of intuition over deliberation will lead to flawed policy choices.

### A. Availability Bias

Professor Kahneman and his collaborator, Amos Tversky, considered what people do when they want to estimate the size of a category or the frequency of some event.<sup>90</sup> They discovered that when examples are easy to retrieve from memory, people will estimate that the category is large or the event frequent. Fluent recall can provide helpful information because, “in general, frequent events are easier to recall or imagine than infrequent ones.”<sup>91</sup> Unfortunately, the availability of examples is a partial and unreliable guide. There are many factors other than frequency that can make it easy to remember examples. They include media coverage of relevant examples,<sup>92</sup> personal experiences (more memorable than general information), pictures (more memorable than mere words), and vivid examples (more memorable than statistics).<sup>93</sup> In addition, people are more likely to be influenced by ease of retrieval when they are “engaged in another effortful task at the same time,” and “if they are (or are made to feel) powerful.”<sup>94</sup>

### B. Confirmation Bias

The availability heuristic goes hand in hand with another way in which our minds operate, generally referred to as “confirmation bias.” This heuristic is defined as “the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand.”<sup>95</sup> There are times when a person deliberately seeks out information to support a position she has taken. The kind of confirmation bias that can distort judgment, however, operates as part of System 1 (intuitive) thinking on a less conscious level. Confirmation bias leads us to find and interpret information in a way that supports preexisting hypotheses and to avoid information or interpretations that support alternate possibilities. It can also take the form of giving

---

90. *Id.* at 129; see also Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in 5 COGNITIVE PSYCHOLOGY 207 (1973), <http://people.umass.edu/biep540w/pdf/Tversky%20availability.pdf>.

91. Tversky & Kahneman, *supra* note 90, at 164.

92. See Shanto Iyengar, *The Accessibility Bias in Politics: Television News and Public Opinion*, 2 INT’L J. PUB. OPINION RES. 1 (1990).

93. KAHNEMAN, *supra* note 87, at 130.

94. *Id.* at 135.

95. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN’L PSYCHOL. 175, 175 (1998).



greater weight to information supporting a position one has taken or remembering that supporting information more readily than information that disconfirms the belief. In the political arena, it has been suggested that once a government has committed itself to a policy, it subsequently focuses on information that supports the choice. This is particularly common in situations that are inherently complex and ambiguous—those that are characterized by interactions among numerous variables and in which the cause and effect relationships are obscure.<sup>96</sup>

There is some disagreement about whether confirmation bias is a motivational or cognitive problem. Both may play a role, but the operation of associative memory is clearly at work. Professor Kahneman points to the research of psychologist Daniel Gilbert regarding the operation of believing and unbelieving as a way to understand a mechanism of cognitive bias. Understanding a statement, says Gilbert, must begin with an attempt to believe it—"you must first know what the idea would mean if it were true."<sup>97</sup> The initial effort to understand and believe is an automatic System 1 process. *Unbelieving*, on the other hand, requires thought.

How does that testing work? It turns out that it matters how the question being tested is framed because the brain searches for confirming evidence to test a hypothesis. As Kahneman explained:

When asked, "Is Sam friendly?" different instances of Sam's behavior will come to mind than would if you had been asked "Is Sam unfriendly?" . . . Contrary to the rules of philosophers of science, who advise testing hypotheses by trying to refute them, people . . . seek data that are likely to be compatible with the beliefs they currently hold.<sup>98</sup>

Consider, then, how availability bias and confirmation bias can act together: a person determines whether she believes something is probable based on how easy it is to remember supportive examples. That ease of recall is affected by personal experience as well as other factors that make memories more vivid and accessible. Then, once a belief is formed, she tends to seek out, pay attention to, and give more weight to information that is consistent with the belief. Letting go of initial impressions is not impossible, but it is really hard.

---

96. *Id.* at 191–92.

97. KAHNEMAN, *supra* note 87, at 81.

98. *Id.*

*C. Cognitive Bias and the Band of Experts*

When deciding whether to recommend rule changes, the members of the Advisory and Standing Committees make judgments about the existence and severity of problems in the conduct of civil litigation. They are also predicting that the rules as amended would decrease the frequency or severity of discovery problems without creating more significant new problems. In this most recent round of amendments, the Rules Committees were presented both with empirical data indicating that most cases proceed efficiently and with a chorus of complaints in the form of opinion surveys. They were told that effective enforcement of substantive law requires effective discovery, but they were also told that the cost of litigation hurts U.S. businesses. In choosing to adopt significant changes to the discovery rules in ways intended to decrease the amount of discovery, they chose to believe the complaints and discount the fear of decreased enforcement. Are there ways in which the availability and confirmation bias heuristics help explain that choice?

When a Committee member considers whether the costs of discovery exceed its benefits, a number of things are apt to come quickly to mind and thereby increase the impression that abuse is a significant phenomenon. Many flow from the masterful use of heuristics in the public relations campaign described in Part IV *supra*. Its narrative both undercuts the value of litigation and exaggerates its costs. The volume alone is impressive, stretching across more than three decades. Consider the ways in which the anti-litigation narrative has been structured to be particularly “available”:

- Extensive media coverage (achieved through paid advertising), creation of media opportunities through the issuance of annual “reports” with catchy names, promotion of coverage of outrage stories,<sup>99</sup> and the media’s own tendency to cover the dramatic and unusual.
- The parade of “loony lawsuits” provides vivid stories that are extremely memorable. From websites to press releases to Judicial Hellholes reports, bizarre facts combined with false or misleading procedural accounts (that are far less captivating in any case) bring to mind what seem to be ridiculous lawsuits and make them seem like examples of the background norm rather than aberrations.

---

99. The organizations promoting the negative view of litigation sometimes enhance awareness by acting as “‘availability entrepreneurs,’ individuals or organizations who work to ensure a continuous flow of worrying news.” KAHNEMAN, *supra* note 87, at 142. If successful, a combination of forces can result in an “availability cascade,” which can create intense pressure on policymakers to act on the resulting fears.

- The campaign personalizes the narrative by threatening the audience's own financial well being, adding emotion and making the message more like a personal experience.
- Even numbers, although normally less memorable, have been dramatized with emotional content ("you pay a \$3400 annual tort tax") and exaggerated rhetorical flourish ("80% of the cost of litigation is discovery").
- All of these tools have been reinforced with visuals whether they depict the drama of hellfire and brimstone, misleading charts,<sup>100</sup> or pictures of the cookie jar taking money from a family's savings.

The complaints about the cost of discovery are also tied to memorable sources: the leaders of the most powerful corporations on the planet, the partners of the most prominent Wall Street law firms, and extremely powerful political figures. ATRA is funded by major corporations, as is the U.S. Chamber of Commerce's ILR.<sup>101</sup> The American College of Trial Lawyers and the ABA weighed in with opinion polls full of complaints. The witnesses at the committee's public hearings, and those who provided written comments on the proposed amendments, include these major players. The Chief Justice who appointed the committee members has urged them to act on the complaints voiced at the Duke Conference, and Congress is breathing down their necks with complaints about litigation and threats to enact legislation. That level of incessant complaints from prominent citizens is easy to remember.

These general societal examples are, in all probability, reinforced by the committee members' own professional experiences. Although empirical studies have always shown that most litigation proceeds at reasonable cost, there is that very small percent of litigation with high costs, which is also a repeat finding of empirical research.<sup>102</sup> From the FJC's closed case study, we know something about what those cases look like: they are complex, high stakes, highly contentious, and tend to involve larger law firms and hourly billing.<sup>103</sup> They are, in short, the kind of cases that the elite lawyers on the Rules Committees are apt to litigate. They, or their firms, have been involved in the expensive cases (indeed, it is their hourly bills that form a large portion of the costs)—and so when searching their memories to answer the ques-

---

100. See Thornburg, *supra* note 65, at 1100 (providing examples).

101. For a partial list of ATRA members, see *Sample List of ATRA Members*, AM. TORT REFORM ASS'N, <http://www.atra.org/about/sample-members> (last visited Jan. 19, 2016). For more information about ILR funding, see SAM JEWELER, PUB. CITIZEN, *THE GILDED CHAMBER* 3, 3 fig.1 (Feb. 6, 2014), <https://www.citizen.org/documents/us-chamber-of-commerce-funders-dominated-by-large-corporations-report.pdf>.

102. See Rule Memorandum, *supra* note 15, at 268.

103. Lee & Willging, *supra* note 16, at 784.

tion “does discovery cost too much” they are apt to recall their own experiences as vivid examples of high cost. From the perspective of a corporate client that believes a claim against it to be nonmeritorious, any cost of defense is not just high but too high. Judicial members of the Rules Committees came mostly from that elite type of practice. As judges, their focus is not with the average, self-monitoring lawsuit, but instead with those cases that involve repeated disputes about scope, privilege, and e-discovery. In both cases, the sample provided by personal experience is atypical of the norm; the availability heuristic jumps from ease of access to personal experience to a conclusion that excessive discovery costs are normal.<sup>104</sup>

A combination of societal messages, political loyalties, and personal professional anecdotes, then, may lead Rules Committee members to intuitively believe that litigation often has no social benefit, that discovery’s costs frequently exceed its value, and that the current rules have not been effective in eliminating those problems. Then confirmation bias kicks in, and when competing information and arguments are presented, there is a tendency to disregard them. Opinion surveys, testimony from law firms and corporations claiming that discovery costs are too high, and public comments on the proposed rules supporting a decrease in discovery supported a belief that members already held personally. They supported a course of action to which the Advisory Committee had already committed. And, as such, they had more impact than arguments or evidence to the contrary.

The Advisory and Standing Committees’ use of survey data may actually be stacking availability effects. The most common type of submission to the Advisory Committee attempting to document the existence of discovery abuse came in the form of opinion surveys. And what are those survey responses but a collection of the impact of association bias on other people? Assuming again that the survey responses are genuinely believed and not just instrumental arguments to secure desired law changes, they are still composed of opinions generated by the same kind of mental processes described in this Article. Those lawyers were also exposed to the dominant anti-litigation narrative; many of the survey respondents also had significant defense-oriented practices or were members of associations of corporate lawyers.

---

104. Although members of the Advisory Committee clearly were intellectually aware of data substantiating the high proportion of civil suits that function well and the very low rate of “worrisome” cases, the close fit between the vivid public narrative and their personal experiences may also have led to “base rate neglect.” Guthrie et al., *supra* note 87, at 22. Their own specific anecdotes caused them to disregard data about low costs in most cases.

In addition to availability, confirmation bias may well have played a role in the way attorneys responded to survey questions. For example, the ABA Litigation Section's survey instrument phrased some of the inquiries in ways that would summon examples of litigation problems. Using a Likert scale questionnaire, survey respondents were asked to agree or disagree with statements like these:

- "There are too many Rules."
- "The Rules are too complex."
- "The Rules, as a whole, are internally inconsistent."
- "The Rules are enforced in an inconsistent manner, even within a single district."
- "Notice pleading has become a problem, because extensive discovery is required to narrow the claims and defenses."
- "Fact pleading can narrow the scope of discovery."
- "Frivolous claims and defenses are asserted more frequently than they were five years ago."
- "Discovery is abused in almost every case."
- "Counsel use discovery as a tool to force settlement."
- "Judges do not enforce Rule 26(b)(2)(C) to limit discovery."<sup>105</sup>

Try it yourself. The framing of these issues will tend to make you search for memories that make the statements true. And although that is not the only possible response (some survey respondents did, in fact, disagree with the statements), it is likely that your brain first took you to positive examples. If the respondents held negative views of the costs of discovery, opinion polls contained few prompts that would cause them to search for disconfirmatory concrete information like the actual cost of discovery in specific cases.

## VI. CONCLUSION: A BROADER BAND?

As Professor Kahneman and others have argued, it is not easy to kick System 2 into gear to tame the intuitive leaps of System 1. Nevertheless, it is not impossible to nurture slower thinking and greater awareness of one's own heuristic tendencies. During the rule amendment process described in this Article, the Advisory Committee modified its initial proposals slightly in response to outside critique. Overall, however, the package of amendments is the product of a

---

105. ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT (Dec. 11, 2009), <http://www.uscourts.gov/file/document/aba-section-litigation-survey-civil-practice>.

group of people whose similar backgrounds allowed too many inputs to go unheeded.

Structurally, some measures could be taken to restore greater balance to the rules process. One way to improve intuitive results is to become more aware of situations in which errors are likely. Even if intuition dominates decision making, committee membership that is more experientially and philosophically diverse would produce a more varied set of intuitions and biases, a situation in which people with competing visions will become more aware that theirs is not universally held. If members of a group share a bias, the aggregation of judgments will not reduce error.<sup>106</sup> The Advisory and Standing Committees need more political variety: a different ratio of judges to practitioners as well as practitioners from a far wider variety of practices and client types.

Organizations (such as committees) can also adopt processes more likely to avoid a rush to judgment. These can include the use of “checklists” that force issues to be considered;<sup>107</sup> the adoption of systems in which all members document their thoughts in writing before the meeting begins so as to maximize the availability of diversity of knowledge and opinion;<sup>108</sup> and an imaginative exercise known as the premortem. Premortem works as follows:

[W]hen the organization has almost come to an important decision but has not formally committed itself, . . . [gather] for a brief session a group of individuals who are knowledgeable about the decision. The premise of the session is a short speech: “Imagine that we are a year into the future. We implemented the plan as it now exists. The outcome was a disaster. Please take 5 to 10 minutes to write a brief history of that disaster.”<sup>109</sup>

Some facets of the rulemaking environment make improved intuition and deliberation more difficult. As Professor Rachlinski and his collaborators have noted, intuition improves if a person receives “immediate, high quality feedback about the causes and consequences of errors.”<sup>110</sup> For the Rules Committees, the time lag and complexity of data collection make it difficult to convincingly document the consequences of prior rule changes, depriving the Committees of corrective feedback.

Other committee practices already support the use of System 2 thinking. For example, decisions that are allowed adequate time are

---

106. KAHNEMAN, *supra* note 87, at 84.

107. See Guthrie et al., *supra* note 87, at 40–42 (discussing checklists and multifactor tests).

108. KAHNEMAN, *supra* note 87, at 85.

109. *Id.* at 264.

110. Guthrie et al., *supra* note 87, at 33.

more likely to encourage deliberation, and the rulemaking process is not a speedy one. Similarly, requiring a written opinion justifying a decision can make deliberation more likely, and proposed rule amendments come with written reports and Advisory Committee Notes.<sup>111</sup>

Nowhere is the current impact of Committee homogeneity more clear than in the 2015 discovery rule amendments. Whether deliberately or through the operation of cognitive biases, the amendments are a gift to institutional defendants. While ostensibly aimed at the few cases in which discovery costs are disproportionate, in fact they have the potential to encourage resistance to discovery and to deprive litigants of crucial information in ordinary cases. The amendments and the Committees' rationale for the amendments match neither reliable data nor the results of past rule amendments. Instead, they reflect a stubborn belief that litigation is too expensive and that that expense arises out of excessive discovery. Information to the contrary was discounted, rejected, or ignored.

The "Band of Experts" concept has understandable appeal to a group faced with a difficult, politicized task and an ongoing information deficit. The Advisory and Standing Committees would like to be seen as making wise, neutral decisions. Ultimately, however, the concept does not fit the role. Although members are intelligent and experienced, the committees fall prey to predictable cognitive traps; their role requires decisions that will affect litigation advantages and disadvantages. Procedural expertise, unfortunately, does not come in a neutral package when normative decisions are made. We need a broader Band.

---

111. Whether those writings were done at a time that they actually guided the process leading to the decision to recommend the amendments is less clear; it is conceivable that the reporters use their considerable skills to construct the best available arguments in favor of the recommendations after the decisions have been finalized through a less deliberative process.