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# How We Got Here: A Brief History of Requester-Pays and Other Incentive Systems to Supplement Judicial Management of Discovery

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# How We Got Here: A Brief History of Requester-Pays and Other Incentive Systems to Supplement Judicial Management of Discovery

*E. Donald Elliott\**

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*[W]hat's past is prologue . . . .*

—William Shakespeare<sup>1</sup>

## INTRODUCTION

Over the last two decades, a mature academic literature has developed about how we might use incentives as a complement to discretionary judicial decisions for controlling civil discovery. Professor Brian Fitzpatrick and the other organizers of the *Vanderbilt Law*

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1. WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1.

*Review* “Future of Discovery” Symposium thought it would make sense to start this symposium by summarizing what has been written previously on the subject in the hope that the next time that the rules advisory committee tries again to solve the problem<sup>2</sup> of properly managing discovery, it might benefit from some of this learning.

## I. A BRIEF HISTORY OF CIVIL DISCOVERY AND ITS ABUSE

The allocation of discovery costs first became a significant issue after the Xerox copying machine went on the market in 1959. Prior to that time, the focus in discovery had been on live depositions to avoid surprise at trial, so costs were limited. One of my mentors, the late federal district judge Gerhard Gesell, a prominent antitrust litigator in the 1960s,<sup>3</sup> once told me that even in a complex antitrust case, lawyers would typically send out only four or five documents to be copied by “photostat,” essentially a photographic negative, to use as exhibits at trial.<sup>4</sup> Until 1970, Rule 34, relating to production of documents, actually required leave of court and a showing of good cause to obtain any production of documents.<sup>5</sup> All of that changed in the 1960s and 1970s with the widespread use of xerographic methods for copying documents.<sup>6</sup> By 1978, the *Manual for Complex Litigation* was recommending “wave discovery,” beginning with broad production of documents as the first step in complex cases.<sup>7</sup> Expanded production of documents made possible by improvements in copying technology meant that in big cases with a lot at stake, the parties now exchanged

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2. I call discovery a “problem” because the Rules Advisory Committee keeps amending the rules to try to solve it. See Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 773 n.1 (2011) (collecting examples). I am well aware, however, as the literature has shown for over twenty years, that extensive discovery is limited to a subset of cases. See, e.g., Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597, 597 (1998):

The recent studies of civil discovery . . . establish beyond any reasonable doubt that we have two very distinct worlds of civil discovery. These worlds involve different kinds of cases, financial stakes, contentiousness, complexity . . . . The ordinary cases, which represent the overwhelming number, pass through the courts relatively cheaply with few discovery problems. The high-stakes, high-conflict cases, in contrast, raise many more problems and involve much higher stakes.

3. See CHARLES A. MILLER, COVINGTON: A CENTENNIAL STORY 14 (2018) (referring to Gesell as a “legendary” antitrust litigator); see also *id.* at 13 (describing copying documents by Thermofax and photostat prior to the advent of Xerox photocopying).

4. Personal communication.

5. FED. R. CIV. P. 34 advisory committee’s note to 1970 amendment.

6. As the problem of excessive discovery costs was largely created by technological developments, there is some chance that electronic discovery by computer searches may reduce search costs enough to make the problem more tractable.

7. MANUAL FOR COMPLEX LITIGATION § 2 (1978).

and paid lawyers to examine thousands, and sometimes millions, of documents—very few of which were actually used at trial<sup>8</sup>—prior to taking depositions.

The next major development was an unfortunate and not very thoughtful U.S. Supreme Court decision in 1978, *Oppenheimer Fund, Inc. v. Sanders*.<sup>9</sup> It created the default rule that still applies today that a “presumption”<sup>10</sup> exists that the party responding to a discovery request must pay the costs of complying. Unfortunately, that decision was written just as law and economics was beginning to make its way into law schools<sup>11</sup> and, through them, into the minds of law clerks. In 1978, however, the Supreme Court paid no attention to the potential strategic or incentive effects of allowing a requester to impose virtually unlimited costs on an opponent through discovery requests that were only tangentially related to the “subject matter” of the litigation (as Rule 26 then read).<sup>12</sup>

When one reads the *Oppenheimer Fund* opinion today, one will find that the actual decision is not an insuperable impediment to reform. The issue in the case was not the allocation of the costs of discovery but rather which side should pay for the notice to a class required under Rule 23. Rather than just holding that the plaintiffs’ lawyer should pay for notice to the class because he or she will benefit financially from the formation of a class—as I suspect that Marty Redish and I would<sup>13</sup>—the Supreme Court looked by analogy to the “practice” under the discovery rules and decided that a “presumption” should apply that a party complying with a court order must ordinarily pay the costs of complying.<sup>14</sup> The court did acknowledge, however, that the judge has discretion to “shift” costs to the other side.<sup>15</sup> I hate that term, “cost shifting,” because it suggests that costs naturally fall on one

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8. LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES 3 (2010), [http://www.uscourts.gov/sites/default/files/litigation\\_cost\\_survey\\_of\\_major\\_companies\\_0.pdf](http://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf) [<https://perma.cc/NTN4-46QF>] (“The ratio of pages discovered to pages entered as exhibits is as high as 1000/1. In 2008, on average, 4,980,441 pages of documents were produced in discovery in major cases that went to trial—but only 4,772 exhibit pages actually were marked.”).

9. 437 U.S. 340 (1978).

10. *Id.* at 358.

11. See Robin I. Mordfin & Marsha Ferziger Nagorsky, *Chicago and Law and Economics: A History*, U. CHI. L. SCH. (Oct. 11, 2011), <https://www.law.uchicago.edu/news/chicago-and-law-and-economics-history> [<https://perma.cc/TM7W-9TR3>] (detailing the growth of law and economics at law schools in the 1970s, which “were one of the most exciting times in the study of law and economics”).

12. FED. R. CIV. P. 26(b)(1) advisory committee’s note to 2000 amendment.

13. See Redish & McNamara, *supra* note 2, at 777 (arguing that requesters should generally bear costs of discovery under quantum meruit principles because they benefit from the production of the information).

14. 437 U.S. at 358.

15. *Id.*

side or the other and may only be “shifted” to the other side for some special reason. As Ronald Coase famously showed in 1960,<sup>16</sup> fencing costs do not fall naturally on either farmers or ranchers or, by extension, on requesters or responders to discovery. Rather, they are a product of their joint activity, and thus it is a policy decision for the law to allocate the costs to one or the other.<sup>17</sup> In my view, the proper policy decision is that the discovery rules should create incentives to produce a socially efficient level of discovery. The goal of a socially efficient level of discovery means that the parties should have enough discovery to reach a just result in settlement or at trial but without so much discovery that its costs become an impediment to reaching a just result in settlement or at trial. But as far as is apparent from its opinion, the Court that decided the *Oppenheimer Fund* case in 1978 was unaware of Coase’s work and its implications for the allocation of discovery costs.

The key sentence about discovery in *Oppenheimer Fund* was the following:

Under th[e discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests, but he may invoke the district court’s discretion under Rule 26(c) to grant orders protecting him from “undue burden or expense” in doing so, including orders conditioning discovery on the requesting party’s payment of the costs of discovery.<sup>18</sup>

The problem—which still bedevils us today—is that while both the Supreme Court in 1978 and the Advisory Committee in 2015 stated that judges have discretion to allocate costs to the requester, neither of them gave a hint as to what valid grounds for doing so might be. “Undue burden or expense” is a circular riddle: How is a judge supposed to decide what is “due” and what is “undue”? The question at issue is how much expense each side should bear and under what circumstances. As a result, the discretionary rule announced in *Oppenheimer Fund* has, in practice, reified into an almost unfailing obligation that responding parties pay for whatever discovery the requester is entitled to under the broad scope of the federal rules, whether the requester actually needs it or not.<sup>19</sup>

The principal draftsman of the Federal Rules of Civil Procedure, Dean (later Second Circuit Judge) Charles Clark, explained the problem with such broad, standardless discretionary approaches to

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16. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 4 (1960).

17. See Ronald J. Allen, *How to Think About Errors, Costs, and Their Allocation*, 64 FLA. L. REV. 885, 886–87 (2012) (applying the Coase theorem to allocation of discovery costs).

18. 437 U.S. at 358 (quoting FED. R. CIV. P. 26(c)(1)).

19. For an interesting exception in the context of an administrative subpoena by a federal agency, see *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1021 (D.C. Cir. 1978), which noted that the reviewing court may provide for reimbursement of expenses to comply with an administrative subpoena if the burden of complying has become “unreasonable.”

judicial management. In a brilliant article in 1950, also in the *Vanderbilt Law Review*, Dean Clark reflected on the successes and failures of the 1938 amendments to the Federal Rules of Civil Procedure, a dozen years after their adoption.<sup>20</sup> One of the main lessons he drew from his experience was that to be effective, rules should not merely grant discretionary power but also “explain” how that power is to be used by giving illustrations:

[W]ithout a tradition for the exercise of discretion, a general grant of power is likely to accomplish little. . . . If left to their own devices, without any precise guide beyond a general authorization, [courts] will stick to what they have known in the past. . . . A basic reason for the effectiveness of the federal rule authorizing pre-trial procedure is its careful statement of possible issues to be pre-tried, at the same time that it grants broad discretion to the court.<sup>21</sup>

## II. REGULATING DISCOVERY THROUGH INCENTIVES

In what follows, I will summarize the key points in the academic literature about allocation of discovery costs that have developed over the last generation in response to the flawed, standardless rule announced in the *Oppenheimer Fund* decision that discovery and its costs should be “managed” by judges deciding what costs are “due” or “undue” with no lodestar to guide them.

### A. *Elliott (1986): The Limits of Judicial Second-Guessing and Incentives to Help Regulate Discovery*

The first article of which I am aware to try to unravel the Sphinx’s riddle of when requesters, as opposed to responders, should pay for the costs of discovery by looking at the incentives created was my own 1986 article in *The University of Chicago Law Review*.<sup>22</sup> In it, I argued:

[W]e should think about civil procedure less from the perspective of powers granted to judges, and more from the perspective of incentives created for lawyers and clients. Our current system of civil litigation creates perverse incentives for lawyers, and then relies on judges to police litigant behavior through techniques like managerial judging. If we are not satisfied with the results, we should redesign the system to provide direct incentives for appropriate behavior.<sup>23</sup>

Later in that article, I applied this general perspective of regulating litigation behavior through incentives, as opposed to

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20. Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 497 & nn.9–10 (1950).

21. *Id.* at 501.

22. E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986).

23. *Id.* at 308.

discretionary judicial-management decisions, to discovery.<sup>24</sup> The core of my argument was that what are called “monitoring problems” in economics (that is, the judge’s inability to second-guess how much and what kind of discovery a litigant actually needs) suggest that we should regulate the quantum of discovery through incentives on the requester rather than judicial second-guessing or arbitrary limits.<sup>25</sup> Two examples of incentive-based approaches to managing discovery that have been broadly accepted since I wrote in 1986 are setting a firm trial date and limiting the number of interrogatories.<sup>26</sup> Both approaches create an incentive for the requester to prioritize, which makes the judge’s job easier but does not entirely replace discretionary judicial management.

I call using incentives as well as discretionary orders “the regulatory approach” to civil procedure. I can see, in retrospect, that it was natural for me to think about trying to manage behavior in litigation through incentives as well as discretionary judicial orders because I also work in the field of environmental law. Beginning in the early 1980s, environmental law was in the midst of a revolution in the use of economic incentives, such as marketable permits like those created by the acid-rain trading program under the 1990 amendments to the Clean Air Act<sup>27</sup> as well as “command-and-control” regulation by officials to manage pollution.<sup>28</sup> The two problems seemed similar to me in that in both situations, officials lack sufficient information to make well-informed decisions about how to allocate resources. The Nobel Prize-winning economic theorist Friedrich Hayek contended that the inability of government officials to marshal enough information to make centralized resource-allocation decisions is endemic to all types of central planning.<sup>29</sup> What this boils down to in the context of discovery is that the requester generally knows better than the judge what he or she really needs to develop his or her case. The challenge is to create a structure of incentives that causes the requester only to request

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24. *Id.* at 310–15.

25. *Id.* at 331.

26. *Id.* at 312–13.

27. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, 2584–634 (1990).

28. *See, e.g.*, Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1334–40 (1985) (discussing the shift from traditional command-and-control regulation to a system of economic incentives).

29. *See* 1 F.A. HAYEK, *The Fatal Conceit*, in THE COLLECTED WORKS OF F. A. HAYEK 66, 76–77 (W.W. Bartley III ed., 1988) (analyzing how decentralization allows multiple people to utilize the information they possess, thereby increasing the total amount of information taken into account in decisionmaking); *see also* Richard B. Stewart, *Economics, Environment, and the Limits of Legal Control*, 9 HARV. ENVTL. L. REV. 1, 6 (1985) (criticizing command-and-control environmental regulation as “Soviet-style centralized planning”).

information if the likely benefit to his or her case or to improving the accuracy of case assessment by both sides exceeds the cost to the requester to producing it. This is called the question of “allocative efficiency” in economics,<sup>30</sup> but it boils down to making sure that “the game is worth the candle.”

I later returned to discovery in a 2012 article, in which I expanded upon my basic notion that a modified form of a “requester-pays” standard makes sense as a way to ration the proper amount of discovery.<sup>31</sup> There I argued for a limited amount of free discovery but with the right of the requester’s lawyer to obtain more if he or she is willing to pay for it. This approach is actually more favorable to requesters than the current system because they can obtain discovery despite a judicial ruling that it is not needed or proportional to the needs of the case, provided they are willing to pay for it.

### *B. Setear and Easterbrook (1989): Strategic Incentives for Impositional Discovery*

An important dimension to the problem of regulating discovery costs that I had overlooked was supplied a few years later in a brilliant article by John Setear,<sup>32</sup> at the time a defense analyst for the RAND Corporation and currently a law professor at the University of Virginia, and a comment on Professor Setear’s article by Frank Easterbrook,<sup>33</sup> then already a judge on the U.S. Court of Appeals for the Seventh Circuit but also still a senior lecturer at the University of Chicago Law School. Whereas my article had largely focused on the overall level of discovery expense, Professor Setear and Judge Easterbrook developed the key insight that the requester has a strong *strategic incentive* to overuse discovery to impose costs on the other side in litigation and thereby apply pressure to coerce settlements.<sup>34</sup>

Professor Setear developed a game-theoretic analysis of discovery by comparison to the logic of nuclear deterrence, but perhaps his key insight is the concept he calls “impositional discovery,” discovery

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30. *What Is Allocative Efficiency?*, MY ACCT. COURSE, <https://www.myaccountingcourse.com/accounting-dictionary/allocative-efficiency> (last visited Sept. 21, 2018) [<https://perma.cc/RKJ2-EGMX>] (“Allocative efficiency is an economic concept that occurs when the output of production is as close as possible to the marginal cost.”).

31. E. Donald Elliott, *Twombly in Context: Why Federal Rule of Civil Procedure 4(b) Is Unconstitutional*, 64 FLA. L. REV. 895, 953–56 (2012).

32. John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569 (1989).

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

34. *Id.* at 637; Setear, *supra* note 32, at 582.



that is requested primarily not to obtain needed information but to impose costs on the other side:

In the economic view of such a decision [to tender a discovery request], a party to litigation will tender a request whenever the benefits to her of doing so exceed the costs of formulating the request. It is possible to separate these benefits into two broad categories: “informational benefits” and “impositional benefits.” “Informational benefits” are benefits that the requesting party expects to gain from the *information* that she receives from the responding party. Factual statements from the responding party can increase the requesting party’s ability to hone the legal basis for her case, or help her estimate the value of the stakes in the case and her chances of prevailing on the merits. “Impositional benefits,” in contrast, are those benefits that the requesting party expects to gain because her request *imposes costs* upon the answering party.<sup>35</sup>

In his comment on Professor Setear’s article, Judge Easterbrook developed the implications for rulemakers of the “impositional discovery” concept. Like me, Judge Easterbrook thinks that judges are not very good at detecting impositional, as opposed to legitimate, discovery:

Impositional discovery depends on asymmetric stakes: the requester incurs lower costs than the person interrogated. The requester saddles its adversary with these costs to improve its bargaining position. We could do what almost every other civilized legal system does and deny the abuser the fruits, requiring it to pay the costs it has imposed. This does not mean “sanctions”; when legitimate and impositional requests look alike, the threat of sanctions is hollow. Only an *automatic* reversal of costs is likely to do the trick. The [requesting] party always knows better than the judge which requests are legitimate and which are impositional.<sup>36</sup>

Judge Easterbrook also made short work of the canard, which still bothers many other judges, that making requesters or their lawyers pay for some portion of the costs of the discovery that they demand would adversely affect the poor by depriving them of access to the courts:

A proposal to require losers to pay winners’ fees and costs—even one so modest as Professor Elliott’s—invariably induces the rejoinder: That would freeze poor persons and those of modest resources out of court! Not likely; the poor routinely are excused from paying costs now, and such an exception would apply to any loser-pays system. . . . Those of modest means rarely participate in the kinds of cases in which there is voluminous discovery even under current rules. . . . Impositional discovery is practiced in big-stakes cases between substantial litigants, represented by the most costly legal talent. This problem should be tackled, with the difficulties of impoverished and middle-class litigants carved off for different treatment if need be.<sup>37</sup>

The modest proposal to which Judge Easterbrook referred is one I made from the floor of the Boston University discovery conference to add the costs of responding to discovery to the costs that are taxed if a Rule 68 offer of judgment is rejected and the ultimate judgment is less

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35. Setear, *supra* note 32, at 581–82 (footnote omitted).

36. Easterbrook, *supra* note 33, at 645.

37. *Id.* at 646.

than the offer that was rejected.<sup>38</sup> This modest form of a “loser-pays” rule for the costs of discovery is similar to one later advanced by Cameron Norris that the costs of responding to discovery could be taxed against the party losing a motion for summary judgment.<sup>39</sup> In both situations, the party seeking discovery may obtain it but has to pay for it if it turns out that its claim that it needed the discovery to substantiate a valid claim was incorrect. This feature of determining who pays retroactively, when it may be clearer whether the discovery in question was or was not really needed, distinguishes these proposals from the Redish-McNamara proposal discussed later.<sup>40</sup>

The Setear-Easterbrook argument, that discovery is used strategically to impose costs on the other side in order to affect settlement values, is an application of a general principle developed a few years earlier by two then–University of Chicago law professors, William Landes and Richard Posner.<sup>41</sup> Their seminal article *Adjudication as a Private Good* demonstrated that settlement values are affected by procedural costs as well as the underlying merits of the case.<sup>42</sup> The Setear-Easterbrook argument applies that general insight to discovery and suggests that litigants have a strong incentive to use unnecessary discovery to bludgeon their opponents to settle in order to avoid procedural costs, rather than costs of the underlying merits of the case.<sup>43</sup>

The title chosen by Professors Landes and Posner, *Adjudication as a Private Good*, was unfortunate. It is a title that only an economist could love—or understand. Maybe it would have attracted more attention from judges if its title had been *Why All of the Settlements Reached in America’s Civil Courts Are Unjust to One Degree or Another*, because that’s exactly what the authors proved.<sup>44</sup> Professors Landes and Posner proved that the settlement value of a case is a function not merely of the merits of the case but also the procedural costs avoided by

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38. *Id.*

39. See Cameron T. Norris, *One-Way Fee Shifting After Summary Judgment*, 71 VAND. L. REV. 2117 (2018) (arguing requesters should be taxed the amount that producers pay to produce discovery, which would be given to the government).

40. See *infra* Section I.D (advocating for a requester-pays system because requesters are the beneficiaries of the discovery).

41. See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 278–80 (1979) (exploring the effect that litigation expenditures have on settlement values).

42. *Id.*

43. Easterbrook, *supra* note 33, at 637; Setear, *supra* note 32, at 582.

44. Unfortunately, they proved it using algebra as well as words. Sometimes formulas with letters in them rather than numbers in examples can be off-putting to lawyers and judges. Consequently, when I teach their work, I provide numerical examples so that law students can better follow their argument.

settling rather than litigating.<sup>45</sup> In some types of litigation, procedural costs avoided count for far more in determining settlement values than the anticipated outcome on the merits.<sup>46</sup> Thus, for example, a number of studies have shown that up to ninety percent of the money paid in asbestos cases has gone to people who are not sick but who were named anyway as plaintiffs in lawsuits, thereby imposing procedural costs on the other side and creating settlement value.<sup>47</sup> In other work, I have pointed out that creating monetary value merely by filing cases, meritorious or not, is a form of arbitrage,<sup>48</sup> in which value can be created simply by the act of filing cases. Of course, no procedural system can be costless, but the high cost of broad discovery imposed at the will of the requester, typically with little or no policing by the court, exacerbates the problem of unjust settlements.

No one knows what percentage of settlement dollars reflects the value of litigation costs avoided, as opposed to an assessment of the likely outcome on the merits, but one 2005 empirical study of employment discrimination cases concluded that it makes economic sense for an employer to pay at least \$4,000 per claim, on top of any additional value for any merit to the claim, simply to avoid the costs of

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45. This is especially true under the so-called “American Rule,” under which both sides bear their own litigation costs, but a few years later, Steven Shavell showed that the same general principle that procedural costs affect settlement outcomes also applies under different rules for allocating litigation costs. Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

46. For example, at the Dallas miniconference on discovery in October 2012, which is discussed at the end of this article, Alex Demetrief, then vice president for Litigation and Legal Policy at General Electric (“GE”) and later its general counsel, stated that ninety percent of GE’s settlement decisions are driven by avoiding the costs of discovery, not the merits of the case.

47. James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 823 (2002) (“By all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who . . . are completely asymptomatic.”); see also Christopher J. O’Malley, Note, *Breaking Asbestos Litigation’s Chokehold on the American Judiciary*, 2008 U. ILL. L. REV. 1101, 1105 (“Most individuals with pleural plaques experience no lung impairment, no restrictions on movement, and usually do not experience any symptoms at all.”); Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES (Apr. 10, 2002), <https://www.nytimes.com/2002/04/10/business/a-surge-in-asbestos-suits-many-by-healthy-plaintiffs.html> [<https://perma.cc/F9CW-GRGH>] (“Very few new plaintiffs have serious injuries, even their lawyers acknowledge. . . . The overwhelming majority of these cases . . . are brought by people who have no impairment whatsoever.”); Roger Parloff, *Welcome to the New Asbestos Scandal*, FORTUNE (Sept. 6, 2004), [http://archive.fortune.com/magazines/fortune/fortune\\_archive/2004/09/06/380311/index.htm](http://archive.fortune.com/magazines/fortune/fortune_archive/2004/09/06/380311/index.htm) [<https://perma.cc/46QU-MBSH>] (“According to estimates accepted by the most experienced federal judges in this area, two-thirds to 90% of the nonmalignants are ‘unimpaired’—that is, they have slight or no physical symptoms.”).

48. Elliott, *supra* note 31, at 955. See generally Philip H. Dybvig & Stephen A. Ross, *Arbitrage*, NEW PALGRAVE DICTIONARY ECON. (1987), [https://link.springer.com/referenceworkentry/10.1057/978-1-349-95121-5\\_449-1](https://link.springer.com/referenceworkentry/10.1057/978-1-349-95121-5_449-1) [<https://perma.cc/ZDN5-NKBR>] (“An arbitrage opportunity is an investment strategy that guarantees a positive payoff in some contingency with no possibility of a negative payoff and with no net investment.”).

defense.<sup>49</sup> In my experience, today a lot more than \$4,000 per case is attributable to litigation costs avoided. Thus, the more latitude that judges give requesters to impose unnecessary discovery costs on their litigation opponents, the further settlements will deviate from the theoretical ideal of an assessment of the likely outcome.

It has always puzzled me why judges are not more concerned that they are dispensing *in*justice rather than justice on a daily basis in their courtrooms, which is exactly what happens when cases settle to avoid unnecessary discovery costs rather than costs based on an honest appraisal of their merits. My friend Randy Shepard, the former Chief Justice of Indiana, has suggested to me that this may be because under the federal system, except in class actions, judges rarely ever see either the costs of discovery or the amounts of the settlements that are made primarily to avoid litigation costs.<sup>50</sup>

### *C. Cooter and Rubinfeld (1994): Strategic Cost Imposition by Responders*

The next major development in the field was a comprehensive analysis of the economics of discovery in the leading law and economics journal, *The Journal of Legal Studies*, by Robert Cooter, a Berkeley economist, and Daniel Rubinfeld, who at the time was a law professor at Berkeley but currently teaches at NYU.<sup>51</sup>

By my lights, Professors Cooter and Rubinfeld went wrong by discounting requester-pays systems as merely moving the judicial monitoring problem to the costs of complying. They rightly pointed out that under a pure requester-pays system, the party complying with discovery requests has a strategic incentive to inflate the costs of complying in order to impose costs strategically on the other side.<sup>52</sup> But what Professors Cooter and Rubinfeld overlooked, in my opinion, is that in practice, the risks of the strategic imposition of cost are not symmetrical: it is much easier to impose costs by broad discovery

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49. David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1579 (2005) (“Because it costs employers (1) between \$4000 and \$10,000 to defend an EEOC charge, (2) at least \$75,000 to take a case to summary judgment, and (3) at least \$125,000 and possibly over \$500,000 to defend a case at trial, it almost always makes good business sense to settle a case for \$4000.” (footnotes omitted)). Costs will vary, however, by geographic area of the country and type of case.

50. Personal Communication.

51. Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435 (1994); *see also* Daniel L. Rubinfeld, *Discovery*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 609, 612–14 (Peter Newman ed., 1998) (discussing the potential for abuse of discovery and proposing a shift of discovery costs so that they fall on the requesting party).

52. Cooter & Rubinfeld, *supra* note 51, at 454.

requests that *might* lead to admissible information than it is to inflate the costs of compliance. Judges are better at identifying and second-guessing inflated production costs; they do something similar all the time in cases in which they award legal fees.

*D. Redish and McNamara (2011): A Quantum Meruit Argument for a Requester-Pays System*

The next major development in the field was an article by Marty Redish of Northwestern Pritzker School of Law and his then-student Colleen McNamara.<sup>53</sup> By analogy to the common law, quasi contract concept of quantum meruit, to prevent unjust enrichment, Professor Redish and McNamara argued that requesters should generally pay for discovery because they are its beneficiaries:

Absent compensation to the party that produced the information, the enrichment of the requesting party is indeed unjust. . . . [T]he producing party not only bears the financial costs of complying with its opponent's request, but it also suffers the additional detriment of having the fruits of its labor used against it in the ongoing litigation. Essentially, the producing party suffers on two distinct levels as a result of its efforts. The requesting party, in turn, receives two distinct benefits as a result of the producing party's work: it obtains the immediate benefit of receiving the specific information it requested, as well as a simultaneous detriment to its opponent.<sup>54</sup>

As appealing as this argument may be, a possible rejoinder is that the requester is claiming a preexisting wrong by her opponent that discovery is supposedly necessary to set right. No one would claim that a bank robber is entitled to recover in quantum meruit from his victim when the police confiscate his ill-gotten gains and return it to its rightful owner, even though, when viewed in isolation, the bank obtains a benefit compared with the situation immediately prior to the transfer.<sup>55</sup> Making the requester pay automatically for discovery that was necessary to redress an injury or defense that turns out to be valid does not increase fairness but adds insult to injury. Unlike in loser-pays approaches to allocating litigation costs, the court does not know, at the time discovery is requested, whether the claim that the requester has been wronged and needs discovery to rectify that wrong is valid.<sup>56</sup> Thus, instead of assuming, as did Professor Redish and McNamara, that a

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53. Redish & McNamara, *supra* note 2.

54. *Id.* at 790 (footnote omitted).

55. See generally RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 63 (AM. LAW INST. 2011) ("Recovery in restitution to which an innocent claimant would be entitled may be limited or denied because of the claimant's inequitable conduct in the transaction that is the source of the asserted liability.")

56. This analysis applies equally whether the requester is plaintiff or defendant. A defendant-requester is seeking information in discovery to help make out a defense that might reduce or eliminate the claims wrongfully brought against it.

requester should always pay for discovery because the requester benefits from it, I favor approaches like Cameron Norris's or the one that I suggested at the Boston University discovery conference in 1988, based on Rule 68 offers of judgment.<sup>57</sup> These approaches allocate the costs of discovery retroactively when it is easier to determine, in hindsight, whether the information produced in discovery was actually necessary to right an injustice.

*E. Bone (2003): Diverging Client and Attorney Interests with Regard to Discovery*

The final work I will discuss is chapter 7 of Professor Robert G. Bone's masterful book *Civil Procedure: The Economics of Civil Procedure*.<sup>58</sup> Professor Bone was professor of law and Harry Elwood Warren Scholar at Boston University Law School when the book first appeared in 2003 and is now professor of law at the University of Texas at Austin, where he holds the G. Rollie White Teaching Excellence Chair in Law.<sup>59</sup>

Professor Bone's book collects the literature and develops the economic perspective on many issues in civil procedure in three hundred pages of clear, brilliantly written explanation. It appears designed to be used as supplementary reading along with the standard legalistic casebook in a course in civil procedure, and I have used it myself in that role when teaching both introductory and advanced civil procedure at Yale Law School.

Chapter 7 is about discovery.<sup>60</sup> In clear, easily understandable prose, Professor Bone summarized the existing literature and described the problem of managing discovery clearly from an economic perspective. He began with the benefits of discovery: "This additional evidence [produced by formal, court-ordered discovery] has social value insofar as it improves the accuracy of trial outcomes and the quality of settlements negotiated in light of those outcomes."<sup>61</sup>

But Professor Bone also recognizes the potential for abusive or excessive discovery as identified by Professor Setear, Judge Easterbrook, and others:

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57. See *supra* text accompanying note 39 (proposing that costs of responding to discovery should be added to costs that are taxed if the ultimate judgment is less than a Rule 68 offer that had previously been rejected).

58. ROBERT G. BONE, *CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE* (2003).

59. Robert G. Bone, U. TEX. AUSTIN SCH. L., <https://law.utexas.edu/faculty/robert-g-bone/> (last visited Sept. 21, 2018) [<https://perma.cc/N3PZ-RT96>].

60. BONE, *supra* note 58, at 200–31.

61. *Id.* at 209.

In economic terms, an additional investment in discovery is “excessive” whenever the social costs of the investment exceed the social benefits. It is easy to see why parties engage in excessive discovery (defined in this way). The reason is that the party promulgating the discovery request does not bear the full costs and, in particular, does not have to pay an opponent’s response costs. Thus, parties engage in excessive discovery for the same reason firms pollute excessively: they are able to **externalize** a portion of the cost.<sup>62</sup>

Professor Bone also sees that due to prevailing fee arrangements, lawyers themselves may have incentives to engage in discovery that diverge from the interests of their clients, a point that was perhaps implicit but not prominent in the prior literature:

Cost-externalization is not the only reason for excessive discovery. Agency problems also contribute. Suppose, for example, that clients have difficulty monitoring their attorneys, who as a result have considerable freedom to pursue their own self-interest. If the arrangement is fee-for-services, the attorney is prone to engage in excessive discovery in order to pad fees.<sup>63</sup>

In a speech to Lawyers for Civil Justice in 2012, I described discovery as “a public choice problem on steroids” because of the three separate perverse incentives that Professor Bone describes: (1) the requester does not pay the full social costs of discovery but can externalize most of them onto the complying party; (2) the requester has a strategic incentive to engage in impositional discovery to increase litigation costs and coerce more favorable settlements; and (3) if paid on an hourly basis, as most defense lawyers are, the defense lawyer may have a selfish incentive to engage in, or not resist, excessive discovery to enhance his or her own fees.<sup>64</sup>

As is often the situation in law, it is easier to describe the problem than to find the optimal solution. Professor Bone first described expanding automatic production of information without a request under Federal Rule of Civil Procedure 26(a) to include all relevant information in the parties’ possession (which he called “mandatory disclosure,” a term I do not find particularly useful because all discovery required by court rules is “mandatory”).<sup>65</sup> He pointed out that this approach might create an incentive to overproduce materials to try to hide the proverbial needle in a haystack.<sup>66</sup>

Next he turned to limits on discovery, such as limiting the number of interrogatories or depositions that a party may request. He pointed out that

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62. *Id.* at 217.

63. *Id.* at 218.

64. E. Donald Elliott, *Litigation Costs: A Tragedy of the Commons on Steroids*, Address to Lawyers for Civil Justice (May 4, 2012) (on file with author).

65. BONE, *supra* note 58, at 225–27.

66. *Id.* at 227.

[o]ne problem with strict limits is that they are insensitive to the specific discovery needs of particular cases. . . . For this reason, discovery limits are usually presumptive rather than strict; parties can exceed the limit with the court's approval. However, making limits presumptive undermines their ability to reduce costs and control strategic abuse.<sup>67</sup>

He concluded, somewhat tautologically: "From an economic perspective, the challenge is to design a system of limits that strikes the best balance between the benefit of reducing discovery excess and abuse and the cost of depriving parties of valuable information."<sup>68</sup> Again, it is easier to define the problem in economic terms than to specify a good solution.<sup>69</sup>

Finally, Professor Bone turned to what he called "cost shifting,"<sup>70</sup> a term for which I have previously expressed my disapproval.<sup>71</sup> In the main, he recognized the appeal of a requester-pays system from an economic perspective and, like me, he sees the problem as analogous to the well-understood problem of the economic incentives for excessive environmental pollution:

Just as nuisance law deters pollution by forcing the polluter to internalize pollution costs, so too a cost-shifting rule deters excessive discovery by forcing a requesting party to internalize discovery costs. Moreover, cost-internalization is likely to have a salutary effect not only on excessive discovery but also on some types of abusive discovery. For example, a strategy of threatening discovery for its impositional value backfires when the abuser must pay the additional costs it threatens to create.<sup>72</sup>

Another important incentive-based system for managing litigation behavior that Professor Bone discussed elsewhere in his book, but not with specific reference to discovery, is loser pays.<sup>73</sup> Under a loser-pays system, the litigant whose position in the litigation has been determined to be invalid pays some or all of the costs of factual discovery, including those incurred, in the first instance, by his opponent. This approach is very common in many other countries and is probably the dominant solution to the problem worldwide.<sup>74</sup>

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67. *Id.* at 228.

68. *Id.* at 229.

69. See generally Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 453–59 (1974) (criticizing economic analysis of law for merely restating problems in economic terminology).

70. BONE, *supra* note 58, at 229–31.

71. See *supra* text accompanying notes 15–17.

72. BONE, *supra* note 58, at 230.

73. *Id.* at 158–86.

74. See Mathias Reimann, *Cost and Fee Allocation in Civil Procedure: A Synthesis*, in 11 IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE 3, 31 (Mathias Reimann ed., 2012) ("Almost all [thirty-five] systems covered in this chapter in principle shift the expenses of [discovery] to the loser, most in whole, some at least in large part.").



## III. WHERE WE GO FROM HERE

I hope that the brief summary above shows that over the last generation, a number of leading academics have collectively developed a sophisticated and robust theory of what causes abusive and excessive discovery that is worthy of serious attention. Let us hope that the next time the Civil Rules Advisory Committee takes on the problem of controlling civil discovery yet again, it will give lawyer-economists and incentive-based approaches a seat at the table to develop ideas like those described above and in the balance of this symposium.<sup>75</sup>

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75. Professor Bone and I were invited to the Advisory Committee's September 2012 miniconference on discovery in Dallas to address this topic, but they ran out of time before they got to us, and we were not allowed to address it.