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DISCOVERY IN GLOBAL PERSPECTIVE:
ARE WE NUTS?

Stephen N. Subrin*

The idea that we, in the United States, are in some ways nuts is not a new one for me. When my wife and I visit Europe, I often come home thinking that somehow we have it wrong; that perhaps the Europeans have a wiser sense of proportion and priorities. When we visited relatives in Scotland, I admired the small size of the refrigerators. We went to the neighborhood grocery store more frequently and purchased only what was needed for the next day or so. There was less waste. So much more public money was spent on shared space such as the parks, plazas, and museums in France and Italy. In London, Paris, and Florence one finds pubs or cafes where lunch and a post-work ale, wine, or coffee with friends are daily rituals. I know that vacations are not the best time for objective research. Yet, I see merit in the sensibilities that less can be better than more, that public expenditures for the community at large are not inherently misguided, and that one's profession need not devour one's humanity. Although my vacation musings do not provide a perfect match, they touch on some of the issues raised in comparing discovery in civil cases in the United States with that of the rest of the world. Is more better? How should lawyers spend their time? What is the appropriate relationship between private and public expenditures in law enforcement? Are we in fact nuts in our approach to discovery?

To call someone or something “nuts” has at least three different meanings. When someone says, “I am nuts over you,” it denotes an intense attraction, although, as in love, there may also be a bit of ambivalence. In 1997, the American Bar Association (ABA) Litigation Section magazine was devoted to “Discovery.” The introduction began:

Most cases settle, and victory is not in the scathing cross, but in the tedious review of documents. Success is in the details, the expertly drafted interrogatories or request for records, and in the ingenious strategy to obtain the statement allegedly protected by privilege. For it is Discovery which we do. The motions, the papers, the depo-

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sitions. This is the numbing, ditch digging work that determines the
winner . . . .

Twelve of the eighty-six Federal Rules of Civil Procedure deal with
discovery. I suspect that for full time litigators these rules, as well as
state and local rules dealing with discovery, are among the most util-
ized on a day-to-day basis. In 1998, the chairperson of the Federal
Civil Rules Advisory Committee convened a conference on discovery.
His conclusions are, I believe, a fair summary of how American law-
yers view discovery, as well as an accurate description of the results of
empirical studies:

1. The desire for information in connection with the resolution of
civil disputes was nearly universal. No one at the Conference
seemed to advocate the elimination of requiring full disclosure of
relevant information.
2. Discovery is now working effectively and efficiently in a majority
of cases, which represent "routine" cases.
3. In cases where discovery was actively used, it was thought to be
unnecessarily expensive and burdensome . . . .

When one is called "nuts," it can also mean one is acting in an unu-
usual way, different from the way that others act. From a comparative
law perspective, we really are different in our approach to discovery.
I have written elsewhere how, during the drafting of the Federal Rules
between 1935 to 1937, the Advisory Committee turned away from
what had been quite limited discovery in federal court and in most
state courts and embraced virtually every known discovery method:
interrogatories, oral depositions, written depositions, document re-
quests, physical and mental examinations, inspection of property, and
requests for admissions. For Edson Sunderland, the main draftsman
of this portion of the rules, there was no bad discovery borscht. More
was better. We went from discovery fishing expeditions as an evil to
discovery fishing as a good, a needed complement to notice pleading.
Recall the words of Hickman v. Taylor:

[The deposition-discovery rules are to be accorded a broad and lib-
eral treatment. No longer can the time-honored cry of "fishing ex-
pedition" serve to preclude a party from inquiring into the facts
underlying the opponent's case. Mutual knowledge of all the rele-
vant facts gathered by both parties is essential to proper litiga-
tion.]

1. Discovery, 1997 A.B.A. Sec. Litig. 23.
2. Paul V. Niemeyer, Here We Go Again: Are the Federal Discovery Rules Really in Need of
3. Stephen N. Subrin, Fishing Expeditions Allowed: The Historical Background of the 1938
5. Id. at 507.
Complete discovery would, it was argued, eliminate surprise, lead to enlightened settlements, and when necessary, facilitate more focused and efficient trials.

It is not as if most of us, whether lawyers, judges, law professors, or clients, are sure that we have gotten it right. The rapid pace of amendments to the federal discovery rules has brought expanded case management, discovery conferences, pretrial conferences, required attorney consultations, more stringent certification, numeric discovery limits, the concept of proportionality, mandatory disclosure, a redefinition of "scope," and has pointed to our own skepticism. This skepticism has to be heightened when one looks at civil discovery in the rest of the world, where civilizations seemed to have survived quite well without American discovery.

In comparing American civil discovery with that in the rest of the world, it is traditional to look at other common law countries, particularly England, and at civil law countries such as France, Italy, and Germany. One then considers Japan, since its place in the world economy is so central. Let me summarize quickly what I have gleaned from the literature, although I am fully aware of the dangers of misrepresentation when foreigners attempt to describe the procedures used in other countries. What actually happens in litigation is often a faint, distorted shadow of what appears in the rules or the academic literature.

That said, it does seem true that two of the biggest differences between civil law countries and the United States with respect to pretrial discovery are the centrality of the judge in civilian civil litigation and the continuity of the proceedings. We are accustomed to lawyers conducting pretrial discovery, supervised in a general way by judges when there is active case management, followed by a self-contained trial in the rare case that does not settle or is not otherwise terminated. After the pleadings in civil law countries, the judge decides what evidence he or she needs and proceeds to request documents and interrogate witnesses in person, summarizing the testimony in writing. The civil law judge's role is to decide the case on as limited an issue as necessary. As Professor Langbein argued in his provocative article, *The German Advantage in Civil Procedure*, the German judge has no need.


7. For a scathing attack on American discovery by an American lawyer, see Loren Kieve, *Discovery Reform*, 77 A.B.A. J. 79 (1991). Here is a representative sample from the article: "The obvious solution is one the rest of the civilized world (or at least the English and civil law systems) has long used: No discovery." *Id.* at 81.
to explore every possible avenue in preparation for trial. He only explores what he thinks is relevant, and if what he originally thought would decide the case turns out insufficient to the task, he then turns to another avenue. The advocates in civil law countries can propose witnesses to be questioned and questions to be asked, but it is the judge who does the questioning.

Professor Geoffrey Hazard compares discovery in the United States and civil law countries this way:

[C]ivil-law litigation proceeds through a series of short hearing sessions—sometimes less than an hour each—focused on development of evidence. The products of this are then consigned to the case file until an eventual final stage of analysis and decision. In contrast, common-law litigation has one or more preliminary or pretrial stages, and then a trial at which all the evidence is received consecutively, including all “live” testimony.

Lawyers in civil law countries do not conduct pretrial depositions. There is also no pretrial document production conducted by the lawyers. A party can request the court to require the opposing party to produce a document, but in some civil law systems the opposing party cannot be compelled to produce a document that will establish liability against him, and in others “a party may be compelled to produce a document [only] when the judge concludes that the document is the only evidence concerning the point in issue.”

In 1998, Japan engaged in reform that altered what in the United States would be called pretrial discovery. The new code requires that the plaintiff’s complaint be specific about the underlying facts, and that “[e]vidence . . . be itemized and written out according to each point to be proved.” Initially, there are what the Japanese call “plenary” hearings where the judge, with the aid of the parties, attempts to identify and clarify issues. The judge can order the parties to produce documents and can also order the inspection of evidence or examination of witnesses by an expert. There are two aspects of these preliminary plenary hearings and preparation for them that appear similar to American discovery. First, each side must submit relevant

10. Id. at 1682.
12. Id. at 697 (citation omitted).
13. Id. at 699-700.
documents "in advance of the hearing in adequate time for the other party to make its preparation."\(^{14}\) Although the provisions in the new code are rather complicated and require judicial interpretation, it seems to knowledgeable observers that many more documents are now discoverable than under the previous procedure.\(^{15}\) A party can ask the court to order the opposing side to "clarify the documents' titles and contents, but there is no direct penalty if the holder does not follow this order."\(^{16}\) Second, "Each party may, during the course of the litigation, submit a written inquiry to the other party, asking for answers to questions that are necessary to prepare the inquiring party's case. A duty of cooperation is imposed on the parties in litigation."\(^{17}\) Once again though, "there is no direct penalty" for noncompliance.\(^{18}\) "Thus, the success of this system depends largely on the parties' sincere cooperation."\(^{19}\) After the plenary hearings, there is a concentrated examination system, more akin to the American trial, with the witnesses examined by both parties.\(^{20}\)

In some ways, the civil litigation systems of England and other common law countries are closer to that of the United States. When it comes to pretrial discovery, though, we are still substantially different, even after far-reaching procedural reform in England in 1999. In common law countries, including England, Canada, Australia, New Zealand, South Africa, and India, the lawyers develop the evidence as opposed to the court. After preliminary or pretrial stages, the evidence is received in what is usually one continuous trial. Before the 1999 procedural reforms in England and other common law countries such as Canada and Australia, document production rules were based on the English Judicature Acts of 1873 and 1875.\(^{21}\) Parties were obligated to make relevant documents available to the opposition, including documents that may lead to relevant evidence. This was similar to the scope of discovery under Federal Rule of Civil Procedure 26(b), both before and after the 2000 Amendments to the Federal Rules. But as Professor Hazard explained, a number of other aspects of English procedure and culture resulted in the English interpreting the

\(^{14}\) Id. at 701 (citation omitted).


\(^{16}\) Kojima, supra note 11, at 703.

\(^{17}\) Id. at 701 (citation omitted).

\(^{18}\) Id. at 701-02.

\(^{19}\) Id.

\(^{20}\) Id. at 706-07.

\(^{21}\) See Hazard, supra note 9, at 1677-78.
scope of permissible document requests in a considerably narrower manner than in the United States.\textsuperscript{22} Hazard particularly emphasizes the requirement for more specific and comprehensive fact pleading in other common law countries and tying permissible document discovery to relevance of what has been pleaded.\textsuperscript{23} He summarizes:

It would appear that, in our sister common law countries, the combination of specific pleading, the short time limit imposed for document production, and the definition of the obligation to produce set forth in the general rule results in considerably narrower response in the way of document production than that to which we have become accustomed in this country.\textsuperscript{24}

Hazard also suggests that a comparison of discovery in other common law countries and in the United States should take into account the custom in the former of not bringing suits unless the claimant, without further discovery, can establish a \textit{prima facie} case.\textsuperscript{25} In a 1998 article, the general counsel for the Financial Services Authority, the financial regulatory agency in England, reported that there was "no pre-trial oral stage of any kind" in his country.\textsuperscript{26}

In April 1999, the courts in the United Kingdom underwent what has been called a "sea change" in their civil procedure.\textsuperscript{27} Lord Woolf, the Master of the Rolls, had been appointed to chair a special committee to examine the British civil litigation system. He concluded that English civil litigation was slow, complex, expensive, and unresponsive. The new reform procedure highlights extensive case management and significant factual and legal research that lawyers must do before filing a case, with severe penalties for filing frivolous writs.

\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id. at 1681. \textit{But cf.} Paul Michalik, \textit{Justice in Crisis: England and Wales, in Civil Justice in Crisis: Comparative Perspectives of Civil Procedure} 118, 125-26 (Adrian A.S. Zucker- man ed., 1999) (stating "[t]his process of locating, reviewing, listing, inspecting, and copying documents can be extremely time-consuming, especially in major commercial cases where there may be rooms full of potentially relevant files"). Michalik also summarizes portions of the \textit{Woolf Report of the Review Body on Civil Justice} (Cm. 394, 1988), which paints a less favorable review of English pre-trial restraint:

Traditionally, the English system allowed parties to control the pace and extent of litigation, especially at the pre-trial stage, with minimal judicial supervision. As a result, parties have been free to subvert the available procedures to serve their own personal ends. This has engendered an unduly partisan, combative litigation culture. The complexities in the rules have given lawyers and litigants ample opportunities to indulge in wasteful, costly practices.

\textit{Id.} at 152.
\textsuperscript{25} See Hazard, \textit{supra} note 9, at 1681-82.
\textsuperscript{26} \textit{London Attorneys Explain Their Legal System, Corp. Legal Times}, Feb. 1998, at 40.
\textsuperscript{27} Jason Curriden, \textit{Woolf Reforms Target Inefficiency and Inequity in UK Court System, Inside Litig.}, July 1999, at 1.
Under the new rules, the complaining party must first mail a Letter of Protocol to the defendant that includes "a detailed account of the accusations being made and a thorough summary of the evidence the claimant has against the defendant."\footnote{28} If the defendant disputes the case, it must state why and give details of the supporting evidence. If the claimant remains unsatisfied, it may file a petition. Unlike the past, where only bareboned allegations were required, "the new writs must be full of details and supporting materials, including relevant documents, photographs, sworn testimonials, and reports from experts."\footnote{29}

Cases are assigned to one of three tracks: small claims, cases involving five thousand to fifteen thousand pounds, and cases involving over fifteen thousand pounds. The third category of high stakes cases have extensive case management, including court determination of proportionate and reasonable fees. Each side is required within weeks to produce all documents and the names of witnesses that they believe are relevant to the litigation, whether it helps or hurts their argument. Much testimony will be restricted to written reports. In limited situations, such as when a witness is unlikely to be available for trial, parties can apply to the court for permission to take oral depositions. If this limited right to an oral deposition is granted, the court decides whether a judge will preside over the deposition, or whether "an examiner of the court" or "such other person as the court appoints" will preside.\footnote{30} The head of litigation of a national firm in the United Kingdom stated that the firm now spends "a lot more time early in the case thinking about how the case will play out."\footnote{31} She added: "The system before was a battle of the wallets.... Whichever client had the deepest pockets had the definite advantage in litigation. You could have mountains of discovery."\footnote{32} This would suggest that the reforms are having some beneficial effects.\footnote{33}

\footnote{28} Id. at 3.
\footnote{29} Id.
\footnote{31} See Curriden, supra note 27, at 2.
\footnote{32} Id. at 5.
\footnote{33} LORD WOOLF, ACCESS TO JUSTICE—FINAL REPORT: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND & WALES 105-06 (1996). In Lord Woolf’s discussion of discovery of documents, which he requested to be renamed “disclosure,” he recommended that the extent of discovery be proportional to the case. He identified four categories of documents that, prior to his report, were required to be disclosed: (1) parties’ own documents that “they rely upon in support of their contentions;” (2) “adverse documents of which a party is aware” and which “adversely affect his own case or support another party’s case;” (3) “documents which do not fall within categories (1) or (2) but are part of the ‘story’ or background” of
It would be a mistake to conclude that pretrial discovery in the United States is totally different from other countries. We have seen that there is document production and what sounds like mandatory disclosure elsewhere. In some of the other systems, parties can seek permission from the court, usually only in a limited number of circumstances, to take oral depositions. Japan now permits what appear to be pretrial interrogatories. “In 1988, the Netherlands adopted a new Evidence Act affording some opportunities for discovery.” Active case management in the United States, including early control of discovery in some courts, begins to resemble the judicial control exerted in civil law countries. Nonetheless, the number of discovery mechanisms available to the American lawyer as a matter of right, the degree of party control over discovery, the extent to which liberal

the case; and (4) documents that may “lead to a train of inquiry enabling a party to advance” its own case or damage its opponent’s case. Id. at 124. Lord Woolf proposed that fast track cases would be limited to categories (1) and (2), which he described as “standard disclosure,” while exceptional cases would be permitted “extra disclosure,” as described in categories (3) and (4). Id. Extra disclosure will only be permitted upon the issuance of a court order. The court must be satisfied that the extra disclosure will be necessary to do justice, and that “the cost of such disclosure would not be disproportionate to the benefit” nor would a party’s ability to continue the litigation be impaired by the order. Id. at 125. Lord Woolf made no mention of depositions in his report, neither mentioning the number of depositions taken nor recommending any limitations or changes to the established practice. Id.

34. In Canada, for example, where depositions are called “examinations for discovery,” there is only the automatic right to examine each individual party and one representative of each corporate party. Steven R. Schoenfeld et al., Understanding Litigation in Canada, N.Y. L.J., Apr. 16, 2001, at S8. These oral examinations are essentially the same as a deposition in the United States, except that in some provinces witnesses may refuse to answer questions that are objected to on the basis of relevance until the witnesses are ordered to answer them by the court. Id. Unlike the United States, there is no right to depose non-parties, and most provinces do not permit non-party oral discovery without leave of court. Id. The party seeking the non-party deposition has the burden to show that: (1) the information cannot be obtained from a person whom the requesting party is entitled to examine; (2) it would be unfair to force the requesting party to proceed to trial without the examination; and (3) the examination would not cause unreasonable expense to the other party, or be unfair to the non-party. In most provinces, a party must seek a court order. Id.

35. There is no automatic discovery of documents under Netherlands law. However, there are various provisions that enable a party to obtain documents in which it has a legitimate interest from opposing or third parties. A party awaiting litigation seeking inspection or production of an authentic instrument to which it has not been a party may review the instrument if the court feels that there exist grounds for production. If a person has a special interest in documents that are at the disposal of another person, he/she may demand a copy of it at his/her own expense. The court decides, if necessary, on the way inspection is to be arranged or copies or extracts are to be produced. Public records are available for discovery without court order. See HEBLY, THE NETHERLANDS CIVIL EVIDENCE ACT 1988, at 16-18 (1992); Richard L. Marcus, Retooling American Discovery for the Twenty-First Century: Toward a New World Order?, 7 TUL. J. INT’L & COMP. L. 153, 185 (1999) (citing HEBLY, supra). See also Edward F. Sherman, The Evolution of American Civil Trial Process Towards Greater Congruence with Continental Trial Practice, 7 TUL. J. INT’L & COMP. L. 125 (1999) (drawing comparisons between American and continental civil procedure systems).
discovery in the United States has become what almost looks like a constitutional right, and the massive use of discovery of all kinds in a substantial number of cases surely sets us apart.

Of course, accusing one of being “nuts” can have a third meaning, distinguished from intense attraction or difference. It can mean “crazy” or “irrational,” clearly wrong or mistaken. In this sense, I suppose that much of the world does think we are nuts when it comes to civil discovery. A consistent theme of those comparing American discovery to that in other countries is that the latter avoid and condemn discovery “fishing expeditions.” Here are a few examples. An Australian jurist in condemning “fishing expeditions” explained “that a person who has no evidence that fish of a particular kind are in a pool desires to be at liberty to drag it for the purpose of finding out whether there are any there or not.”

“Most countries,” another commentator explains:

do not have the liberal discovery rules of the United States and many are actively hostile to discovery within their country. Civil law countries in particular frequently view discovery as an infringement of sovereignty. Some countries have required attorneys seeking a business visa to affirm that they are not going to the country for the purpose of taking a deposition. Canada and Great Britain view much United States discovery as a fishing expedition.

In commenting on discovery in the Westinghouse Uranium litigation, “the House of Lords regarded the US [sic] discovery process as being a fishing expedition and thus an abuse of court process.” Another article describes the failure of the United States Supreme Court to limit American discovery on foreign soil to that permitted by the Hague Convention, notwithstanding our country’s adoption of that Convention. It describes the French countermoves through blocking statutes and the French “narrow” discovery rules that “prevent ‘fishing expeditions’ for evidence for use in United States legal proceedings.” The authors add: “What the French fear most is not the revelation of damaging material but rather the occurrence of ‘fishing

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expeditions,' i.e., any request that is not for a clearly identified document.\footnote{41}

The foreign critics of American discovery say very little about why "fishing expeditions" are bad. Fishermen, after all, see such excursions in a positive light. I suppose the negative connotations include wasted time and expense for both private individuals and the court system, invasions of privacy, and the unfairness of forcing defendants to expend resources when plaintiffs do not have advance information of liability.

But this continual use of the phrase "fishing expeditions" to condemn American discovery with little analysis gives pause. What neither foreign commentators on American discovery nor homegrown conservative critics tend to mention is the extensive empirical research in our country demonstrating that in many American civil cases, often approaching fifty percent, there is no discovery, and in most of the remainder of the cases there is remarkably little. A study by the Federal Judicial Center summarizes the findings of empiricists: "[T]he typical case has relatively little discovery, conducted at costs that are proportionate to the stakes of litigation, and ... discovery generally—but with notable exceptions—yields information that aids in the just disposition of cases."\footnote{42}

This does not mean that our use of discovery resembles most other countries—it does not. Nor does it mean that we do not have discovery abuse—we do. One cannot read Wayne Brazil's articles, including empirical data and vivid descriptions, without being convinced that in

\footnote{41. \textit{Id.} at 118.  
42. Thomas E. Willging et al., \textit{An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments}, 39 B.C. L. \textit{Rev.} 525, 527 (1998). A 1997 survey by the Federal Judicial Center (FJC) concluded that about half of the average district court's civil docket would be unlikely to have any discovery. \textit{Id.} at 549 tbl.6. Similarly, the RAND Institute for Civil Justice concluded that in 38% of the civil cases filed in federal court, lawyers conducted no discovery. In a study of five state trial courts, the National Center for State Courts found that 42% of general civil litigation cases did not have recorded discovery. Susan Keilitz et al., \textit{Is Civil Discovery in the State Courts Out of Control?}, 1993 \textit{St. Ct. J.} 9. The FJC study also concluded that for the cases in which discovery was conducted, the median expenditure per side for discovery, as a percentage of the stakes in the litigation, was a mere 3%. At the ninety-fifth percentile, the expenditures were 32% of the amount at stake. \textit{Id.} See also Thomas E. Willging, \textit{Fed. Judicial Ctr., Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-Based National Survey of Counsel in Closed Federal Civil Cases} 17 tbl.6, 18 tbl.8, 38 tbl.29 (1997). There are now several articles that use empirical data to expose the myths about American discovery and demonstrate that it is used a good deal less than many assume or assert. See, e.g., Elizabeth G. Thornburg, \textit{Giving the “Haves” A Little More: Considering the 1998 Discovery Proposals}, 52 SMU \textit{L. Rev.} 229 (1999); Linda S. Mullenix, \textit{Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking}, 46 \textit{Stan. L. Rev.} 1393, 1432-42 (1994) (analyzing social science findings by the FJC, the Baltimore Discovery case study, and the National Center for State Courts study).}
a substantial subset of cases, in the neighborhood of five to ten percent, or possibly even fifteen percent, lawyers abuse the discovery rules both by over-discovery and by hiding and obfuscating information.\textsuperscript{43} There is frequent distortion of evidence, as a result of lawyer interventions including the type of witness coaching that is forbidden in other countries. But even here, it is important to put American discovery in a larger perspective that includes the nature of our government, the composition of the bench and bar, the constitutional right to a jury, methods of lawyer compensation, ideology and beliefs about power, the degree of safety provided by the welfare state, attitudes about government regulation, and the place of discovery in the overall procedural scheme. In short, to label our system as one that wrongly permits “fishing expeditions” is to miss much of the point.

Our discovery mechanisms are not so irrational when seen in context. Let me sketch out some examples.\textsuperscript{44} Consider our historic distrust of concentrated power. Our doctrines of federalism and separation of powers, the right to a jury trial, and the adversary system, including party control, reflect our historic distrust of residing power in one person or limited groups. We do not think that judges would ferret out negative aspects of our opponent’s case and positive information to prove our own claims or defenses with the same motivation and intensity that self-interest propels. Perhaps if we had more experience with career judges, elevated as the result of performance based on objective criteria, as opposed to politically-appointed or elected judges, we would have more confidence in turning over discovery to the judiciary. But one must be cautious here. Professor Marcus quotes Professor Damaska on the European experience:

As Professor Damaska has recognized, Continental civil procedure exhibits “a considerable degree of tolerance—almost insouciance, to common law eyes—for the incompleteness of evidentiary material.” Assigning fact gathering to the judge does not solve this problem; “the protagonist who tends to monopolize fact gathering—the


\textsuperscript{44} I do not claim that this is original. Indeed, Geoffrey Hazard and Richard Marcus, each of whose work I greatly respect, have explained in some detail how our discovery is an integral part of a much more interconnected legal and civil process, and how difficult it would be to change our wide-open discovery, without disturbing other aspects of our legal process and general culture that are unlikely to change. See Hazard, supra note 9, at 1682-93; Marcus, supra note 35, at 188-90, 194-98.
judge—is not really very energetic or resolute in his probing. His exercise of his near-monopoly power to develop evidence seems lazy.”

The relative proportion of lawyers and judges in our country also helps dictate American discovery practices. There are approximately a million lawyers in the United States. In 1998, there were 9065 state judges of courts of general jurisdiction. At the federal district court level, there were 642 authorized life tenured judgeships and 436 magistrate judges. In addition, there were 337 senior status district judges. This means we have approximately one hundred lawyers for each judge who presides over a court of general jurisdiction. Also, judges are increasingly preoccupied with criminal matters. Whether it is a good idea or not, the judiciary does not have the personnel to replace lawyers as having the primary responsibility for pretrial discovery. Nor is it likely that state or federal legislators will soon drastically increase the funding for the judiciary.

In the United States, civil litigation plays a more substantial role in the governmental and societal structure than in most other countries. Alexis de Tocqueville noted in the 1830s how many hotly contested political issues end up in the United States courts. These issues are frequently, if not usually, raised by private litigants in civil litigation, as opposed to law enforcement by the state itself. A recent article about the Japanese legal system emphasizes how unusual the United States is in utilizing civil litigation, often through the tort system, to

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48. Id. at 17, tbl.3 (exploring the 1999 statistics).


51. “The whole system of civil adjudication would ground to a virtual halt if the courts were forced to intervene in even a modest percentage of discovery transactions.” Marcus, supra note 35, at 187 (citing In re Convergent Tech. Sec. Litig., 108 F.R.D. 328, 331 (N.D. Cal. 1985)).

52. “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.” Alexis de Tocqueville, Democracy in America 248 (J.P. Mayer & M. Lerner eds., 1966).
enforce social norms. In this article, the author notes that in Japan, after private individuals sought to enforce environmental and anti-discrimination laws through civil litigation, the government, particularly "the entrenched bureaucracy," sought to curtail private enforcement so that the state could retain its power "as the appropriate enforcer of legal norms." Perhaps a truer comparison of the utilization of discovery in the United States would be between our civil discovery and the methods used in other countries to gain information, through force or otherwise, by the police, prosecutors, and administrative agencies in their attempt to enforce laws. It may well be that other countries permit so little discovery because the bulk of their civil cases are like the routine cases in the United States that engender modest discovery.

Broad discovery seems critical in many situations in which private individuals in the United States use civil litigation to enforce rights. This is particularly true in such cases as civil rights, products liability, securities, and antitrust, in which evidence to make a *prima facie* case frequently resides in the files and minds of the defendants. In these lawsuits, it would often be very difficult, if not impossible, for the plaintiff to plead her facts or evidence with particularity in the complaint, as is required in the pleading rules of other countries. The lack of precise pleading means that the defendant also frequently needs extensive discovery. The United States Supreme Court has repeatedly drawn the connection between notice pleading and liberal discovery. It is instructive that the three main cases in which the Supreme Court has insisted that the Federal Rules of Civil Procedure call only for simplified, notice pleading all involve civil rights and all speak to the important place of discovery in the overall procedural scheme. And, of course, settlement negotiations and deciding summary judgment motions, so important in American procedure given the dearth of detail required in the complaint and the consequent difficulty of obtaining a dismissal for failure to state a claim, are highly reliant on

54. Id. at 773. For a comparison of the Japanese and American views of law enforcement with descriptions of discrimination and environmental cases, as well as others, see id. at 772.
55. Professor Linda Silberman made this suggestion to me after the Clifford Conference.
56. Conley v. Gibson, 355 U.S. 41 (1957); Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163. 168-69 (1993) ("In the absence of such an amendment [of Rule 9(b)], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."): Swierkiewicz v. Sorema N.A., 122 S. Ct. 992. 997-98 (2002) (holding that "[b]efore discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case").
extensive discovery. In short, it would be difficult to eliminate extensive discovery in United States civil litigation without also changing the relative places of civil litigation, lawyers, judges, and juries in our culture and the relative roles of pleading, discovery, summary judgment, and other elements of procedure.\(^{57}\) The rules and the culture are interrelated in complex ways that would be very difficult to disentangle, even if such rearrangements were deemed desirable.

So upon closer look, the place of discovery in the United States is not nuts,\(^{58}\) but just dramatically different based on how we view the roles of government, the individual, civil litigation, and the constituent parts of the procedural system. In fact, there are occasions when the citizens of other countries would be more justly served by permitting portions of the American discovery practice, such as pretrial depositions. The current Council Draft of the American Law Institute/UNIDROIT Principles and Rules of Transnational Civil Procedure, a project with legal advisers from many countries, permits depositions upon order of the court.\(^{59}\) In the introduction to the Draft, the authors describe the limited right of document discovery and depositions in civil law countries and add: “However, in a modern legal system there is a growing practical necessity—if one is serious about justice—to permit document discovery to some extent and, at least in some cases, deposition of key witnesses.”\(^{60}\)

Whether or not the rest of the world draws closer to the United States model of discovery,\(^{61}\) we are closer to other countries in how discovery is actually utilized and in our developing views of the place of discovery in civil litigation than is at first apparent. As I mentioned earlier, we have never had much discovery in the United States in the

\(^{57}\) For instance, the right to jury trial makes it more difficult to have the discontinuous hearings that include evidence-gathering, which are a hallmark of civil law adjudication. Langbein’s suggestion that judges could conduct pretrial discovery, while at the same time maintaining jury trials, runs into the conceptual and practical problems of turning discovery over to judges that I have just discussed. \(See\ supra\) note 44 and accompanying text. \(See also\) Gross, \(supra\) note 8.

\(^{58}\) Here, of course, I am using the term “nuts” in the sense of crazy or clearly mistaken or wrong.

\(^{59}\) Principles and Rules of Transnational Civil Procedure \(\S\) 22.1 (ALI/UNIDROIT, Discussion Draft No. 3, 2002).

\(^{60}\) Id. at 12. \(See also\) G.L. Davies, Civil Justice Reform in Australia, in Civil Justice in Crisis, \(supra\) note 46, at 177 (complaining about the abusive use of document discovery in some cases, while “in the majority of cases which turn substantially on oral evidence, each party may take the other by surprise”).

\(^{61}\) Professor Marcus notes that the experience of the drafting of the International Commerce Commission new Rules of Arbitration, and the preliminary draft of the American Law Institute’s Transnational Rules of Civil Procedure, along with other indications, make it “hard to see that the rest of the world has moved much toward discovery of the American mold.” Marcus, \(supra\) note 35, at 185-86.
vast bulk of cases. Almost all of the amendments to the federal discovery rules during the past two decades have been in the direction of restraining discovery: discovery and pretrial conferences, judges and lawyers encouraged to view discovery in terms of "proportionality" of the stakes involved, limitations on the number and length of depositions and interrogatories, and sanctions for obstructive behavior.

I want to close by suggesting that there are economic, social, intellectual, and cultural factors that, in the long haul, may have an even greater influence than the rules themselves in drawing the American discovery experience away from the "fishing expeditions" so deplored by others. Senator Thomas Walsh of Montana was, in the first third of the twentieth century, the major opponent to the Enabling Act that empowered the Supreme Court to promulgate the uniform federal procedural rules. I am reminded of a letter he wrote friends upon

62. See supra note 42 and accompanying text.

63. It may seem strange that in the United States the Federal Rules of Civil Procedure have been amended in so many ways to control and curtail discovery, while at the same time empirical data shows that in most cases there does not appear to be discovery abuse. Several reasons have been proposed including that the drafters of rule amendments do not sufficiently take into account empirical data. In drafting the 1993 amendments to Rule 26, "there was little relevant empirical evidence and, indeed, the [Advisory] Committee repeatedly rejected pleas to stay its hand pending the evaluation of experience under local rules." Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 Brook. L. Rev. 841, 845 (1993) (footnote omitted). See also Laurens Walker, A Comprehensive Reform for Federal Civil Rulemaking, 61 Geo. Wash. L. Rev. 455, 458 (1993) (citing Linda S. Mullenix, Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking, 69 N.C. L. Rev. 795, 810 (1991) (stating that "there is virtually no empirical study of the current practice of such informal discovery, the efficacy of such experiences, or the results of informal discovery") (footnote omitted). Additionally, critics assert that the business community and especially insurance companies have painted an unduly negative picture of American civil litigation and discovery, and that the judges themselves are apt to concentrate on and be influenced by the big cases that consume so much of their time. For the judicial role in misperceiving what goes on in typical cases, see Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4 (1983); Mullenix, supra note 42, at 1397-1410 (summarizing some of the growing literature on the myths surrounding discovery and explaining how the myths about discovery abuse were promulgated and spread). See also Jeffrey W. Stempel, Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform," 64 Law & Contemp. Probs. 197 (2001); Linda S. Mullenix, The Pervasive Myth of Pervasive Discovery Abuse: The Sequel, 39 B.C. L. Rev. 683 (1998). Also, the Federal Rules of Civil Procedure are trans-substantive in the sense that the same rules are available for all types of cases. William W. Schwarzer, In Defense of "Automatic Disclosure in Discovery," 27 Ga. L. Rev. 655, 656 (1993). Consequently, if the drafters want to amend rules to control or curtail discovery in those cases in which there is more likely to be abuse, their net also covers the routine cases since, for the most part, they have been unwilling or unable to draft substance-specific rules. Griffin B. Bell et al., Automatic Disclosure in Discovery — The Rush to Reform, 27 Ga. L. Rev. 1, 39 (1992).

his return from a trip to England. He had become convinced that the
habits of restraint of the bench and bar in England at the time and the
overall legal culture had a good deal more to do with how their litiga-
tion was conducted than rules or statutes.65

Let me mention three powerful influences that encourage lawyers
in the United States to be more restrained and focused in their use of
discovery. I do not know enough about the legal cultures in other
countries to speculate on whether similar cultural currents are at work
elsewhere. Because there is considerably less discovery abroad than
in the United States, there is less reason to cut back. In the United
States, business clients are exerting a powerful pressure counter to the
expansive discovery excursions of the past. There is evidence that
business clients have expanded their own in-house legal departments
in order to control fees, and they are monitoring the fees charged by
litigators to a much larger extent than previously. This is particularly
true of insurance companies, who, much to the pain of defense coun-
sel, want detailed explanations of the cost of each litigation step for
which they will be charged.66 There is also reason to believe that the
utilization of hourly rates, which permit legal bills to be greatly in-
creased by the use of multiple attendees at painfully long depositions
and other fee-enhancing techniques, are being curtailed by the use of
preset fees.67

Alternative dispute resolution (ADR) is also having an impact on
litigation in the United States in multiple ways.68 Most obvious is

65. Letter from Thomas Walsh to Mr. and Mrs. Hutchens, reprinted in THOMAS J. WALSH
PAPERS, LIBRARY OF CONGRESS (Oct. 5, 1925) Box 281, Judiciary File (concluding that "it is the
habits of our bar that need reforming, not the laws under which they act"). See also Subrin,
supra note 64. at 997-98. My former student, Thomas Main, has recently described how both
state and federal appellate judges interpret the same words in procedural rules differently per-
haps depending on the legal climate at the time the decisions are rendered. Thomas O. Main,
Procedural Uniformity and The Exaggerated Role of Rules: A Survey of Intra-State Uniformity in
Three States That Have Not Adopted the Federal Rules of Civil Procedure, 46 VILL. L. REV. 311
(2001). Professor Jeffrey Stempel mentioned to me, in discussing my ideas for this paper, that
underlying modern literary criticism and deconstruction thought is the notion that the meaning
of language is contingent on context.

66. See, e.g., Robert I. Weil, Insurance Companies and Their Lawyers–The Cost Squeeze, 32
DEF. L.J. 391 (1983); Andrew Blum, Insurers' Cutbacks Hit Firms, NAT'L L.J., Nov. 22, 1993, at
1; William G. Ross, The Honest Hour: The Ethics of Time-Based Billing 59, 113-24
(1996). See also Bryant Garth, From Civil Litigation to Private Justice: Legal Practice at War with
the Profession and Its Values, 59 BROOK. L. REV. 931, 950-53 (1994) (discussing increased com-
petition to attract corporate clients and the increased sophistication of clientele).

67. See, e.g., George B. Shepherd & Morgan Cloud, Time and Money: Discovery Leads to
Hourly Billing, 1999 U. ILL. L. REV. 91, 164 n.289; Darlene Ricker, The Vanishing Hourly Fee,

68. This paragraph draws heavily on a paper I recently delivered at a conference at the Wil-
liam Boyd School of Law, University of Nevada, Las Vegas, Stephen N. Subrin, A Traditionalist
binding arbitration, which (unfairly, in my view) often forces employ-
ees and consumers into dispute resolution processes that permit little
or no discovery. Perhaps less obvious is the growing use of media-
tion, frequently at earlier stages of the litigation, before a good deal of
discovery has occurred. Some lawyers are using mediators to help
them decide what discovery is needed in order to either settle the
case, or if that fails, get it ready for trial. In the United States, only
two to four percent of commenced cases are tried; the majority of
cases settle. There is a growing awareness that settlement, whether
through mediation or unaided negotiation, will often turn on nonlegal
variables. This is not to say that the law and facts are unimportant in
mediations or negotiations. The written and oral overviews at media-
tion contain relevant law applied to relevant facts. But the very na-
ture of a mediation, with the mediator often asking pointed questions
of both parties, forces a type of focus on the most relevant informa-
tion that makes it obvious that prolonged discovery, often providing
little of genuine importance, can be wasteful and even distracting.

The ivory tower permits me to suggest one other cultural factor that
is a bit harder to articulate and even more speculative in its effect on
discovery. Almost all of scientific and intellectual thought in the last
century pointed in the direction of the uncertainty of our knowledge
and the interconnectedness of what we think are “facts.” Modern
and post-modern thought suggests the impossibility of ascertaining
objective truth, and science teaches the hidden mysteries of cause and
effect. The environmentalists tell us that a butterfly flapping its wings

69. See, e.g., Jean R. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court’s
Preference for Binding Arbitration, 74 WASH. U. L.Q. 637, 683-84 (1996). See also ALLAN SCOTT
RAU et al., PROCESSES OF DISPUTE RESOLUTION 600-01 (3d ed. 2002).

70. The overall completed state trial rate was estimated at 2.9% of all terminations for 1991-
92; the federal rate was 3.7%. Theodore Eisenberg et al., Litigation Outcomes in State and Fed-
2.2% of federal civil cases reached trial (5,780 trials of 259,234 total civil cases terminated).
ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES

71. A classic examination of the variables involved in settlement is H. LAURENCE ROSS, SET-
TLED OUT OF COURT (1980). The mediation literature is replete with examples of how issues
that are not illuminated by discovery, such as the continuing relationship of the parties, influence
settlement.

72. I have previously discussed modern and post-modern thought and its impact on litigation
jurisprudence in Stephen N. Subrin, On Thinking About a Description of a Country’s Civil Pro-
MODERNS (1997), particularly helpful in understanding modern and post-modern thought.
in Brazil influences the wind currents hundreds of miles away. Any of us who prepares lawsuits knows that there is often an endless supply of documents and witnesses, and that further inquiry just might turn up something slightly, or even greatly, relevant. And now we have the hidden, never erased traces in the hard drive of computers, with billions of units of information that might yield a helpful clue. There is a staggering amount of information that one might bring to bear on many disputes. At some point, though, comes the realization that too much information is indigestible. The skillful lawyer realizes that in order to make the story understandable to others, she will have to focus her narrative on the most important information, and this is probably better accomplished earlier rather than later.

The lead article in a recent issue of Litigation, an issue centered on tactics, is entitled Focusing: When Less is More. The author, an associate editor of the magazine and a partner in a Philadelphia firm, suggests a change in the direction on how litigators must approach their task:

The days of leisurely, broad-based discovery that allowed our theories and strategies to evolve over time as we gradually filled in pieces of the big picture are becoming history, with both courts and clients increasing the pressure on us to get to the point quickly. Courts are competing with each other to clear their dockets, setting “rocket docket” schedules and imposing rigid limits on discovery.

The author mentions the new federal rules’ limit on the number of interrogatories and the seven-hour limit on depositions. She continues:

The old deposition outlines no longer work. Clients are also losing patience with protracted litigation. It takes too long and costs too much. They want the process streamlined, and they want quick results. The challenge is how to do this without sacrificing thoroughness and care. Again, the answer is focus.

She suggests that the lawyer consider her closing statement at the beginning of case preparation and “[e]arly in the case, analyze the claims and defenses to identify a potentially dispositive issue for summary

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73. A research librarian at Northeastern University School of Law, Michelle Pearce, has found many variations of the oft-used quote about the butterfly in Brazil. Many sources give credit to the American meteorologist, Edward N. Lorenz. Address at the American Association for the Advancement of Sciences, Predicability: Does the Flap of a Butterfly’s Wings in Brazil Set Off a Tornado in Texas? (Dec. 29, 1979).
75. Id. at 10.
76. Id.
judgment . . . . Then take focused discovery to establish key undisputed facts to support this motion.\textsuperscript{77}

Client supervision of fees, increased use of ADR, and awareness that there are no natural cutoffs to information accumulation point in the same direction as the rule amendments that constrain discovery. I think it is safe to predict that over time one will find shorter, more focused discovery “fishing expeditions” by American litigators in many cases.

But there is one place that the United States remains substantially different. Government plays a less active role in the United States in enforcing law and regulating social norms than in other countries, and the United States provides less of a safety net for its citizens than elsewhere, such as not providing national health care. So long as this continues, civil litigation, usually by private parties, will play a different and more intense role in the United States than in other countries. There will continue to be cases in which the stakes are so high for one or more parties that every shred of potential information will seem worth exploring. It took years of litigation and discovery to uncover concealed information in the asbestos and tobacco industries.\textsuperscript{78} In an antitrust case, such as Microsoft, the parties—at least the plaintiffs—correctly perceive that expansive discovery is critical to the ultimate

\textsuperscript{77} Id.

\textsuperscript{78} In early asbestos cases, industry leaders were successful in convincing juries that they could not have been aware of the health risks of asbestos prior to 1964. Paul Brodeur, Outrageous Misconduct 106 (1985). Attorney Karl Asch, upon reviewing the 1974 annual report of Raysbestos-Manhattan, saw a self-congratulatory reference to a study that Raysbestos had commissioned in 1930 in which the Metropolitan Life Insurance Company surveyed all of its factories for health hazards. Id. at 107-08. The report further mentioned that Raysbestos had joined with other asbestos products manufacturers in the mid-1930s in funding research programs on the biological effects of asbestos. Id. When served with discovery requests, Metropolitan Life claimed that they could not find the papers. Id. at 109. Following a motion to compel, the insurance company released a report of some surveys that it had performed. Id. Finally, Asch obtained a subpoena duces tecum ordering then CEO of Raysbestos to give testimony in deposition and to bring with him all documents pertaining to working conditions. Id. In that deposition, one and a half years since the initial request for document production, William Simpson revealed that his father’s papers were in storage in the company vault at the company’s headquarters. See Brodeur, supra, at 110. His father, Sumner Simpson was the CEO of Raysbestos in the 1930’s. In his files, Asch found the “smoking gun” that showed that Raysbestos and other industry leaders most certainly knew of the hazards of asbestos well before 1964. Id. The other U.S. asbestos giant, Johns-Mansville, had claimed that they had discarded all correspondence between its officials and Sumner Simpson when they moved corporate headquarters five years earlier. Id. For descriptions of concealment and ultimate discovery in tobacco litigation, see Peter Pringle, Cornered: Big Tobacco at the Bar of Justice 138-59 (1998). See also Michael V. Ciresi et al., Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation, 25 Wm. Mitchell L. Rev. 477, 479-564 (1999). On the importance of law to deter wrongdoing by corporations, see Thomas H. Koenig & Michael L. Rustad, In Defense of Tort Law 3-5 (2001).
oucome. These are situations when discovery restraint will not make sense.

Large, high stakes cases notwithstanding, I do think we are learning a sense of discovery restraint that will be more appealing to the rest of the world. Smallness will look better. Fewer American lawyers will be likely to spend so large a portion of their professional lives in warehouses reading the small print of documents, or as the third associate watching a deposition. Whether more of them will drink espresso in cafes at a leisurely pace after work while discussing the exquisite relationship of post-modern thought to depositions is perhaps doubtful—unless they become law professors.

79. The deposition testimony ran tens of thousands of pages. Carol B. Swanson, Antitrust Excitement in the New Millennium: Microsoft, Mergers, and More, 54 OKLA. L. REV. 285, 318 (2001). "Eugene Crew, a San Francisco lawyer who is at the hub of the California cases, said that 12 to 15 witnesses were being deposed each month and that millions of pages of documents had been gathered." Barnaby J. Feder, Private Suits Put Microsoft At Little Risk, N.Y. TIMES, July 16, 2001, at C1. In requesting to delay the hearings on the proposed remedies by at least four months, Microsoft "accused the states of seeking internal documents that 'are truly breathtaking in scope,' forcing Microsoft to employ 'a team of 40 lawyers and paraprofessionals working between 60 and 72 hours a week exclusively on this document production.'" Stephen Labaton, Delay Sought By Microsoft In States' Case, N.Y. TIMES, Dec. 22, 2001, at C2. Big antitrust cases long precede the Microsoft experience, however. In 1911, the government's break-up of Standard Oil involved a record that was "inordinately voluminous, consisting of twenty-three volumes of printed matter, aggregating about 12,000 pages, containing a vast amount of confusing and conflicting testimony relating to innumerable, complex, and varied business transactions, extending over a period of nearly forty years." Standard Oil Co. v. United States, 221 U.S. 130-31 (1911).

80. They may, though, find themselves more at computers. A recent article in Litigation magazine outlines the many places in computers where the lawyer may hunt relevant data: active data, embedded data or metadata, replicant data, residual data, back-up data, legacy data, bookmarks, cache files, and cookies. James P. Flynn & Sheldon M. Finkelstein, A Primer on "E-vide-nce," 28 LITIG. 34, 36-37 (2002). See also Jason Krause, Discovery Channels, 88 A.B.A. J. 48, 50 (2002) (quoting Charles Weeden that "[i]t used to be you'd send young associates out to Brooklyn to some vermin-infested, sweltering warehouse to wade through mountains of paper documents... Now, if you can put your data in a central database with a powerful enough search function, you can type in a keyword and get more information than that poor associate in Brooklyn ever could.").

81. They might also consider relocating to the Paris office of their firm.