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Articles

THE UNWRITTEN NORMS OF CIVIL PROCEDURE

Diego A. Zambrano

ABSTRACT—The rules of civil procedure depend on norms and conventions that control their application. Civil procedure is a famously rule-based field centered on textual commands in the form of the Federal Rules of Civil Procedure (FRCP). There are over eighty rules, hundreds of local judge-made rules, due process doctrines, and statutory rules, too. But written rules are overrated. Deep down, proceduralists know that the application of written rules hinges on broader norms that animate them, expand or constrain them, and even empower judges to ignore them. Unlike the FRCP and related doctrines, these procedural norms are unwritten, sociological, flexible, and informal. Norms shape every aspect of the litigation system, from the division of labor between state and federal judges, to the application of Rule 11 sanctions, discovery technology, and multidistrict litigation. Yet the field of civil procedure has not fully grappled with these procedural norms in a systematic way nor appreciated the power of norm-making to resolve current problems.

This Article explores the influence of norms in civil procedure with three goals in mind. First, the Article argues that a wide array of litigation practices, culture, and conventions constitute what it calls "procedural norms." Conceptualizing civil procedure in this manner allows the Article to examine how these norms are created, changed, codified, or replaced. It also reveals the importance of norm entrepreneurs and the problem of sticky norms in civil procedure. Second, the Article's core goal is to explain the role of norms in civil litigation—how they organize judicial administration, serve as structural features of our litigation system, and distribute power among different legal actors, including federal and state judges. A surprising amount of our civil procedure law boils down to unwritten practices and conventions that form a large body of procedural norms. It is these norms that often implement the abstract values of our procedural system. And, crucially, because norms can trump textual commands, changes to the FRCP may be less relevant without a deeper account of the norms behind them. Finally, the Article argues that a pivot to norm-making can be an important corrective to the ossification of the federal rulemaking process. Procedural norms can solve litigation problems because they are flexible and sometimes

even subversive—they prioritize values that are contrary to the commitments of the FRCP. Ultimately, the Article seeks to make norms a first-class citizen in the study of civil procedure, on par with rules and case law in their importance and significance.

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INTRODUCTION

In civil procedure, there are rules, doctrines, and statutes—and then there is everything that actually matters. While procedure is famously centered on the application of textual rules, proceduralists understand that a combination of norms, practices, culture, and conventions are at the center of procedural law. Indeed, there is a deep-seated set of unwritten norms that are at the heart of the greatest debates in procedure today. Unlike the Federal Rules of Civil Procedure (FRCP), norms are sociological, flexible, and informal. In civil litigation, norms provide the infrastructure that litigators and judges inhabit. And the application of written rules hinges on broader norms that animate them, expand or constrain them, and even empower judges to ignore them. Civil procedure is thus a code-based field that is everywhere suffused by unwritten norms. Consider a few examples discussed in this Article:

- Rule 11 allows judges to sanction parties for failure to perform "an inquiry reasonable under the circumstances" and for filing a case for "improper purpose[s]."[1] But a norm sharply limits the text and instructs judges to avoid sanctions whenever possible.[2] The norm is so entrenched that judges routinely ignore a statute that requires courts to certify Rule 11 compliance.[3]
- Rule 16 and the Multidistrict Litigation (MDL) statute say little about the division of labor among plaintiffs' attorneys in an MDL or about whether the presiding judge has any power over the matter. But, by convention, MDL judges have significant power over the process, "speed" has become the "marker of success in MDLs,"[4] and, among other things, steering committee attorneys refuse to criticize one another in public.[5]
- For decades, the Supreme Court subscribed to a norm that major procedural changes should come from the rulemaking process and not judicial interpretation of the federal rules.[6] The Court then broke that norm

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[1] FED. R. CIV. P. 11.

[2] *See infra* Section III.B.

[3] M. Todd Henderson & William H.J. Hubbard, *Judicial Noncompliance with Mandatory Procedural Rules Under the Private Securities Litigation Reform Act*, 44 J. LEGAL STUD. S87, S91–92 (2015) (finding that courts make the required Rule 11 findings in less than 14% of applicable cases).

[4] Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1699 (2017).

[5] *See* Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 84 (2019). *See generally* ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION (2019) (exploring norms in MDLs).

[6] Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 14 (2010) (charting the Court's commitment to the rulemaking process until its decision in *Twombly*).

in 2007 when it heightened pleading standards, provoking waves of outcry and criticism.[7]

- Unwritten practices structure the division of labor between state and federal judges in complex litigation. Even though no rule, doctrine, or statute permits it, a practice of federal–state cooperation allows state and federal judges to schedule joint hearings and sit side-by-side in the same courtroom.[8]
- Judges are supposed to adjudicate their own cases, but a norm allows them "to assign settlement oversight responsibilities to *another sitting judge*, often under the label of mediator."[9] Because of this norm, it is now common for sitting district court judges to preside over other judges' cases.[10]
- The rules of discovery are vague and underspecified, but a discovery "culture" influences and dominates the process.[11] For example, a cultural norm instructs litigants not to bring trivial discovery disputes to the judge, nor file repeated motions, even though no written rule prohibits such behavior.[12] Relatedly, modern discovery tech is permeated by practices that are nowhere in the FRCP.[13]
- Several states have adopted a "fact pleading" standard that is different from federal "notice pleading." But a convention of federal–state uniformity means that state courts in fact pleading states often ignore their own law and apply the federal standard, regardless of explicit differences in the rules.[14]

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[7] *See, e.g.*, *id.*; William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 694 nn.3–5 (2016) (surveying the literature).

[8] William W. Schwarzer, Nancy E. Weiss & Alan Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1689–90, 1723 (1992) (describing how state and federal judges "forged into uncharted territory" and eschewed "existing formal mechanisms" to hold joint hearings).

[9] Melissa B. Jacoby, *Other Judges' Cases*, 78 N.Y.U. ANN. SURV. AM. L. 39, 40 (2022) (emphasis added). Of course, the pro-settlement norm has long been established. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 385–86 (1982) (describing pro-settlement judges).

[10] *See* Jacoby, *supra* note 9, at 45 (citing orders).

[11] Edith Beerdsen, *Discovery Culture*, 57 GA. L. REV. 981, 987 (2023) (describing the culture and practices governing everyday discovery processes).

[12] *Best Pretrial Hacks*, ABA (Apr. 2019), https://americanbar.org/news/abanews/publications/youraba/2019/april-2019/legal-experts-share-their-best-pretrial-hacks/ [https://perma.cc/87L5-XZE6].

[13] *See* Neel Guha, Peter Henderson & Diego A. Zambrano, *Vulnerabilities in Discovery Tech*, 35 HARV. J.L. & TECH. 581, 592 (2022) (chronicling the rise of discovery technologies).

[14] 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, 319 (2001) (finding that federal and state courts apply the same procedural rules "in *practice*," despite "fundamental differences in the *texts*").

This Article explores the influence of procedural norms in civil litigation with three goals in mind.[15] First, the Article brings together a disparate array of practices, norms, and conventions under the banner of "procedural norms." Doing so allows the Article to explain how these norms are created, changed, and replaced. Second, the Article explores the role of norms in civil procedure—how they configure judicial administration, serve as structural features of our litigation system, and distribute power among different legal actors, including attorneys and judges. Finally, the Article examines the power of norm-making—the process of creating norms to address litigation problems.

My most basic aim is to develop a vocabulary for describing the many flavors of norms in a *trans-procedural* way. While the Article does not provide an exhaustive catalogue of procedural norms, it describes specific ones—from those that regulate sanctions to those that guide discovery tech—when they shed light on how civil procedure operates. The Article also examines how these procedural norms interact with procedural values, including: adversarialism, accuracy, fairness, simplicity, and efficiency. It appears that procedural norms have a subversive nature, often prioritizing values that are contrary to the public commitments of the FRCP. Procedural norms put a thumb on the scale of cooperation over adversarialism, flexibility over stability, standardization over discretion, party control of information over transparency, and technocracy over the Rules Enabling Act (REA) process. Indeed, surveying the unwritten infrastructure of civil litigation exposes the deeper organization of our rules and their evolution.

Civil procedure scholars have long grappled with the existence of norms, practices, and an evolving ethos of civil litigation. Canonical works like Judith Resnik's piece on managerial judging or Owen Fiss's critique of settlements arguably described a norm shift in the federal judiciary that left behind passive judging in favor of active judging.[16] Edward Purcell's studies on the evolution of federal courts mentioned the importance of "professionally defined norms of law."[17] Richard Marcus, too, argued that a

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[15] While limited, the list of examples above covers norms that are national, influence the entire litigation process, count on supporting evidence for their existence (via surveys, interviews, and other sources), and illustrate fundamental commitments.

[16] Resnik, *supra* note 9, at 386–91; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1081–82 (1984). For another notable article that engages with procedural norms, see Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1835–38 (2014), which argues that declining rates of litigation will inhibit the "democratic iterations" that refine procedure.

[17] *See* Edward A. Purcell Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 659, 712 (1999).

"liberal ethos" stood behind the rules.[18] And Burt Neuborne spoke of an "intangible . . . elite tradition [that] animates the federal judiciary, instilling elan and a sense of mission in federal judges."[19] More recently, Andrea Seielstad introduced the concept of unwritten procedural law to clinical education, Elizabeth Chamblee Burch focused on the importance of norms in MDLs, and Edith Beerdsen highlighted the role of culture in discovery.[20]

And yet, despite references to norms in the scholarship, discussions have tended to either stop at a high level of generality or focus narrowly on specific areas of procedure. Much less attention has been paid to what role, exactly, procedural norms are playing in the overall structure of litigation.[21] The literature offers no definition for the term "norm" or systematic treatment of how these norms emerge or in which areas of procedure they predominate, be it discovery or judicial federalism. Nor does the literature explore whether norms can solve procedural problems or whether they promote or weaken established procedural values such as accuracy or access to justice. Instead, civil procedure scholars sometimes invoke the label of "norm" or "practice" as a throwaway reference to intangible influences on judges. Left unspecified is precisely what we mean when we speak of norms, conventions, practices, or ethos.

In this Article, I argue that procedural norms need to be understood and distinguished from procedural law. Without delving into philosophical debates about "law," in procedure, we can conceive of law as anything that, if violated or ignored, subjects a judge or lawyer to straightforward legal consequences (e.g., contempt or reversal on appeal). Of course, written law, precedent, and even ad hoc procedural orders can have legal consequences.[22] Procedural norms, by contrast, are enforced informally, via social networks and professional or reputational consequences. Norms go unmentioned in the

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[18] Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986).

[19] Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1124 (1977).

[20] *See* Andrea M. Seielstad, *Unwritten Laws and Customs, Local Legal Cultures, and Clinical Legal Education*, 6 CLINICAL L. REV. 127, 130–34 (1999) (describing how to prepare clinical students for the outsized role unwritten law plays in the real world); BURCH, *supra* note 5, at 88; Beerdsen, *supra* note 11, at 1006; *see also* Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 10 (2021) (discussing MDL norms); Colter L. Paulson, *Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure*, 45 ARIZ. ST. L.J. 471, 476 (2013) (discussing contract-related norms).

[21] Additionally, a terrific literature has described the concept of local legal cultures. *See, e.g.*, Thomas W. Church Jr., *Who Sets the Pace of Litigation in the Urban Trial Courts?*, 65 JUDICATURE 76, 84–85 (1981) (surveying how criminal cases are decided in four urban courts); Herbert M. Kritzer & Frances Kahn Zemans, *Local Legal Culture and the Control of Litigation*, 27 LAW & SOC'Y REV. 535, 539 (1993) (noting substantial variation in the application of Rule 11).

[22] For a full distinction between ad hoc procedure and norms, see *infra* Part I.

case law and exist instead in backrooms—judicial and legal conferences, conversations among attorneys, and professional gatherings. Attorneys and judges create norms sometimes unwittingly and often as part of social networks. Although norms are sometimes mentioned in treatises or guides—such as the *Manual for Complex Litigation* or the *Sedona Principles*—that does not make them written law. Again, unlike law, disregard for a norm does not carry direct legal consequences.

Exploring the norms that structure procedure is fundamentally important. Norms play a significant role in the system, often serving as connective tissue between lofty litigation values and day-to-day courtroom events. Proceduralists have explored the core values that guide American litigation, including efficiency, simplicity, participation, fairness, access to justice, and accuracy.[23] Sometimes these values are instantiated in specific rules of procedure—say, promoting judicial economy through Rule 56 summary judgment—but, at other times, they have no textual embodiment. These values often stand at a distance from courtroom orders. MDL judges, for instance, routinely issue management orders that are not rooted in any rule of procedure. These orders can require parties to show causation evidence in a mass tort case (*Lone Pine* orders) or can award attorneys "common-benefit fees."[24] At first blush, the relationship between those orders and high-level values seems unclear. Yet, there is clearly *something in between* high-level values (efficiency or fairness) and, for example, an attorney's decision to produce a contested document in discovery. As depicted in Figure 1 below, when there is no text, this *something* often goes by the name of norm, practice, or convention—and it provides the connection between values and specific orders. And even when there is a written rule, norms can shape interpretation of the text.

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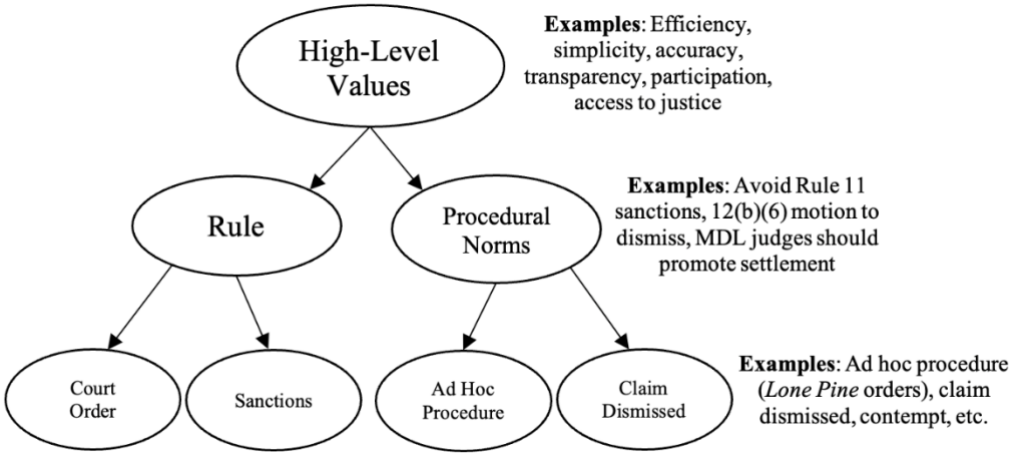
[23] *See, e.g.*, Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1488 (2022) (developing a participatory account of litigation); Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1778 (2015) (arguing that optimal efficiency is a common goal of the civil litigation system); Roger Michalski, *Trans-Personal Procedures*, 47 CONN. L. REV. 321, 323 (2014) (exploring the value that different entities should be treated the same); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004) (discussing fundamental values); David L. Noll & Luke P. Norris, *Federal Rules of Private Enforcement*, 108 CORNELL L. REV. 1639, 1708 (2023) (suggesting legislative fidelity as a worthy procedural value).

[24] Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2, 14–16 (2019); BURCH, *supra* note 5, at 87.

FIGURE 1: VALUES, NORMS, AND ORDERS



Surveying the norms of civil procedure is overdue. Other fields have long mapped and engaged with their own norms and practices, drawing useful lessons along the way.[25] The entire field of law and society is premised on the idea that law on the books differs from law in action due, in large part, to implicit norms.[26] Using this insight, norms analysis has explicated vast and diverse areas of law, from constitutional and international law all the way to property law. For instance, Robert Ellickson's book *Order Without Law* represents the seminal work on norms in property law, teaching that informal practices and customs often outweigh written law in property disputes.[27] Likewise, in the past few years, discussions about norms have dominated constitutional law, and specifically, debates over the presidency.[28] Daphna

[25] *See, e.g.*, Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 341 (1997) (advocating for using norms in economic analysis of law); ERIC A. POSNER, LAW AND SOCIAL NORMS 4–5 (2000) (arguing that the law should encourage good social norms and undermine bad ones).

[26] *See, e.g.*, Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 60–61 (1963) (describing how most business relations are not recorded in contract or enforced in court); H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS 240 (2d rev. ed. 1980) (exploring the social and institutional influences that drive accident settlements).

[27] ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (studying how neighbors resolve disputes in rural California).

[28] *See, e.g.*, Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1863–64 (arguing that there is a "constitutional morality" that constrains acceptable political action and public policy); Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1450–52, 1456 (2018) (exploring the breakdown of constitutional norms during the Trump presidency); Neil S. Siegel, *Political Norms*,

Renan, for example, has argued that "[t]he nature of the presidency . . . cannot be understood without reference to norms," drawing on broader political science scholarship.[29] Renan developed a sophisticated description of Article II norms—examples include "the President's duty to defend the constitutionality of a statute in court" or the norm that "insulates individual investigatory decisions from the President"—to examine the evolution of the presidency.[30] So too for customary international law and human rights, which are based around norms and nonlegal obligations (*opinio juris*).[31] And, notably, scholars have recently turned their attention to norms in procedure-adjacent fields such as administrative law and bankruptcy.[32] While civil procedure scholars have written about culture and professional norms,[33] the field has yet to borrow from this broader literature on norms.

This Article defines procedural norms by reference to several underlying ingredients. At their simplest, these norms are informal patterns of behavior among judges and lawyers that are enforced by actual or attempted social sanctions (either rewards or punishments). Procedural norms are not part of the FRCP or statutory commands and are not codified. Nor are they ad hoc procedure or artifacts of local legal culture—they can be national in scope.[34] Yet, they seem to perform a role similar to written rules: they structure behavior, set normative goals, and specify the power of judges or litigants. Just as constitutional norms "implement otherwise abstract principles," procedural norms concretize otherwise abstract values such as efficiency or procedural uniformity into specific practices.[35] Unwritten norms can also be normative, defining whether a judge is correctly doing

Constitutional Conventions, and President Donald Trump, 93 IND. L.J. 177, 198–203 (2018) (same); Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913, 1914–15 (2020) (arguing that constitutional norms complicate the textual primacy narrative).

[29] Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2189 (2018).

[30] *Id.* at 2189–90.

[31] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 23–43 (2005) (describing "*opinio juris*" as "what distinguishes a state act done out of interest or comity from one that a state performs because it is required to do so by law," and arguing that international law is less significant than key actors believe).

[32] *See, e.g.*, Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1165 (2013) (discussing administrative law); DOUGLAS G. BAIRD, THE UNWRITTEN LAW OF CORPORATE REORGANIZATIONS (2022) (discussing bankruptcy).

[33] *See, e.g.*, Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 139 (2009) (discussing "the trappings and uncodified conventions" of federal courts); Resnik, *supra* note 9, at 414 (discussing the changing role of judges in a system where "no explicit norms or standards guide judges in their decisions about what to demand of litigants"); Michalski, *supra* note 23, at 326 (discussing the "trans-personal norm" in state and federal procedure of treating all types of entities equally).

[34] For a full distinction between ad hoc procedure and norms, see *infra* Part I.

[35] Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 MICH. L. REV. 1361, 1367 (2022).

her job, and whether she even has a certain power. Most importantly, the legal community promotes norms through rewards or punishment of deviant behavior. For example, the Joint Panel on Multidistrict Litigation—in charge of selecting MDL judges—rewards norm-compliant judges with appointments to larger MDLs.[36] An observer can often discern the existence of a procedural norm by tracking the behavior of litigants and judges in litigation. Unwritten norms influence what judges and attorneys do and don't do.

Procedural norms can reinforce, elaborate upon, or, more dramatically, contradict the text of the FRCP.[37] Take, for instance, a rule in the Securities Exchange Act that requires courts to certify attorneys complied with Rule 11(b) of the FRCP.[38] Despite this textual command to certify Rule 11 compliance, judges apparently comply less than 14% of the time.[39] This is blatant disobedience of written law. One potential explanation is that a powerful norm *against* sanctions trumps the textual command—where an attorney has not complied with Rule 11(b), a judge would rather avoid the subject altogether by staying silent than sanction the attorney. As mentioned above, another example comes from states that have adopted a "fact pleading" standard that is different from federal "notice pleading." Nonetheless, many state courts ignore the state rule text and apply the federal standard, likely in an effort to promote the norm of federal–state uniformity.[40] Thus, if procedural norms can trump text, then rule changes may be less relevant without a deeper account of the norms behind them.

A systematic study of procedural norms has several payoffs for civil procedure. First, focusing on norms can help us capture descriptively how the system actually operates. As Parts I and II explain, judges and scholars often write as if there were only two sources of procedural rules: the FRCP and statutes, and procedural common law. But, as this Article argues, procedural norms constitute a third source of obligations and unwritten rules in civil litigation. Parts I and II offer a description of a norm-based civil procedure and show how procedural norms serve several functions in the system. Those Parts begin to build a vocabulary for discussing norms in a trans-procedural way. In doing so, Parts I and II help to resolve puzzles that go unexplained when observers focus solely on text or doctrine. For instance,

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[36] *See* Jennifer E. Sturiale, *The Other Shadow Docket: The JPML's Power to Steer Major Litigation*, 2023 U. ILL. L. REV. 105, 138.

[37] For an analogous phenomenon in bankruptcy law, see Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925, 1931–32 (2022).

[38] Henderson & Hubbard, *supra* note 3, at S88.

[39] *Id.* at S90.

[40] Main, *supra* note 14, at 319.

after the 2020 elections, some observers criticized the federal courts for not immediately sanctioning attorneys involved in frivolous election litigation.[41] A few scholars urged the federal courts to apply the text of Rule 11, sanctioning parties for presenting a case for an "improper purpose."[42] But judges took more than a year to sanction the lawyers. As discussed below, there is a shadow norm that structures Rule 11. While the text and doctrine allow for a variety of sanctions, a norm instructs judges to avoid sanctions whenever possible.

Second, and relatedly, a focus on norms can help us diagnose the actual source of litigation problems in a way that informs prescriptions. Once we fit civil procedure with a norm lens, our fiercest procedural debates (and their solutions) seem closely related to norms. Part III focuses on two concrete areas where we can observe the development of procedural norms: modern discovery tech and Rule 11 sanctions. These two examples reveal the importance of norm entrepreneurs and the clash between FRCP text and norms. Section III.A focuses on discovery tech to show how entrepreneurial and organized groups—including the Sedona Conference and the Bolch Institute—have developed norms that guide technology-assisted review (TAR) in complex litigation.[43] These procedural norms have become informal but powerful nudges on litigators. The Article assembles a dataset of forty discovery TAR protocols—documents negotiated by litigants to structure discovery—to expose the opaque cultural conventions of discovery tech and the influence of norm entrepreneurs.[44] This analysis shows how norms stepped in to resolve discovery coordination problems in the face of paralysis from the Advisory Committee. Then, Section III.B explores what happens when norms clash with rules, specifically in the context of Rule 11 sanctions. Between 1983 and 1993, textual changes to the FRCP led to a broader debate among legal actors about the role of sanctions. In the end, a

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[41] Kimberly Wehle, *There's a Way to Halt Trump's Baseless Election Fraud Cases*, POLITICO (Dec. 13, 2020, 6:50 AM), https://www.politico.com/news/magazine/2020/12/13/sanction-attorneys-trump-baseless-election-fraud-lawsuits-444724 [https://perma.cc/NXV4-MPM4]; Scott Cummings, Nora Freeman Engstrom, David Luban & Deborah L. Rhode, *It's Time to Consider Sanctions for Trump's Legal Team*, SLATE (Nov. 23, 2020, 2:37 PM), https://slate.com/news-and-politics/2020/11/trump-legal-team-rudy-giuliani-state-bar-sanctions.html [https://perma.cc/7MZ7-VGJM].

[42] *See* Wehle, *supra* note 41; Cummings et al., *supra* note 41.

[43] For a general discussion of discovery culture and a similar approach to norms, see Beerdsen, *supra* note 11, at 983–84.

[44] For three examples of such TAR protocols, see Order Regarding Search Methodology for Electronically Stored Information, *In re* Broiler Chicken Antitrust Litigation, No. 1:16-cv-08637, 2018 WL 1146371 (N.D. Ill. Jan. 3, 2018); Order Regarding Search and Production of Electronically Stored Information and Paper Documents, *In re* Peanut Farmers Antitrust Litigation, No. 2:19-cv-00463, 2018 WL 1146371 (E.D. Va. Feb. 10, 2020),; and Protocol Regarding Validation of Technology Assisted Review (TAR), *In re* Valsartan, No. 1:19-md-2875-RBK (D.N.J. Dec. 23, 2020).

strong norm against sanctions became entrenched and won out over the Rule's text.[45] The discovery and Rule 11 sagas exhibit several lessons, including the perils of changing the FRCP text without a legal consensus around reforms, and, again, how norms can help resolve coordination problems.

Finally, Part IV argues that pivoting away from rules and toward procedural norms can solve procedural problems. This Part also reveals a deeper set of values that are subversive to the formal text. Among other things, norms allow us to observe a shift in power from the Civil Rules' Advisory Committee to nongovernmental organizations such as the Sedona Conference where norms are hashed out. The breakdown of the federal rulemaking process—due to paralysis and polarization—has created pressure to develop coordination mechanisms through norms.[46] While norms and formal law are sometimes in constructive dialogue, they can also compete as tools for coordination, and we may expect more norm development as formal lawmaking processes become less effective.[47] In other words, procedural norms serve the crucial purpose of infusing flexibility into a system where rulemaking is growing more difficult. And these informal norms also show that while our legal system is nominally adversarial, norms push counsel and parties towards maximum cooperation. Importing these insights into the study of procedure could improve debates and even alter how judges and practitioners think about interpreting and applying the rules.

The pivot to norms is pressing and timely as polarization within the federal judiciary and legal elites has increasingly become a topic of public interest.[48] Because norms are enforced through communities and tight-knit circles, changes to the political composition of the judiciary are likely to manifest in the norms that govern day-to-day litigation. Moreover, as discussed above, polarization and paralysis in FRCP rulemaking means that norm-making has become the main alternative to written rules.

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[45] *See* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 619 (2000) (discussing how norms might prevent an "overly condemnatory" law from being enforced).

[46] *See generally* David Marcus, *The Collapse of the Federal Rules System*, 169 U. PA. L. REV. 2485 (2021) (arguing that the rulemaking process has irreversibly broken down).

[47] *See* A. Benjamin Spencer, *Rule 4(k), Nationwide Personal Jurisdiction, and the Civil Rules Advisory Committee: Lessons from Attempted Reform*, 73 ALA. L. REV. 607, 611–14 (2022) (discussing the failure to adopt an amendment to Rule 4).

[48] *See* Gina Passarella Cipriani, *The Legal Industry Is Squarely in the Crosshairs of Politics*, LAW.COM (July 20, 2022, 3:36 PM), https://www.law.com/2022/07/20/the-legal-industry-is-squarely-in-the-crosshairs-of-politics/ [https://perma.cc/TAG2-6K86]. For a discussion that legal elites have refused to hold each other accountable, see Leah Litman, *Lawyers' Democratic Dysfunction*, 68 DRAKE L. REV. 303, 324–25 (2020).

Consequently, procedural norms are likely to have an increasingly important impact on litigation.

Take, for instance, one current debate that implicates procedural norms: the power of judges in MDL and the appearance of ad hoc procedure. The rise of MDL has provoked fierce debates. Commentators have increasingly sorted into two camps: those who see MDL as a good (if flawed) vehicle for mass tort claims versus those who see MDL as a profoundly flawed enterprise that allows repeat players to benefit at the cost of clients.[49] This debate sometimes unfolds in the language of rules and text—MDL critics argue that the lack of textual rules is a serious impediment that allows these repeat players and even judges to corrupt the process.[50] Even Judge Vince Chhabria recently noted: "The Civil Rules Advisory Committee should consider crafting a rule that brings some semblance of order and predictability to an MDL attorney compensation system that seems to have gotten totally out of control."[51]

But there is another layer in MDLs: informal practices, beliefs, and customs—that is, procedural norms.[52] If the debate were only about text or doctrine, then we should focus on statutory or rule changes. But if the debate is also about norms, then changes to the text will not solve all, or any, problems. Judges or litigators can find work-arounds to new textual changes.[53] Focusing on a rulemaking process that has become mostly ossified is missing the fuller picture. In addition to text, we should focus on MDL practices, norm-making, and the norm entrepreneurs who shape the process.

The Article proceeds as follows. Part I provides a definition of norms in civil procedure and explains how they are created, enforced, and changed. Part II shows how procedural norms serve a variety of functions: concretizing otherwise abstract values, channeling judicial discretion into narrower options, coordinating among litigation players, and allocating power among litigants and judges. Part III dives into the case studies of discovery tech and Rule 11 to provide a more granular understanding of norm creation and the clash between textual rules and norms. Finally,

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[49] *Compare* Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1458–63, 1523–26 (2017) (critiquing the current system), *with* Bradt & Rave, *supra* note 5, at 93–96 (defending it).

[50] BURCH, *supra* note 5, at 120–24.

[51] *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 953 (N.D. Cal. 2021).

[52] Professor Burch has used norms as a lens into MDLs. *See* BURCH, *supra* note 5, at 88; Burch & Williams, *supra* note 49, at 1447–48 (discussing the fertile grounds for "norm development"); Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation: A Response to Engstrom*, 129 YALE L.J.F. 64, 82–83 (2019) (arguing that MDL norms undermine procedural parity).

[53] *See* Church, *supra* note 21, at 78–79 (arguing that attitudes and informal practices of lawyers and judges govern the speed of litigation).

Part IV draws out a set of lessons and weighs the costs and benefits of procedural norms.

I. FINDING NORMS IN CIVIL PROCEDURE

This Part provides a definition of a procedural norm, connects procedure to broader literatures on legal and nonlegal norms, and explains how norms are created, enforced, and changed over time.

The FRCP create a basic dispute-resolution system of defined stages that serve many roles: to lay out the basic facts of a case and give notice to the defendant (as well as an opportunity to respond); to structure the exchange of information relevant to the case; to dispose of frivolous or meritless cases as early as possible; and to prepare the case for a final resolution via trial, dispositive judgment, or settlement. The rules are carefully choreographed to achieve these goals through pleadings, discovery, dispositive motions, trial, and posttrial motions.

Yet—apart from a passing mention in Rule 1 to justice, speed, and expense—this structure is mostly silent on the broader goals of the system, judicial duties in carrying out the rules, and litigants' relationship to each other.[54] Some of these missing pieces are filled by statutes or rules of professional responsibility. But important gaps remain. No case law can fully define what proper litigation behavior entails. No rules govern the full details of MDL cases. And some rules give judges discretion—for example, to sanction attorneys—but do not fully define the scope of that discretion.[55] Even more, federal judges cannot develop doctrines that bind state judges in parallel cases.[56] All of this leaves crucial procedural details underspecified.

Norms fill these gaps. Procedural norms provide more specific normative goals, define judicial duties, and structure the stages of our litigation system as discussed above. And they do this through informal "rules of the road," expectations about behavior, and social pressures within the litigation system. They are connected to cultural patterns and social networks.

Before proceeding, however, be warned that, as many scholars have found, exploring the relationship between norms and law can be a difficult and even "mysterious" task.[57] That is because norms are not disciplined by clear boundaries. Under H.L.A. Hart's framework, norms preceded the

[54] FED. R. CIV. P. 1 ("[The FRCP] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

[55] *Id.* R. 11.

[56] This is because of, among other things, the Anti-Injunction Act. *See* 28 U.S.C. § 2283.

[57] Oren Tamir, *Constitutional Norm Entrepreneuring*, 80 MD. L. REV. 881, 889 (2021).

existence of formal rules.[58] There is no REA that can delimit their adoption. And no set of cases can work out their relationship with the FRCP. Instead, this Article must make do with conclusions based on partial evidence. Relatedly, while the Article draws on the work of norm theorists, the comparison with other areas of law, such as property, is limited. The main reason is that property law norms are often worked out by lay persons, while civil procedure is dominated by attorneys. This makes the line blurrier between legality and norms than in other areas of law.

Below, Section I.A attempts to build a definition of procedural norms and contrasts norms from established concepts such as judicial discretion, ad hoc procedure, and best practices. That Section also focuses on the thorny relationship between norms and law. Sections I.B and I.C then explore how the legal community creates and enforces norms. Finally, Section I.D explains how norms are changed or abolished.

A. Overview and Definition of Procedural Norms

Procedural norms are informal patterns of behavior or practices among litigation actors that are enforced by social sanctions. Norms are unwritten and often followed out of a sense of obligation. They either substitute for a missing textual rule of litigation, supplement an existing rule, or provide a normative standard for the litigation system. By regulating the behavior of litigation actors, procedural norms build and sustain an infrastructure of litigation. Breaking them down into their ingredients, norms are: informal, sociological, unwritten, and involve a sense of obligation. Moreover, norms can be national or local in scope. Equally important, as discussed below, is that norms can be contrasted from concepts such as best practices, procedural values, ad hoc procedure, and judicial discretion.

1. Procedural Norm Ingredients

Procedural Norms are Informal and Sociological. Procedural norms are informal because they are not part of the FRCP, statutes, other written rules, or case law. They are sociological because they structure the behavior of a group of people: mostly attorneys and judges. They do this by providing a "prescribed guide for conduct or action"[59] and "a standard for others to evaluate" a litigant or judge's behavior in litigation.[60] In this sense, they coordinate behavior by organizing the litigation system around expected patterns of conduct. Two sociological features are relevant here:

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[58] H.L.A. HART, THE CONCEPT OF LAW 81, 91–99 (3d ed. 2012).

[59] *Rule*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/rule [https://perma.cc/5HNE-N88X].

[60] Renan, *supra* note 29, at 2197–98.

- Litigation Actors: procedural norms govern the conduct of attorneys, law firms, judges, parties to litigation, and judicial adjuncts (settlement administrators, mediators, etc.). Part II further explores how these norms differ depending on the relevant actor (mostly judge vs. lawyer).
- Litigation Behavior: procedural norms regulate most acts that take place in civil litigation, including the filing of motions, settlement negotiations, and how judges decide cases.

Consider the norm that an MDL judge has the power to supervise the lawyers in an MDL or that speed is the measure of an MDL's success.[61] Neither the MDL statute nor the FRCP explicitly authorize these norms but they exist in the shadow of Rule 16's command that a "court may order the attorneys" to appear in pre-trial conferences to establish "early and continuing control so that the case will not be protracted because of lack of management."[62] The norms expand a judge's power under Rule 16, set an expected pattern of behavior, and coordinate litigation by instructing lawyers to accept judicial supervision and communicate closely with the judge. Once appointed, norms nudge attorneys to informally negotiate with each other on how to communicate with other counsel. And then abutting norms kick in, including a prohibition on MDL attorneys from criticizing each other in public.

Procedural Norms Are Unwritten and Range in Specificity. Procedural norms are unwritten in the sense that, unlike law, they do not derive their power from the act of being written down.[63] Even when they are recorded in guides or manuals, writing these norms down does not create them; it only memorializes their pre-existence.

Moreover, these norms can range from specific commands to judges to more abstract guides for conduct. Professor Renan, for instance, has identified a similar range of norms in the context of constitutional law. Among others, she identified specific norms such as the President's obligation "to defend the constitutionality of a statute in court" and the prohibition on presidential "individual investigatory decisions."[64] Renan also addressed abstract norms such as the President's "informal power over both legislative and administrative policymaking," and the obligation to "exercise considered, fact-informed judgments on major [policy] questions."[65]

[61] *But see* 28 U.S.C. § 1407(f) (allowing that "[t]he panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure").

[62] FED. R. CIV. P. 16(a).

[63] COLIN TURPIN & ADAM TOMKINS, BRITISH GOVERNMENT AND THE CONSTITUTION: TEXT AND MATERIALS 217 (Alison L. Young ed., 8th ed. 2021) (quoting Joseph Jaconelli, *Do Constitutional Conventions Bind?*, 64 CAMBRIDGE L.J. 149, 169 (2005)).

[64] Renan, *supra* note 29, at 2189, 2203.

[65] *Id.* at 2190.

Procedural norms can similarly range from broad understandings of due process as requiring active party participation and control, to obligations on federal judges to cooperate with state judges, to specific instructions on how to interpret the FRCP.[66]

Procedural Norms Follow from a Sense of Obligation; They Are Not Merely Best Practices. Many procedural norms have the flavor of best practices and sometimes overlap with them. For instance, the norm that attorneys should not bring trivial discovery matters to judges or file repeated motions is a suggested best practice by the ABA.[67] But norms are fundamentally different in several ways. For one, while best practices are merely suggestions, even trivial procedural norms follow "from a sense of obligation" and can be socially enforced by peers.[68] As the literature discusses, norms are "social regularities that individuals feel obligated to follow because of an internalized *sense of duty*."[69] Litigation actors are expected to follow procedural norms and understand those norms to be an inherent part of what it means to be an attorney or judge. That is why norms are sociological—they have bite because a violation can be informally policed and punished by peer groups. Best practices are not sociological in that sense. This also means that norms reflect an underlying morality of procedure in a way that best practices cannot.[70] For another, procedural norms can be structural. The procedural norm that the Supreme Court should defer to the rulemaking process is nowhere near a best practice.

Procedural Norms Can Be National or Local. The procedural norms explored below are national in scope and distinct from other concepts such as local legal culture or norms of professional conduct. Some works, for instance, have highlighted how pleading standards and other rules vary by locality.[71] Those local practices could be called local procedural norms. But most of the norms I discuss below do not suffer from local variability. Every federal court, for instance, should understand the trans-party norm: judges should not condition application of the federal rules by entity type.[72] Survey evidence finds that federal judges from across the nation generally agree with each other on the prioritization of procedural values such as participation and

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[66] Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1256 (2005) ("[W]e tend to view active party participation and control over the litigation as a fundamental due-process norm . . . .").

[67] *Best Pretrial Hacks*, *supra* note 12.

[68] Vermeule, *supra* note 32, at 1185.

[69] McAdams, *supra* note 25, at 340 (emphasis added).

[70] As a practical matter, best practices will sometimes be phrased in the same way as norms.

[71] *See* Main, *supra* note 14, at 319.

[72] Michalski, *supra* note 23, at 325.

fairness.[73] The *Manual for Complex Litigation* is another example of a set of informal guidelines that guide the work of all district court judges. Procedural norms also only indirectly relate to professional conduct. Unlike the rules of professional responsibility, procedural norms exist to structure the litigation process, not to provide ethical guidance to attorneys.[74]

We can therefore contrast national procedural norms from norms that may apply in other contexts: international, regional, local, and those specific to particular judges or courts. There may be some slippage between these different contexts, but the relevant norms all play distinctive roles. The focus of this Article is at the national level.

2. Procedural Norms Differ from Other Concepts

Setting aside the definitional ingredients of a procedural norm, it is important to contrast them from other established concepts:

Procedural Norms Are Not Co-extensive with Procedural Values. Procedural norms are distinct from high-level procedural values. Some scholars have used the word norm to refer to values such as access to justice, efficiency, or fairness. In this Article, access to justice and similar values are just that—*values* that guide the rules, judges, and litigation more generally. But they are not norms of litigation because they are too abstract. Procedural norms, as I discuss them here, are instead concrete practices inspired by values. While a lawyer would rarely think to herself that she should "promote efficiency"—a value—in a case, in MDL, lawyers have a deep and routine reliance on the steering committee for achieving efficiency—a norm.

Procedural Norms Are Not Ad Hoc Procedure. Procedural norms are not enforced via judicial orders. That means they are not equivalent to what scholars call ad hoc procedure: a series of judge-made procedures "designed to address a procedural problem that arises in a pending case or litigation."[75] Take, for instance, a quintessential ad hoc procedure like *Lone Pine* orders, which are case-management orders that require mass tort plaintiffs to "supply prima facie evidence of injury, exposure, and causation" or face dismissal.[76] A *Lone Pine* order is a judicially created requirement that can be judicially enforced under penalty of dismissal and is ultimately tethered to the federal rules.[77] By contrast, a typical procedural norm—such as the norm that judges should not sanction attorneys under Rule 11 except in extreme

[73] Roger Michalski, *The Clash of Procedural Values*, 22 LEWIS & CLARK L. REV. 61, 97 (2018).

[74] There is a rich literature on the norms of professional responsibility. *See, e.g.*, Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 6–8 (2003) (exploring the existence of a "service norm").

[75] Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 772–73 (2017).

[76] Engstrom, *supra* note 24, at 5.

[77] *Id.*

circumstances—is an informal belief that emerged out of a consensus in the legal profession, is contrary to the written text of the FRCP, and any judge is free to ignore it without falling outside of the abuse of discretion standard. In this sense, norms and ad hoc procedure do not exist in the same conceptual space.

Procedural Norms Are Not Co-extensive with Judicial Discretion. Even more, the concept of procedural norms co-exists with, but is not equivalent to, judicial discretion.[78] As recently discussed by Professor David Engstrom, a system that depends on trans-substantive rules inevitably places pools of discretion in the hands of individual trial judges.[79] To be sure, procedural norms sometimes fill in legal gaps by narrowing discretion. But while a judge might exercise discretion based purely on an individual choice, norms are instead communal guidelines. Norms emerge out of relationships between different judges and litigants. Discretion, by contrast, is an individualized exercise. Moreover, when judges exercise discretion, they make law, not norms. For instance, judges have discretion under *Twombly* and *Iqbal* to draw on "judicial experience and common sense."[80] As soon as a judge writes an opinion that applies their common sense, however, they have created law that is subject to appellate review and reversal. But norms are not law in the same way. In contrast to an exercise of discretion, when a federal judge cooperates with a state judge in the handling of a parallel case, they are following unwritten norms, not law.

Procedural Norms Are Usually Not Law. Again, norms can be contrasted from law because breach of a procedural norm does not carry legal consequences. Written procedural rules—whether in doctrine, statutes, or the FRCP—are law because ignoring them subjects a lawyer or judge to consequences such as contempt or reversal on appeal. But norms are neither in the FRCP or statutes, nor are they part of precedential opinions. Instead, these norms exist in meetings among attorneys or judges and constitute only informal understandings of litigation. As I discuss here, ignoring a procedural norm does not subject a judge to any legal consequences. When

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[78] On judicial discretion, see, for example, Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2083–85 (1989), which describes four consequences of procedural flexibility; Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1986 (2007), which discusses serious problems that arise from broad judicial discretion and urges caution in delegating discretion to trial judges; and Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1564 (2003), which argues that evolving procedures in the United States during the twentieth century have trended toward increased judicial discretion and that this trend is not cause for alarm.

[79] David Freeman Engstrom, *Digital Civil Procedure*, 169 U. PA. L. REV. 2243, 2244–45 (2021).

[80] Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

norms do appear in judicial opinions, they do so only as dicta or law of the case, but not in any way that is precedential.

With that said, it is possible that judges indirectly enforce some norms. As the related literature on conventions notes, "courts may not directly *enforce* conventions" but may "indirectly *recognize* and *incorporate* conventions [during] their usual duty of interpreting written laws or rules."[81] It may well be that breaching a procedural norm—say, that attorneys should not bring trivial discovery disputes to a judge—may increase the likelihood of an adverse ruling. If so, norms sometimes carry legal consequences. Moreover, judges sometimes incorporate procedural norms in their decisions. For instance, a judge's supervisory role in an MDL has been well-documented.[82] In that sense, a procedural norm can become common law.

B. How Procedural Norms Are Created: Norm-Making, Bottom-Up, Top-Down, and Norm Entrepreneurs

Elite lawyers or influential judges form procedural norms by repeatedly engaging in behavioral patterns that become part of the litigation process. The literature on norms in other legal fields outlines how norm-making hinges on a few key ingredients: a small number of actors in a "close-knit" group, a need to manage day-to-day tasks or cooperation, gossip networks, and repeated interactions.[83] But norms can come in two sets: (A) those that are orchestrated from the top-down by organizations or norm entrepreneurs—these entrepreneurs can specialize in creating and popularizing norms of litigation behavior—and (B) those that are formed in an organic, bottom-up, grassroots manner through practice that develops and then catches on.

In the classic formulation of norms, close-knit groups create norms to govern cooperation and day-to-day tasks or social relations. Close-knit groups can be relatively small, but they can also include hundreds or thousands of people. In the property law demonstration of norms, geographic neighbors who share similar goals and challenges form close-knit groups to achieve social cohesion and cooperation.[84] More than just size, however, the crucial ingredient for norm formation is that information moves across members of the group easily and quickly. A close-knit group might arise "when informal power is broadly distributed" and there is "a gossip network through which to pass information about how particular members act[]."[85]

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[81] Vermeule, *supra* note 32, at 1183.

[82] *See, e.g.*, BURCH, supra note 5, at 2–3.

[83] *See* ELLICKSON, *supra* note 27, at 177–78, 125–26, 164–66, 232–33.

[84] *See id.* at 178.

[85] *Id.* at 177, 181.

Close-knit groups are conducive to norms because they allow free flow of "information about norms and violations and also the power and enforcement opportunities needed."[86]

Beyond quick information transfer and small sizes, members of close-knit groups must be able to engage in repeated interactions. It is this constant possibility of repeat play that is "conducive to the emergence of cooperation."[87] Members must understand who is part of the group and who is not and must be able to predict a high rate of repeated interaction with in-group members. In the context of the presidency, norms "[are] reinforced through several mechanisms, including bureaucracy, congressional oversight, leaks, and media attention."[88] Crucially, these groups include numerous political and media repeat players who interact with one another over decades.

Applying these ingredients to federal civil litigation can explain how procedural norms emerge among judges and federal litigators. Beginning with group size, litigators and judges form natural close-knit groups because of repeated interactions. Federal judges, of course, are a small and insular group—numbering in the hundreds—with similar backgrounds and experiences. Historical accounts of the federal courts have emphasized the similar backgrounds of federal judges, with Purcell once noting that "[i]n spite of considerable variations by time and place . . . federal judges tended increasingly to be drawn from the upper echelons of the bar with more pronounced national orientations and stronger commitments to professionally defined norms of law."[89] Likewise, while there are hundreds of thousands of practicing attorneys in the United States, the pool of repeat-player litigators in federal courts is considerably smaller. And there is an even smaller group of "elite lawyers" who practice in the largest cases.[90] The small number of judges and elite litigants creates an environment comparable to classic close-knit groups. That is why some scholars have recognized that in federal court there is a "local 'federal courtroom culture,' the complex of assumptions, attitudes, and practices that characterize[s] the state's elite federal bench and bar."[91]

Moreover, the possibility not only of repeat play but also of repeat litigation from different angles is crucial. Elite litigators may have the upper hand in one particular case only to have the losing hand in the next case. This

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[86] *Id.* at 177.

[87] *Id.* at 178.

[88] Renan, *supra* note 29, at 2210.

[89] Purcell, *supra* note 17, at 712.

[90] *See* Burch & Williams, *supra* note 49, at 1446–47.

[91] Purcell, *supra* note 17, at 717.

possibility of repeat interactions from different negotiating positions incentivizes cooperation in a formally adversarial system. Judges also face repeated interactions with elite lawyers, in cases and informal meetings. A lawyer practicing in front of a judge today may become a repeat litigator or even a future appellate judge.

In communication networks, formal and informal communication channels—and, with them, gossip avenues—are wide open for judges and litigators. It is uncontroversial to recognize that judges exist in a thick sociological environment. There are, of course, the formal meetings: judicial conferences, education programs, and other bureaucratic judicial gatherings. Professor Gil Seinfeld once noted that "[t]he Judicial Conference has . . . served as a vehicle through which the federal judiciary seeks to educate its members . . . . These educative processes help to spread across the federal bench a sense of 'how we do things here.'"[92] Of course, these meetings and formal gatherings spread the "ethos of an institution . . . among members."[93] More informally, as Professor Maggie Gardner recently noted, "[e]ven if district judges generally work independently, they operate within a collegial environment in which they interact with their peers in a range of informal to formal settings."[94] She adds that "[a] district's judges may meet for weekly lunches . . . or they may more informally run into colleagues in the hall or stop by each other's chambers."[95] And, as discussed below, the *Almanac of the Federal Judiciary* provides a channel for lawyers to gossip about federal judges.[96]

There is some empirical evidence to back the idea that federal judges have developed a common set of views around civil procedure. Professor Roger Michalski recently found in a survey study that "federal judges as a group largely share[d] the same views on procedural values," even though they were appointed by different presidents and served in different parts of the country.[97] According to Michalski, there was a distinct approach to procedure among judges that differed from attorneys and government employees—"most federal judges emphasize participation and fairness as the core procedural values."[98]

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[92] Seinfeld, *supra* note 33, at 140–41.

[93] *Id.* at 141.

[94] Maggie Gardner, *District Court En Bancs*, 90 FORDHAM L. REV. 1541, 1586 (2022).

[95] *Id.*

[96] *See generally* ALMANAC OF THE FEDERAL JUDICIARY (2022) (providing judicial profiles which include commentary from lawyers derived from their experiences litigating before different judges).

[97] Michalski, *supra* note 73, at 90.

[98] *Id.*

Setting aside judges, litigators have similar gathering points, either at bar association meetings, law school alumni events, professional societies, or even collaboration in a settlement. And there is evidence of a nationally cohesive set of procedural preferences among some litigators. Defendants, for their part, seem to prioritize accuracy and finality over participation or fairness.[99]

Bringing all of this together, procedural norms form when elite lawyers or influential judges engage in a repeated behavioral pattern that structures the litigation process. Again, norm innovations can be orchestrated (top-down) or grassroots (bottom-up):

Orchestrated, Top-Down. Some norms come down from influential norm entrepreneurs. This can be an organization such as the Sedona Conference—explored in Part III—or an influential judge or lawyer that invents a new form of conduct or expectation. Judge Jack B. Weinstein, for example, famously invented innovative procedures that other judges copied.[100] Scholars have noted that "superstar" judges sometimes revolutionize legal doctrines in single decisions in what some have dubbed a "contagious principle of exceptional procedure."[101] They can do this, too, for norms. A superstar judge or litigator can invent a new norm wholesale and propagate it throughout the legal system. Even more, Supreme Court Chief Justices can use their agenda-setting power over the rulemaking process to make norm-shaping pronouncements. Chief Justice John Roberts, for instance, attempted to shape norms around discovery in his yearly announcements about rulemaking.[102] The key for these top-down norms is that they catch on because they are internalized as part of the litigation process and therefore create a sense of obligation.

Grassroots, Bottom-Up. At other times, a procedural norm may emerge out of grassroots litigation networks. For instance, class action settlement negotiations among multiple attorneys can stumble on a new unwritten strategy for resolving a case. If successful, that informal behavior can and

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[99] *See id.* at 97.

[100] Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 392 (2011).

[101] Engstrom, *supra* note 24, at 15 (quoting Wex S. Malone, *Damage Suits and the Contagious Principle of Workmen's Compensation*, 12 LA. L. REV. 231 (1951)). For a discussion of superstar judges, see Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600, 623 (2020).

[102] JOHN G. ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2015), https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [https://perma.cc/NL6A-535F] (praising changes to discovery).

does spread throughout the class action world.[103] Over time, no attorney may remember how a norm started or why they follow it. And yet, judges and litigators may feel compelled to follow the norm. Indeed, "[i]f each judge knows that other judges are subject to the same norms and thus similarly incentivized, all judges are more likely to invest in the process. Doing it well will confer prestige and other reputation benefits."[104] In time, a "norm is more likely to become internalized and serve as a reason in itself for action."[105]

To be sure, norm entrepreneurs can come from diverse sources and may provoke both top-down and grassroots reforms. Section III.B, for instance, highlights half a dozen organizations, judges, and scholars involved in debates over norms for discovery tech.

C. Decentralized Enforcement of Procedural Norms and the Procedural Ecosystem

Even though norms are unwritten and lack formal penalties, legal actors nonetheless enforce existing norms through informal sanctions. As Ellickson long ago observed, "systems of social control typically employ both rewards and punishments—both carrots and sticks—to influence behavior."[106] But as the literature on conventions recognizes, one key feature of norms is that enforcement is *decentralized* and governed by an ecosystem.[107] As the main actors in the procedure world, litigators and judges give rewards and punishment that enforce procedural norms in three ways: through internalized obligations, reputational sanctions, and institutional sanctions.

1. Internalized Obligations and Conscience

The first and most direct source of norm-compliance is an internalized sense of duty and related "sanctions of conscience."[108] Procedural norms become entrenched when they are fully internalized by legal actors as defining what it means to be a lawyer or judge. A long literature has noted that judges' behavior and mindset is influenced by the concept of "role fidelity"—the combination of beliefs, self-conceptions, social expectations,

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[103] The history of the settlement class certification is itself an example, going from a "new" and "adventuresome . . . approach to using Rule 23 when it arose in the 1970s," to a "'stock device'" by 1997. Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73, 80 (2020) (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 618 (1997)).

[104] Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1396 (2012).

[105] *Id.*

[106] ELLICKSON, *supra* note 27, at 124 (emphasis omitted).

[107] For a discussion of the ecosystem-like properties of civil procedure, see Brooke D. Coleman, *Endangered Claims*, 63 WM. & MARY L. REV. 345, 348 (2021).

[108] Vermeule, *supra* note 32, at 1182.

and institutions that define what it means to be a judge.[109] Role fidelity and its psychological precursor, role theory, explain how individuals follow norms because "of an internalized *sense of duty*."[110] Judges and litigators "create shared normative expectations" and "those expectations shape behavior."[111] Among other mechanisms, the fear of violating one's duty can produce compliance with norms. And breach of the norm can be sanctioned by the "pangs of conscience" and psychological consequences, including self-criticism and feelings of disappointment. To be sure, "the psychological processes and mechanisms that bring about this sort of internalization are still poorly understood."[112] But whatever the mechanisms, so long as lawyers or judges believe that some litigation behavior is part of their duty, they will generally strive to comply with it or else risk the sanctions of their own conscience.

2. Reputational Sanctions

By far the most common method of norm enforcement is the use of reputational consequences. The norm literature has always noted the importance of reputation. Humanities and social science scholarship teach that reputation plays a crucial role in policing human behavior. The concept is central to economics and "[s]ociologists have long been aware of the important role [of] gossip and ostracism."[113] Closer to procedure, legal theorists have developed a rich account of the role of social forces in structuring order.[114]

Legal actors can use reputational consequences to reward or punish litigation behavior. Consider the *Almanac of the Federal Judiciary*, a publication that allows lawyers to anonymously comment on the performance of federal judges.[115] For instance, comments about Judge Charles Breyer—a repeat MDL judge—include that he is "smart," "professional," and "evenhanded."[116] One commenter advises others to "[b]e formal in his court. He chewed me out for not saying 'Your Honor.'"[117] On the negative side, lawyers note about another Northern District of California

[109] Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1349, 1396–1400 (2010).

[110] McAdams, *supra* note 25, at 340 (emphasis added); Shugerman, *supra* note 109, at 1397–98.

[111] Shugerman, *supra* note 109, at 1397–98.

[112] Vermeule, *supra* note 32, at 1189.

[113] ELLICKSON, *supra* note 27, at 143.

[114] *See id.* at 168 (referring to, and citing, Alexander Bickel, Lon Fuller, Friedrich Hayek, and Thomas Schelling).

[115] ALMANAC OF THE FEDERAL JUDICIARY, *supra* note 96.

[116] *Id.* (summarizing comments on Judge Charles Breyer).

[117] *Id.*

judge that "[h]e is openly hostile," "has the veneer of southern civility, but can be extremely mean-spirited," and "is a little mean, but that is well known."[118] This kind of reputational policing extends to peer-to-peer gossip among lawyers who cherish their reputation in the legal community. As Professor Leah Litman recently noted, despite polarization, "the network of elite lawyers still finds common ground with one another. This group likes to be 'good sports' with one another."[119] Although Litman argues this network does not police norms effectively, she still identifies the group as close-knit and heavily concerned with reputation. Attorney norm breaches can be punished in a variety of ways, including: banishment from professional networks, disinvitations to events, general ostracism, refusal to work as co-counsel, or hostility in future cases.[120]

The possibility of career consequences looms large in judicial and attorney concerns with reputation. A recent paper by Professor Kyle Rozema found that reputational harms often lead to very real career consequences for lawyers (that go beyond formal punishment).[121] Rozema found that attorneys who are disciplined for violating state rules of conduct face real hurdles to stay employed in the legal field. Attorneys who are disciplined but not disbarred, working at a midsize or large law firm, are about 35% more likely to separate from their firm.[122] Interestingly, this effect does not hold for solo practitioners or attorneys at small law firms—suggesting that the firm must be big enough for peers to hold the attorney accountable.[123] Still, for solo practitioners, career choices post-discipline at *other firms* are similarly diminished.[124] Disciplined solo practitioners are 20% less likely to join another firm.[125] Rozema finds "suggestive evidence that the labor market outcomes of disciplined lawyers are explained by a combination of reputation and information channels."[126] This peer discipline exists for rule violations and, most likely, for norms, too.

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[118] *Id.* (discussing Judge William Alsup's reputation).

[119] Litman, *supra* note 48, at 305. But keep in mind that Litman criticizes the breakdown of norm enforcement.

[120] *See* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 102 (2018) ("When norms are strong, violations trigger expressions of disapproval . . . .").

[121] Kyle Rozema, Professional Discipline and the Labor Market: Evidence from Lawyers 5–6 (Sept. 1, 2023) (unpublished manuscript) (on file with author).

[122] *Id.* at 4.

[123] *Id.* at 17.

[124] *Id.* at 28.

[125] *Id.* at 4.

[126] *Id.* at 5.

To be sure, norm enforcement may be disrupted by the continued growth of politically polarized legal networks.[127] Indeed, some of the most notorious attorney banishments come not from procedural norms but from the related context of partisan norms. Take, for instance, Alan Dershowitz's cooperation with the Trump Administration. Dershowitz was widely mocked for complaining that other law professors would no longer socialize with him on the island of Martha's Vineyard.[128] Likewise, a recent piece reported that conservatives have enforced partisan norms against Chief Justice Roberts in a variety of social ways:

> Legal conservatives of a certain stripe don't like Chief Justice John Roberts . . . .
>
> It's more of an all-out "you can't sit with us" Regina George in "Mean Girls" way. They don't like the reasoning in his legal opinions. They don't like his style of writing in legal opinions. They don't think his jokes from the bench are funny. They think he's arrogant, self-important and, well, "chiefy." In short: They don't think he's one of them.[129]

By contrast, legal networks will reward actions in accordance with norms by celebrating attorney accomplishments, handing out professional awards, recommending attorneys to clients or as co-counsel, inviting attorneys to law school events, and more.

3. Institutional Sanctions

Finally, there are several institutional loci of procedural norm enforcement. The most important ones, of course, are courts and judges themselves. Judges can enforce norms by criticizing the conduct of attorneys or other judges, or nudging the parties to follow expected behavior. Indeed, norms are likely to be the strongest when judges can *informally* enforce them in litigation. Take, for instance, a recent MDL hearing over potential jury instructions, depositions, and exhibits in *In re Juul Labs*. Without explicitly mentioning any requirements under the FRCP or other rules, Judge William Orrick delayed a trial because of a "mess of issues" with motions and jury instructions, demanding that the attorneys go "back to the drawing board" and "get this house in order" because "[y]ou cannot try a case like this. It just

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[127] *See* Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 191–92 (2020).

[128] *See, e.g.*, Joe Patrice, *Summer Officially Begins as Alan Dershowitz Publicly Complains About No One Liking Him on Martha's Vineyard*, ABOVE THE L. (July 18, 2022, 2:04 PM), https://abovethelaw.com/2022/07/summer-officially-begins-as-alan-deshowitz-publicly-complains-about-no-one-liking-him-on-marthas-vineyard/ [https://perma.cc/3LND-FZZW].

[129] Sarah Isgur, *John Roberts: The Man in the Middle*, DESERET NEWS (June 22, 2021, 11:00 PM), https://www.deseret.com/2021/6/22/22544121/john-roberts-the-man-in-the-middle-supreme-court-chief-justice-aca-abortion-roe-v-wade-kavanaugh [https://perma.cc/JU5N-B5HL].

won't work."[130] This shows how judges can use informal tactics, such as trial delays, to nudge litigants to comply with norms. As another example, appellate judges can also enforce norms through dicta that criticize lower court judges.[131]

One major example of institutional enforcement is the possibility of career advancement. In MDLs, for instance, the Joint Panel for Multidistrict Litigation (JPML)—in charge of assigning MDLs to specific judges—can reward judges who perform according to expectations with appointments in other important MDLs. As Professor Abbe Gluck notes, there is a norm of "speed as marker of success in MDLs."[132] Judges who prioritize this norm cultivate a great reputation with the JPML and earn appointment to other cases.[133] This means that institutional rewards can affect judicial compliance with norms.

Beyond courts, law schools are relevant norm-bearers at every stage of an attorney's career. They educate and train young attorneys, inculcating them in the ways of the field while teaching them how to "think like a lawyer." After graduation, respected alumni are invited back to their law schools to serve as everything from guest speakers, to visiting professors, to board members of schools' governing bodies. In addition to the *Almanac of the Federal Judiciary*, law reviews are also an interesting gossip-like vehicle for norm formation. Professors routinely write law review articles that identify litigation innovations and either critique or praise them. That is why a recent article noted that "the sociological connections between the legal academy, the courts, and the administrative state are close enough to enable a prescriptive theory of public law, under the right conditions, to move quickly from the law reviews and lecture halls to the United States Reports."[134] Professors do this, too, by inviting "respected" judges to teach classes or writing op-eds against perceived norm violations. More recently, professors do this through blogs or X, formerly known as Twitter, posts that can resonate in the broader legal profession.[135]

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[130] Amanda Bronstad, *'Get This House in Order.' Judge Delays Juul Trial to Fix a 'Mess of Issues,'* LAW.COM (Oct. 25, 2022), https://www.law.com/therecorder/2022/10/25/get-this-house-in-order-judge-delays-juul-trial-to-fix-a-mess-of-issues/ [https://perma.cc/R3SL-749K].

[131] At some point we may wonder whether this becomes a legal consequence, such that we would stop appreciating underlying practices as norms. Or potentially these institutional mechanisms operate in the "mysterious" space between norms and law.

[132] Gluck, *supra* note 4, at 1699.

[133] *See* Sturiale, *supra* note 36, at 138.

[134] Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1854–59, 1880 (2016); Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2348–49 (1999) (discussing the relationship between academia and judges).

[135] *See, e.g.*, Richard M. Re (@RichardMRe), X (Sept. 4, 2023, 1:33 PM), https://twitter.com/RichardMRe/status/1698766170860535900 [https://perma.cc/45GW-KBLQ].

Consider, finally, recent debates over the so-called "Negotiation Class Action," an example of ad hoc procedure. During the large opioid MDL, Judge Dan A. Polster and special masters invented a new kind of class action that would allow the parties to negotiate a settlement and put it up for a vote of all class members. The Sixth Circuit rejected this innovation as incompatible with Rule 23.[136] While most of the decision is focused on the doctrinal aspects of the innovation, in dicta, the court also tried to police broader norm innovations in MDL. Specifically, the decision noted that "[t]he rule of law applies in multidistrict litigation under 28 U.S.C. § 1407 just as it does in any individual case."[137] This was a clear message to all district court judges: stop inventing new procedures to resolve mass tort cases. Here, we can see a clear distinction between ad hoc procedure (negotiation class action) and a broader procedural norm (judges should innovate to resolve complex cases). And, in a way, this was an attempt to change the pro-innovation norm in MDL cases.

D. How Norms Are Changed or Abolished: Codification, Abrogation, and Cultural Evolution

Procedural norms can be (A) codified in textual rules, (B) changed textually or abolished by authoritative actors, or (C) rendered anachronistic by cultural changes or fall into desuetude.

Codification. Let's begin with norm codification, a common phenomenon in civil litigation. Consider the norm that judges should be litigation managers who closely control each case. This norm instructs judges to "affirmatively manage the conduct of civil cases" to move cases "along expeditiously" and under closer supervision.[138] This norm "emerged in the early 1970s, fueled by the pressures of rising caseloads and concern about increased expense and delay."[139] It constituted a major shift in behavior from passive judging to active judicial management.[140] For over ten years, case management was only a norm: it was a regular pattern of procedural behavior that federal judges adopted to structure litigation, but had no textual grounding and no doctrinal innovation authorizing it.[141] Still, the judges who embraced it were lionized while those who rejected it were seen as out of

[136] *In re* Nat'l Prescription Opiate Litig., 976 F.3d 664, 667–68, 672 (6th Cir. 2020).

[137] *In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 841 (6th Cir. 2020).

[138] Daniel J. Meador, *A Perspective on Change in the Litigation System*, 49 ALA. L. REV. 7, 10 (1997).

[139] *Id.*

[140] Resnik, *supra* note 9, at 379–80.

[141] *See* Meador, *supra* note 138, at 10.

touch with the times.[142] The norm became so ingrained that the Advisory Committee codified it in a 1983 amendment to Rule 16—providing explicit textual authority for judicial case management powers.[143] The Civil Justice Reform Act of 1990 further codified the case management norm into a federal statute.[144] This process of norm-development to codification was quite quick.

Textual Abrogation. A second avenue for norm change is when Congress, the Supreme Court, or the Advisory Committee alter or attempt to abolish a norm with a new textual rule or judicial decision.

Consider the norm that important procedural changes should come from the rulemaking process and not Supreme Court decisions. The Rules Enabling Act of 1934 creates an extended rulemaking process led, in the civil procedure context, by the Civil Rules Advisory Committee.[145] Although this process has always co-existed with the Supreme Court's power to interpret the federal rules, Committee Reporter Arthur Miller has argued that for decades "the Supreme Court stood firm in its commitment to the rulemaking process" as the main vehicle for procedural changes.[146] In other words, the Supreme Court embraced a norm of deference to the rulemaking process.[147] This norm was reinforced by a broader debate in the 1980s that emphasized the Advisory Committee's unique role in considering empirical evidence and public input.[148] Yet, the Court broke this norm in the famous procedural duo of *Twombly* and *Iqbal*, when it essentially reasserted its ability to reinterpret and reinvent the FRCP.[149] This was all the more disruptive because the Advisory Committee had previously rejected calls to heighten pleading standards.[150] Just a few years later, the Court repeated this process in a pair of class action decisions that remade Rule 23.[151] Most commentators agree

142 *See, e.g.*, Resnik, *supra* note 9, at 415 (highlighting the justifications for managerial judging).

143 Meador, *supra* note 138, at 10.

144 *Id.*

145 *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (proposing a reinterpretation of the Rules Enabling Act in light of its history).

146 Miller, *supra* note 6, at 14.

147 Marcus, *supra* note 46, at 2501.

148 As Justice John Paul Stevens argued in dissent, "Congress has established a . . . rulemaking process—for revisions of that order." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 579 (2007) (Stevens, J., dissenting).

149 Miller, *supra* note 6, at 14.

150 *See* Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1592–93 (2015).

151 *See* Diego A. Zambrano, *The States' Interest in Federal Procedure*, 70 STAN. L. REV. 1805, 1805 (2018).

that these decisions have damaged or abolished the norm of deference to the rulemaking process.[152]

One important point about norms is that judicial or statutory changes that challenge an existing norm can engender resistance. Section III.B below will discuss this in the context of Rule 11 sanctions.

Congress has also abolished procedural norms through statutes. One example comes from the class action context. Without any textual guidance, courts had long "appoint[ed] as lead plaintiff the first member of the purported class to file a complaint and . . . as lead counsel a law firm with whom that early filer had a pre-existing relationship."[153] In many ways, this was a simple procedural norm with indirect doctrinal hooks to Rule 23. But Congress explicitly abolished this practice in the securities context through the Private Securities Litigation Reform Act of 1995. A specific provision in that statute created a presumption that the lead plaintiff is the investor with the largest financial stake.[154] This effectively ended the previous norm.

Norm Evolution and Cultural Change. Of course, the procedural ecosystem can also alter norms by convincing major litigation players or judges to abandon their practices (and norms can become anachronistic or fall into desuetude). Consider the pro-aggregation norm that existed after the Advisory Committee revised Rule 23 in 1966. For the following two decades, federal judges embraced the idea that aggregating cases through class actions or other mechanisms promoted efficiency, fairness, and the just resolution of cases.[155] At its simplest, the norm told judges the following: where possible, consolidate or aggregate cases into groups for the efficient management of litigation.[156] But this norm quickly became contested in the class action wars of the 1970s. This contestation then became political when Republicans embraced the anti-class action movement and Democrats embraced plaintiffs' attorneys and aggregation. By the 1990s, the pro-aggregation norm was so contested that it no longer qualified as a consensus practice.[157]

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[152] Miller, *supra* note 6, at 14; Burbank & Farhang, *supra* note 150, at 1594–95.

[153] Elliott J. Weiss, *The Lead Plaintiff Provisions of the PSLRA After a Decade, or "Look What's Happened to My Baby,"* 61 VAND. L. REV. 543, 546 (2008) (in the context of securities class actions).

[154] Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 WASH. U. L.Q. 869, 871, 889 (2005).

[155] David Marcus, *The History of the Modern Class Action, Part I:* Sturm und Drang*, 1953–1980*, 90 WASH. U. L. REV. 587, 626 (2013).

[156] *Id.*

[157] *See* Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2136 (2019); Luke Norris, *Neoliberal Civil Procedure*, 12 U.C. IRVINE L. REV. 471, 499–508

Contestation of norms is common and legacy norms can often clash with new and emergent procedural norms. Witness, for instance, developing norms in the MDL world. An increasing tendency by the JPML to steer cases to particular judges is arguably clashing with a "longstanding 'norm against strategic matching of particular judges with particular cases.'"[158] The old norm sought "to legitimate judicial decision-making by promoting the view that it is principled and reasoned, rather than driven by the desire to achieve particular outcomes."[159] But new norms in the JPML and the need for expertise in case management are potentially supplanting the old norm.[160]

* * *

This Part provided a definition of procedural norms, connected them to the broader literature on legal and nonlegal norms, and explained how norms are created, enforced, and changed.

II. A TYPOLOGY OF PROCEDURAL NORMS AND THEIR FUNCTIONS IN CIVIL LITIGATION

This Part shows how procedural norms serve a variety of functions in civil litigation. A typology of procedural norms must acknowledge the widely different roles that norms can play, including:

- Concretizing abstract procedural values,
- Channeling judicial discretion,
- Coordinating among litigation actors and allocating power among litigants and judges, and
- Organizing day-to-day tasks in litigation.

Moreover, these norms sometimes can be *judge-oriented* or, alternatively, *attorney-oriented*. Below, I will specifically describe when procedural norms are directed at attorneys or judges. Norms perform other roles as well, but the ones discussed here capture the most significant functions that norms play in building an infrastructure of litigation.

(2022) (describing the Supreme Court's anti-aggregative turn). Other class action norms—like the norm that "class certification . . . should be decided near the commencement of the litigation"—have also become contested. Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 842 (2018) (mentioning this as a "basic rule of the road" and "norm").

[158] Sturiale, *supra* note 133, at 134–35 (quoting Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 J. CONST. L. 341, 383 (2004)).

[159] *Id.*

[160] *See id.* at 148.

A. Value Norms: Concretizing Abstract Procedural Values When Text Is Unclear

The most important procedural norms define systemic normative commitments. These norms might tell a district court judge what to "aim for" as a case progresses through the system. They might specify decisional heuristics or constrain the meaning of open-ended text. Or these norms might cajole a judge to make certain trade-offs, sacrificing some values in exchange for others. Most of these norms are directed not at litigants but at judges. And they exist because the FRCP (and related statutes) almost never define with precision the ultimate normative commitments of the federal rules.

The most dramatic norm in this context is the pro-settlement norm because it provides an overarching gold standard for the entire litigation system. By telling federal judges to aim for settlement, this norm completely transforms the litigation system, pushing away from adjudication and towards negotiated compromise. It provides for an ultimate normative commitment and structures the judge's behavior in every case. As is well known, the pro-settlement norm was not always the guiding light of the system. In 1938, the drafters of the federal rules had a different normative commitment in mind: judges should "facilitate the resolution of cases on their merits."[161] Back then, "plenary truth seeking followed by trial was the gold standard."[162] The story of this change has been told, and it involves docket pressures in the 1970s, the growing complexity of the federal docket, strategic litigation moves by repeat players, and Supreme Court invention of procedural hurdles.[163] All of these changes abolished the old pro-trial norm and created a new pro-settlement one.

Consider, as another example, the trans-personal norm that prohibits procedural distinctions among entity types.[164] In other words, courts are not supposed to apply different rules to a corporation vs. a natural person.[165] Unlike the related principle of trans-substantivity—rooted in the text of the REA—there is no textual hook for trans-personality.[166] In a typical case, judges face conflicting pressures. On the one hand, judges have broad authority to adjust procedures to the specific parties at hand. It may often make sense to treat a corporation differently from the federal government or from a single litigant. On the other hand, judges are instructed to follow the

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[161] Maria J. Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1715 (2012).

[162] *Id.* (internal quotation marks omitted) (quoting Miller, *supra* note 6, at 5).

[163] *Id.* at 1721–24.

[164] Michalski, *supra* note 23, at 325 (describing "trans-personality" as "the principle that procedural rules should not vary based on the personhood or entity-type of the litigating parties").

[165] *Id.*

[166] *See id.*

grand values of uniformity, equality, judicial efficiency, and simplicity. Trans-personality resolves this conflict with a simple injunction: Do not make distinctions among entity types. This unwritten rule constrains all district court judges. It prioritizes simplicity, uniformity, and judicial efficiency by avoiding convoluted person-specific procedures.[167] And it enhances the even more basic value that all litigants must be treated alike.

Norms sometimes have normative implications for judicial values more broadly when they simplify trade-offs between the procedural values discussed above. Applying the federal rules can be tricky because there are competing values across the litigation landscape. A judge can resolve a case efficiently by dismissing a claim early, before discovery. But doing so would deprive the plaintiff of access to justice or a sense of participation. This kind of tension is common. The rules do not make these trade-offs easy; they almost never prescribe whether a judge should promote efficiency in a particular context or fairness and accuracy. Norms, however, do exactly that. They arise in specific contexts and instruct judges in simple terms: Here is the value you should prioritize.

Consider the role of MDL judges in shepherding the case to settlement. Not only is there a strong norm in favor of settlements, but the MDL world also emphasizes abutting norms in favor of speed, finality, and global peace.[168] Specifically, norms say something like this: "Judges should promote settlements that extinguish all potential claims against the defendant." In pursuit of this norm, MDL judges have invented a series of ad hoc procedures intended almost exclusively to provide a complete settlement of all cases. Judges may see finality as the ultimate goal because settlements without the full agreement of all plaintiffs and defendants often fail.[169] So, for instance, judges have employed *Lone Pine* "twilight" orders near the end of an MDL litigation aimed at parties who refuse to participate in a voluntary global settlement.[170] They do so to cajole parties into settlement, believing that an MDL resolution that does not fully end the case is a failure. Here, the norm prioritizes finality instead of access to justice, accuracy, or even fairness. It says to the judge: "Set aside most of the typical procedural values and focus on bringing a full end to the case in front of you." This norm is contingent—we could instead live in a world where a norm pushes judges to promote trial for nonsettling plaintiffs. And the norm is enforced via JPML assignments to MDLs—which can be a reward for

[167] *See id.* at 328.

[168] *See* BURCH, *supra* note 5, at 2–3.

[169] Norman W. Spaulding, *Due Process Without Judicial Process?: Antiadversarialism in American Legal Culture*, 85 FORDHAM L. REV. 2249, 2250 (2017).

[170] Engstrom, *supra* note 24, at 35–36.

norm-abiding judges. That means judges are incentivized to have successful, speedy settlements in order to get more MDLs.[171]

These examples demonstrate how norms can concretize procedural values into specific heuristics. These norms tell the judge what to aim for in a specific case, what to spend judicial time on, and how to perform the job. In other words, norms tell judges what they are supposed to do. Moreover, the norms that judges embrace in practice communicate to the litigators in their courts what *they* are supposed to do.

B. Discretion-Channeling Norms

Norms can also limit a judge's discretion under the federal rules. By operating at a more concrete and particularized level than procedural values, norms can give specific instructions to judges where the rules are otherwise vague or under-determined. Suppose, for instance, that judges have discretion under a particular rule to do X, Y, or Z (e.g., dismiss a case with prejudice, dismiss without prejudice, or deny a motion to dismiss). If judges feel obligated to choose X (e.g., dismiss with prejudice) over Y and Z, we could say that a norm structures their discretion. This kind of norm would be "discretion channeling" in that it limits available choices for judges.

While the rules are notoriously specific in some contexts—often providing detailed timelines—they are also riddled with open-ended grants of power or standards. After *Twombly* and *Iqbal*, for example, a court faced with a motion to dismiss is supposed to determine whether a complaint is plausible by "draw[ing] on its experience and common sense."[172] Rule 23—the class action rule—similarly empowers judges with several standards, from commonality to predominance and superiority.[173] The FRCP repeatedly gives courts wide latitude to dismiss claims, including through Rule 56's summary judgment: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[174] These procedural standards provide a lot of discretion, allowing a judge to require a high degree of specific pleading or commonality in a class. District court judges have notoriously disagreed on how to apply these standards, allowing litigants to avoid early dismissal in front of some judges while facing the axe in front of

[171] *See* Sturiale, *supra* note 158, at 113.

[172] Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

[173] FED. R. CIV. P. 23(a), (b)(3).

[174] *Id.* R. 56(a).

others.[175] These examples show the standard-like nature of many federal rules.

It is in standard-like areas that discretion-channeling norms step in to narrow the choices. Consider, again, Rule 11 sanctions. The Rule empowers judges to grant sanctions but in a permissive manner: "If . . . the court determines that Rule 11(b) has been violated, the court *may* impose an appropriate sanction."[176] Violations are themselves standard-like, too, covering failure to form "an inquiry reasonable under the circumstances" and for filing a case for "improper purposes."[177] Under the rules, then, judges have wide discretion to punish different misbehavior.[178] But most judges do not punish any behavior or sanction any parties at all. Indeed, as discussed below, an empirical study found that judges overwhelmingly refuse to comply with a rule that "requires courts to make specific findings about compliance with Rule 11."[179] Why? Part III below suggests that a discretion-channeling norm sits behind Rule 11, limiting its reach only to limited situations. As discussed above, this is a case where Rule 11 and case law give judges several choices—X (no sanctions), Y (light sanctions), or Z (heavy sanctions)—and yet judges seem to feel obligated to choose X.

C. Coordination Norms and Allocation of Litigation Power

A series of procedural norms seek to coordinate and distribute power among litigants or judges. These norms exist to define the authority of the judge vis-à-vis other judges or the authority among lawyers in litigation. Coordination norms can create power that a judge otherwise lacks, notably allowing judges to supervise lead attorneys in an MDL or class action. But coordination norms can also provide guidance in the context of judicial federalism. Importantly, these norms can also govern the relationship among litigants even absent judicial intervention. This Section describes two types of coordination norms and how they fill in gaps in the rules.

1. Intra-Judicial Coordination Norms (Judge-Oriented)

Norms structure the division of labor between different judges. Again, norms tend to emerge where rules or text are missing and informal practices instead dominate. One area where the federal rules are underspecified is in the relationship between different judges. The rules, for instance, say nothing

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[175] *Compare Iqbal*, 556 U.S. at 662, 679–80 (dismissing), *with* Swanson v. Citibank, N.A., 614 F.3d 400, 405–06 (7th Cir. 2010) (allowing case to proceed).

[176] FED. R. CIV. P. 11(c)(1) (emphasis added).

[177] *Id.* R. 11(b).

[178] *See infra* Section III.B.

[179] Henderson & Hubbard, *supra* note 3, at S88–89.

(nor could they) about the relationship between state and federal judges. Similarly, while Rule 72 does attempt to govern the relationship between magistrate and district court judges, it inevitably leaves gaps.[180] In both of these scenarios (and others) norms take hold and fill in gaps.

Let's begin with the example of judicial federalism. Since at least the 1970s, Chief Justices of the United States, the Federal Judicial Center, and the State Justice Institute have emphasized the need for cooperation between state and federal judges.[181] This is particularly important in complex litigation cases that span the nation and straddle the federal–state divide. Mass tort cases, for instance, involve injured plaintiffs in multiple states. These cases can share the same parties and lawyers simultaneously litigating in both the federal and state court systems. Significant complications can arise in many forms: Federal settlement negotiations are affected by the potential ruling of a state court or state settlement, so different discovery rules lead to diverging cases; federal judges can issue injunctions against state proceedings in limited circumstances, allowing differences in the substantive law to affect negotiations in mass tort cases, and on and on.[182] Federal and state judges need to cooperate to resolve delays, reduce costs and duplicative proceedings, and reach consistent results.

In the face of these complications, federal and state reformers have inevitably created norms. Every norm ingredient is there: a small number of judges who form a close-knit group, a need to manage day-to-day tasks or cooperation, gossip networks, and repeated interactions across mass tort cases. To be clear, reformers cannot adopt textual rules in this context both because of constitutional limitations as well as Congressional inaction. But they have been able to agree on informal patterns of cooperation. As Judge William Schwarzer highlighted in the early 1990s, "[i]n a number of cases, state and federal judges have engaged in informal arrangements to coordinate related litigation. Their cooperation has involved calendar coordination, coordinated discovery, joint settlement efforts, and joint motions hearings and rulings. Some judges have even contemplated joint state-federal trials."[183] Schwarzer specifically found that many of the judges "knew each other well."[184] As if to emphasize the importance of gossip networks and reputation, Judge Weinstein once quipped that "coordination [across the state-federal divide] has nothing to do with procedures; it has to do with

[180] FED. R. CIV. P. 72.

[181] Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1871–72 (2000).

[182] Schwarzer et al., *supra* note 8, at 1689–90, 1695, 1706–07, 1714, 1724.

[183] *Id.* at 1690.

[184] *Id.* at 1735.

personality."[185] This cooperation has evolved through informal patterns of behavior, widely shared and understood by a small group of federal and state judges.

More specifically, federal and state judges have developed a set of coordinating patterns of behavior that cover discovery management and scheduling, settlement negotiations, and joint hearings. In order to create a pipeline of coordination, judges have developed a few norms that apply to most large mass tort cases, including: a practice of agreeing to an "[i]ntersystem coordination of discovery" for parallel discovery, an expectation that state judges commit to "cooperate fully" with federal discovery orders, an agreement to "hold[] joint hearings," and an assumption that state and federal judges will "combine[] resources to effect a settlement of all the cases pending."[186]

It bears emphasis that federal and state judges have built norms in this context out of necessity and with the help of the broader infrastructure that supports close cooperation and delivers reputational consequences. A variety of norm entrepreneurs, including the "Federal Judicial Center . . . , the National Center for State Courts . . . , the State Justice Institute, the Judicial Conference of the United States, the Conference of Chief Justices, and the National Judicial Council of State and Federal Courts" have actively urged adoption of best practices and norms of behavior.[187] To be sure, these norms are not universally adopted and, at times, talk of cooperation has been just that—*talk*.[188] Still, it is a remarkable degree of informal coordination. This is the stuff of norms.

Similar norms exist in the context of magistrate judges and other judicial adjuncts.[189] As a magistrate judge recently noted, the judicial division of labor depends on "the level of communication and collegiality between magistrate judges and district judges."[190]

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[185] *Id.* at 1736–37.

[186] *Id.* at 1707–08, 1723, 1714.

[187] McGovern, *supra* note 181, at 1878. For an example of recommended judicial practices and norms, see FED. JUD. CTR., COORDINATING MULTIJURISDICTIONAL LITIGATION: A POCKET GUIDE FOR JUDGES (2013), https://www.fjc.gov/sites/default/files/2014/Coordinating-Multijurisdiction-Litigation-FJC-2013.pdf [https://perma.cc/8E4Z-3PYM].

[188] *See* McGovern, *supra* note 181, at 1878.

[189] For a discussion of magistrate and federal judge differences, see Diego A. Zambrano, *Judicial Mistakes in Discovery*, 112 NW. U. L. REV. ONLINE 217 (2018). For judicial adjuncts, see Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 COLUM. L. REV. 2129 (2020).

[190] George C. Hanks Jr., *Searching from Within: The Role of Magistrate Judges in Federal Multi-District Litigation*, 99 JUDICATURE 47, 52 (2015).

A final kind of norm coordinates and distributes power among courts and the rulemaking process or Congress. As discussed above, the Supreme Court long stood by a norm of deference to the rulemaking process for major procedural changes. Although the Court eliminated this norm recently, for decades it accepted that an unwritten and informal practice could distribute procedure-making power.[191]

2. Intra-Litigant Coordination Norms (Lawyer-Oriented)

Judges and litigants have also developed coordination norms that distribute powers *among litigants* in complex litigation cases. The most notorious example discussed below comes from discovery tech. As Section III.A argues, in an area of discovery where the law lags behind technological developments, attorneys have invented and propagated a set of conventions and practices that can be seen as the norms of e-discovery.[192] Dozens of discovery agreements negotiated among attorneys (away from judges) seem to coalesce around similar choices about the parties' obligations in training machine learning algorithms or how many training documents to disclose. These discovery norms coordinate the obligations of attorneys in complex cases, even without any input from judges, the FRCP, or any other formal law.

Another example comes again from MDL litigation. The need for norms starts, as it almost always does, with a textual gap. The MDL statute, 28 U.S.C. § 1407, provides for the designation of MDL judges and acceptance of tag-along cases. But it has little to say about the actual process of running the MDL. In this gap, judges and attorneys have developed methods to appoint steering committees, coordinate the relationship between steering committee attorneys and those not on the committee, and manage settlement negotiations.

D. Workaday Norms in Civil Litigation

A final set of norms focuses on the daily tasks of litigation. While the federal rules provide the high-level organization of the litigation system, they do not specify day-to-day organizational or application tasks. Norms do. Ellickson highlighted how norms are particularly good at governing "workaday interactions" that nobody would bother to specify in a governing statute or rule.[193] Take, for instance, the following "pretrial hacks" that straddle the line between best practices and norms:

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[191] *See* Miller, *supra* note 6, at 14.

[192] For a related discussion of discovery culture and norms, see Beerdsen, *supra* note 11.

[193] ELLICKSON, *supra* note 27, at 10.

- "Filing motions to compel that involve trivial discovery disputes are not the best way to start any case. Most courts do not want to be bothered with unnecessary motion practice. Therefore, motions to compel typically should not be filed unless the discovery issue is important."
- "Similarly, filing discovery motions before making any meaningful effort to resolve a discovery dispute is ill-advised. Most trial judges expect lawyers to attempt to resolve their disputes outside of court."
- "Summary judgment motions should not be filed unless there is a colorable chance of success. Otherwise, the trial court may be left with an unfavorable impression and perceive that the moving party wasted the court's time and resources."[194]

These hacks are widely known in the legal industry and shape the progress of every litigation. Many of them may be simply best practices. But to the extent that they are informally enforced or become obligations, they are norms. When attorneys violate these norms, they may be punished with reputational consequences.[195]

TABLE 1: TYPOLOGY OF NORMS AND THEIR ROLES

Type of Norm	Role	Examples
Value Norms	Define normative commitments, tell judges what to aim for, simplify normative tradeoffs in litigation.	Pro-settlement norm; trans-personal norm; MDL norms on speed and global peace.
Discretion-Channeling	Narrow judges' discretion when the rules are open-ended. If rule allows X, Y, and Z, the norm may allow only Z.	Norm against Rule 11 sanctions—the Rule allows sanctions for a variety of behaviors but the norm only for egregious violations.
Coordination	Coordinate and distribute power in litigation.	Intra-judicial (judicial federalism norms that govern state-federal interactions); norms that govern MDL steering committees.
Workaday	Specify day-to-day tasks in litigation.	Norms on motions and discovery filings.

[194] *Best Pretrial Hacks*, *supra* note 12. For more on delegated discovery, see Robin Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 127 (2018).

[195] Workaday norms also interact with local rules, culture, and judge-specific standing orders. *See* W. Bradley Wendell, *Regulation of Lawyers Without the Code, the Rules, or the Restatement: Or, What Do Honor and Shame Have to Do with Civil Discovery Practice?*, 71 FORDHAM L. REV. 1567, 1575–76 (2003).

III. NORM ENTREPRENEURS AND THE NORMS-LAW CLASH: DISCOVERY TECHNOLOGY AND RULE 11

This Part explores two case studies in areas of procedure that seem to be increasingly dominated by norms: modern discovery tech and Rule 11 sanctions. These two areas display procedural norms in a uniquely clear manner and illustrate the power of norm-law dynamics. Moreover, while norms can be difficult to study because they are rarely written down, this Article focuses on these two areas because they involve unique datasets that expose how norms emerge: discovery protocols and judicial surveys. Section III.A focuses on discovery tech to show how norm entrepreneurs have developed procedural norms that guide technology-assisted review in complex litigation. Then, Section III.B explores how a few textual changes to Rule 11 between 1983 and 1993 led to a broader debate among judges and lawyers about the role of sanctions. In the end, a norm against sanctions became entrenched and won out against the Rule's text.

A. Norm Entrepreneurs in Discovery and TAR

This Section describes the evolution of a package of procedural norms that govern modern discovery tech. My contention is that in an area of procedure where there is very little law, attorneys have embraced a pattern of conventions and practices that together make up the norms of e-discovery.[196] For instance, attorneys nearly always demand a specific measure of TAR accuracy. Additionally, producing parties can choose their own search methodologies, must engage in a sampling strategy that ensures the proper training of TAR, and must prepare a proper validation strategy. The main piece of evidence for these norms comes from a dataset of dozens of discovery TAR protocols negotiated and employed in complex cases.[197] These protocols have consistently developed common approaches to TAR.[198] As a whole, they expose the otherwise opaque conventions of discovery tech.

By way of background, scholars have recently begun exploring the role of culture in the discovery process. Although discovery is central to complex litigation today, discovery procedures are not grounded directly in the text of the FRCP. To be sure, over a dozen rules in the FRCP structure a process of information exchange between litigators and clients. The rules provide for depositions, interrogatories, document requests, and nonparty subpoenas,

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[196] For background on TAR, see Guha et al., *supra* note 13, at 591–600.

[197] Neel Guha, Peter Henderson & Diego Zambrano, *Vulnerabilities in Discovery Tech: Dataset of TAR Protocols*, https://breakend.github.io/TARProtocols/ [https://perma.cc/BX6M-8GPF] [hereinafter Discovery Protocols Dataset].

[198] *See, e.g.*, Order Regarding Search Methodology for Electronically Stored Information, *supra* note 44, at *2–6 (specifying the TAR and search processes governing electronic data collection).

among many other tools. At the center of it all is Rule 26, which allows parties to request relevant material that is proportional to the needs of the case.[199] All of this makes discovery "extremely broad."[200]

Yet, the rules of discovery are underspecified and leave plenty of room for the emergence of norms and practices. Discovery's key feature is that it is mostly led by the parties, away from judicial supervision. The parties summon a judge by motion only when they have reached an irreconcilable impasse. This means, then, that there is not only little textual law but also no judge to develop a set of guiding doctrines. As Professor Edith Beerdsen recently argued, most of day-to-day discovery is instead governed by informal understandings among counsel in what has grown to be a discovery culture.[201] Setting aside the more general culture of discovery, the use of TAR displays how procedural norms emerge and evolve in procedure. This Section tracks that development by examining (1) the need for coordination around discovery tech and the tension around its emergence, (2) the ways in which various "norm entrepreneurs" influenced and made way for the creation of norms around e-discovery review, and (3) an inventory of the norms that emerged around TAR and e-discovery.

1. The Emergence of TAR and Demand for Norms

The story of the procedural norms of TAR began with the consolidation of TAR itself in the last decade. In the mid-2010s, attorneys began to incorporate the use of algorithms to process corporate databases in antitrust, employment, securities, and other complex cases. Previous technologies, such as keyword-searching, were insufficient to analyze and simplify the process of combing through millions of documents.[202] TAR, by contrast, allows technologists to train a model based on a seed set of manually reviewed documents. Vendors then apply the model to unreviewed documents and generate predictions on the likelihood that a document is responsive to a discovery request.[203] TAR systems save time and costs by reducing the number of attorney hours required to review documents.

Federal judges began to embrace TAR in the early 2010s, resolving discovery disputes in favor of TAR systems that could dramatically decrease

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[199] FED. R. CIV. P. 26.

[200] Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71, 80 (2020) (quoting United States v. Leggett & Platt, Inc., 542 F.2d 655, 657 (6th Cir. 1976)).

[201] Beerdsen, *supra* note 11, at 983–84.

[202] *See The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 201–02 (2007).

[203] Guha et al., *supra* note 13, at 592–93.

costs without a reduction in accuracy.[204] Repeatedly, judges allowed attorneys to use the most cutting-edge technology as a potential solution to complex discovery.[205] Notably, this judicial embrace was part of a broader process of education by attorneys and technologists that pushed the federal judiciary to accept and learn about TAR as an intricate but necessary tool. Sophisticated attorneys quickly incorporated TAR software into their practices.[206]

In time, however, plaintiffs and defense counsel ran into severe disagreements on the accuracy and opacity of some TAR systems.[207] Criticism ranged from the lack of information about TAR parameters, allegedly misleading representations of accuracy, and general confusion with the new technology.[208] This, in turn, provoked a concerted effort by the legal profession and federal judiciary to promote cooperation and transparency in TAR. Judges asked litigants to produce increasing amounts of information on the TAR process, negotiate over discovery protocols, and disclose how each TAR search was planned and conducted.[209] At the same time, litigants argued that courts should not impose overly onerous requirements that would increase costs and diminish the utility of TAR.[210] Some courts agreed and developed a presumption that each TAR process was appropriate until opposing counsel could produce evidence of "a material failure."[211]

This back-and-forth between litigants and courts created significant demand by attorneys and judges for informal consensus around the use of TAR. The system generally faced the pressures of having to increase transparency and accessibility while, at the same time, maintaining reduced

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[204] *See, e.g.*, Herbert L. Roitblat, Anne Kershaw & Patrick Oot, *Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review*, 61 J. AM. SOC'Y FOR INFO. SCI. & TECH. 70, 74–76, 79 (2010) (concluding that computer review systems are as accurate as human review); Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 1, 3 (2011) (asserting that technology-assisted review can be more effective than manual review).

[205] *See, e.g.*, Amended Order at *8, *11, Progressive Casualty Ins. Co. v. Delaney, No. 2:11-CV-00678-LRH, 2014 WL 3563467 (D. Nev. July 18, 2014) (affirming support for technology assisted protocols for discovery); Dynamo Holdings Ltd. P'ship v. Comm'r of Internal Revenue, 143 T.C. 183, 188–89, 194 (2014) (holding that parties can utilize predictive coding for discovery).

[206] Seth Katsuya Endo, *Technological Opacity & Procedural Injustice*, 59 B.C. L. REV. 821, 837–38 (2018); David Freeman Engstrom & Nora Freeman Engstrom, *TAR Wars: E-Discovery and the Future of Legal Tech*, 96 ADVOCATE 19, 19 (2021).

[207] *See id.* at 852–54.

[208] *See* Guha et al., *supra* note 13, at 585, 624.

[209] *Id.* at 597–98 (citing cases).

[210] *See id.* at 585.

[211] The Sedona Conf., *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 123–24 (2018) [hereinafter *Sedona Principles*].

costs and privacy. At the core of these disagreements were minute and technical questions over the use of TAR software. Every TAR system requires a series of decisions to train, refine, and validate document searches. At every step of the way, there is a range of possible choices that could result in a search that complies with Rule 26 and doctrinal requirements. The emerging pressure in the system was to simplify the process and generate sufficient trust in TAR so that litigants could not only maintain low costs and privacy but also accuracy.

2. Norm Entrepreneurs: Sedona, Bolch, Grossman, the DOJ Antitrust Division, and the Federal Judicial Center

Parallel to the technology-assisted reviews (TAR) legal disputes of the last ten years, an even more important conversation was taking place outside of the courtroom. The procedural norms of TAR emerged as part of a concerted effort by a series of norm entrepreneurs who sought to bring informal consensus via legal conferences and gatherings. Below, I focus on several institutions (the Sedona Conference, Bolch Institute, DOJ Antitrust Division, and Federal Judicial Center (FJC)) and one practitioner and scholar, Maura Grossman. These actors played an outsized role in shaping informal understandings about TAR and its subsequent development.[212]

The Sedona Conference. The Sedona Conference has become synonymous with modern discovery tech and complex litigation. In 1997, Richard Braman founded Sedona as a nonprofit institute "dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights."[213] Through Sedona, Braman organized yearly conferences on complex civil litigation topics, inviting faculty, judges, and practitioners to engage in sustained dialogue.[214] The conference quickly captured the zeitgeist of complex litigation, especially because it convinced judges to engage with the legal profession. As Judge Shira Scheindlin noted, Braman "really likes judges and I think he senses their need to participate, as equals, in the development of law and the legal profession."[215] After a few years, the conference created a tight-knit group. Judge Scheindlin even confessed that Braman called her by her first name,

[212] To be sure, technology vendors have also played a role in this debate and their self-interest means that they do not necessarily aim to improve complex litigation.

[213] *See* Kenneth J. Withers, *The Sedona Conference and Its Impact on E-Discovery*, *in* ELECTRONICALLY STORED INFORMATION IN MARYLAND COURTS 845, 845–47 (Paul Grimm, Michael Berman, Alicia Shelton & Diane Kilcoyne eds., 2020).

[214] *Id.* at 847–48.

[215] *Id.* at 850.

and they "became real friends . . . who could count on each other for support whenever we needed it."[216]

Braman and Sedona set their sights on e-discovery after a Conference on Complex Litigation in 2001.[217] Within a year, Braman established a working group focused on "eDiscovery and related issues . . . by meeting independently of the 'regular season' conferences, identifying discreet [sic] issues, and working collaboratively to produce commentaries containing legal analysis, proposing broad principles, and providing practical guidance."[218] One of the early key moves was to ensure that the working group included diverse members of the bar; that "plaintiff and defense lawyers, government and in-house corporate lawyers . . . and other important constituencies would all be represented."[219] In time, this working group became the preeminent source of e-discovery guidelines and, importantly, sought to "achieve consensus through dialogue" and provide guidance to lawyers and judges.[220]

This effort culminated in the *Sedona Principles* of e-discovery, a series of guidelines that have become nearly canonical. The original drafting team included law firm partners, retired magistrate judges, and counsel from diverse sectors of the profession.[221] The principles range from technical suggestions about preservation, to comments on the application of the federal rules to electronic information, all the way to statements about what is favored or disfavored in e-discovery.[222] For example, Principle 6 states what has become a powerful norm: "Responding parties are best situated to evaluate the procedures, methodologies and technologies appropriate for preserving and producing their own electronic data and documents."[223] Other comments discuss the value of advanced techniques such as "sampling" subsets of data.[224] Still others try to shape the culture around discovery, including Comment 5.f.'s injunction that "[e]x parte preservation orders are disfavored absent showing of necessity."[225]

The fundamental Sedona principle is a *value norm* called "The Cooperation Proclamation" and was spearheaded by Braman. Sedona published the proclamation in 2009 with this introductory sentence: "The

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[216] *Id.*

[217] *Id.* at 851–52.

[218] *Id.*

[219] *Id.* at 853.

[220] *See id.* at 852–53.

[221] *Id.* at 855–56.

[222] *Id.* at 856–59.

[223] *Id.* at 857.

[224] *Sedona Principles*, *supra* note 211, at 167.

[225] *Id.* at 110.

Sedona Conference® launches a coordinated effort to promote cooperation by all parties to the discovery process to achieve the goal of a 'just, speedy, and inexpensive determination of every action.'"[226] This statement is followed by two pages that stress three principles: Cooperation in Discovery is Consistent with Zealous Advocacy, Cooperative Discovery is Required by the Rules of Civil Procedure, and a specific Road to Cooperation. Finally, the proclamation ends with an endorsement of nearly 100 sitting and retired judges.[227]

From the beginning, the principles have led the development of both norms and case law on modern discovery. First, there has been substantial overlap between participants in the Sedona Conference and the judges and lawyers who have pushed e-discovery forward.[228] Second, and relatedly, endorsements and citation counts to the *Sedona Principles* evidence a profound influence on the entire legal profession. The Proclamation has garnered "more than 200 endorsements from state and federal judges," and a Westlaw search shows the term "The Sedona Principles" appearing in over 200 cases, 700 trial court documents, and 700 secondary sources.[229] For instance, one influential decision notes that, "[the] injunction that parties should collaborate in conducting electronic discovery underscores that cooperation is the keystone to any successful ESI discovery strategy."[230] Behind this, the Sedona Conference has successfully moved the profession towards consensus around its goals and guidelines.[231]

The Bolch Institute. After Sedona, another major institutional player has been the Bolch Institute at Duke Law School. Established after a major donation from Carl Bolch Jr., the institute specializes in organizing events to educate federal judges, including through a masters of judicial studies program. Within Duke Law, another institute, named the Electronic Discovery Reference Model (EDRM), has partnered with Bolch to coordinate the preparation of specific guidelines for TAR that would go beyond the *Sedona Principles*. To do so, beginning in 2016 Bolch and EDRM assembled a set of influential attorneys from both plaintiffs' and defendants' bar. Three teams, comprised of twenty-five attorneys, then spent

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[226] The Sedona Conf., *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 331 (2009).

[227] *Id.* at 331–38.

[228] Withers, *supra* note 213, at 866–67.

[229] *Id.* at 867; THOMSON REUTERS WESTLAW (Sept. 26, 2023), https://1.next.westlaw.com/Search/Results.html [https://perma.cc/TQS6-UNEM] (search "The Sedona Principles").

[230] Lawson v. Love's Travel Stops & Country Stores, Inc., No. 17-CV-1266, 2019 WL 7102450, at *1 (M.D. Pa. Dec. 23, 2019).

[231] *See Sedona Principles*, *supra* note 211, at 8.

over a year putting together detailed and technical suggestions for TAR.[232] The organization tackled several topics: "[W]hen TAR should be used, what type of disclosures need to be made, how a TAR-based production can be properly checked by the recipient for accuracy, and how it can be used in a cost-effective and timely manner."[233] The teams then presented a draft of their report in a conference that included fifteen federal judges; 75–100 practitioners and experts also assembled "to develop separate 'best practices' to accompany the TAR Guidelines."[234] The Bolch TAR Guidelines were finally produced in 2019 and reveal a wealth of unwritten norms discussed below.[235]

Maura Grossman. Another important norm entrepreneur has been a leading e-discovery consultant, Maura Grossman. Grossman rose to e-discovery fame in 2009 when she published a study finding that the use of TAR could "yield results superior to those of exhaustive manual review, as measured by recall and precision."[236] Courts have cited Grossman's study, along with one by Herbert Roitblat and co-authors, to support the use of TAR based on the insight that some algorithms are "no less accurate at identifying relevant/responsive documents than employing a team of reviewers."[237] Since then, Grossman has become even more influential as a consultant and special master, responsible for the proliferation of procedural norms.

One example of her influence comes from a case in which she participated as special master, *In re Broiler Chicken Antitrust Litigation*.[238] In that position, Grossman shepherded the preparation of a TAR protocol with detailed specifications of how to run and validate TAR systems. For example, the *Broiler Chicken* Protocol pushed the field forward by requiring sampling of nonresponsive documents to ensure that the recall rate was

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[232] BOLCH JUD. INST., TECHNOLOGY ASSISTED REVIEW (TAR) GUIDELINES, at i (2019), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1002&context=bolch [https://perma.cc/LG4S-KEMC].

[233] Michael Greene, *Direction for TAR: EDRM Duke Law Sets Sight on Technology Assisted Review Guidance*, 101 JUDICATURE 6, 7 (2017).

[234] BOLCH JUD. INST., *supra* note 232, i.

[235] *See infra* Section III.A.3.

[236] Grossman & Cormack, *supra* note 204, at 2; *see also* Thomas Barnett, Svetlana Godjevac, Jean-Michel Renders, Caroline Privault, John Schneider & Robert Wickstrom, *Machine Learning Classification for Document Review*, DESI III: ICAIL WORKSHOP ON GLOBAL E-DISCOVERY/E-DISCLOSURE 1, 1–2 (2009) ("[A]utomated search tools are more accurate and effective than simple keyword searching in managing the increasing amount of data subject to analysis in e-discovery.").

[237] Roitblat, *supra* note 204, at 74–75.

[238] *In re* Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772 (N.D. Ill. 2017); Michele C.S. Lange, *TAR Protocol Rules the Roost:* In Re Broiler Chicken, JD SUPRA (Feb. 9, 2018), https://www.jdsupra.com/legalnews/tar-protocol-rules-the-roost-in-re-22515/ [https://perma.cc/QX86-GFQL].

accurate.[239] One practitioner publication exemplifies the reaction in the field, noting the following:

> Magistrate Judge Jeffrey Gilbert and Special Master Maura Grossman released a detailed search protocol in In Re Broiler Chicken Antitrust Litigation . . . .
>
> This new Order will quickly gain momentum outside of chicken industry lawsuits. In your next e-discovery matter, take heed of the Broiler Chicken search and QC parameters to avoid ending up with egg on your face.[240]

Many of the particular requirements of the *Broiler Chicken* Protocol have become standard in the field, especially because of Grossman's influence. Even detractors have to prepare arguments against it.

DOJ and FJC. The final main players in the story of TAR involve government entities. The Department of Justice (DOJ) Antitrust Division guidelines have been a leader in requiring thorough TAR disclosures from defense counsel. Indeed, DOJ prepared a Predictive Coding Model Agreement and Model Second Request Agreement that has become an example for others.[241] Again and again, attorneys have used both the *Broiler Chicken* and DOJ Model Protocols to push their arguments in favor of TAR guidelines.[242] Another similar source of guidelines comes from the FJC, which has prepared a TAR "Pocket Guide for Judges."[243] Government adoption of specific TAR guidelines is simultaneously part of the norm propagation process as well as evidence that a norm has made it.

3. The Procedural Norms of TAR

The norms of TAR have emerged out of a confluence of the FRCP, the Sedona Conference, Bolch, Maura Grossman's work, and other cultural and social inputs. Every step of the way has involved the heavy influence of one or more of these actors. Judges embraced the appearance of TAR in the early 2010s with repeated citations to the Grossman and Roitblat studies.[244] The watershed moment in the emergence of TAR involved a Sedona Conference

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[239] Order Regarding Search Methodology for Electronically Stored Information, *supra* note 44, at *4–5.

[240] Lange, *supra* note 238.

[241] *Predictive Coding Model Agreement*, DOJ ANTITRUST DIV. (Sept. 25, 2018), https://www.justice.gov/file/1096096/download [https://perma.cc/DDS3-3PHB].

[242] Plaintiffs' Reply Memorandum at 17, *In re* Diisocyanates Antitrust Litig., 2022 WL 17668470 (W.D. Penn. Oct. 19, 2022) (No. 18-1001).

[243] TIMOTHY T. LAU & EMERY G. LEE III, FED. JUD. CTR., TECHNOLOGY-ASSISTED REVIEW FOR DISCOVERY REQUESTS: A POCKET GUIDE FOR JUDGES (2017), https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/panel-1_technology-assisted_review_for_discovery_requests.pdf [https://perma.cc/A8AQ-V62D].

[244] *See, e.g.*, Duffy v. Lawrence Mem'l Hosp., No. 2:14-cv-2235-SAC-TJJ, 2017 WL 1277808, at *3 n.11 (D. Kan. Mar. 31, 2017).

participant, Magistrate Judge Andrew Peck.[245] Hundreds of district court orders since have approved the use of TAR.[246] And the profession has also embraced the approach outlined by these actors, approving of TAR in surveys by large majorities.[247]

Let's repeat, again, that the FRCP say almost nothing about the specifics of discovery, let alone the use of machine learning algorithms.[248] As discussed above, judges have built some doctrine around this language, given the rules require a "reasonable inquiry" that is "complete and correct."[249] Still, very little of this translates to specific requirements that can be applied to TAR.

In the absence of technical guidance and specific rules, attorneys have coalesced around a set of practices for what makes a TAR search reasonably accurate and correct. While these practices are opaque and exist only within law firms and backrooms, there are luckily a few places where they are written: discovery protocols and guidelines assembled by some organizations. With regard to protocols, when parties in complex cases agree to employ cutting edge TAR methods, they often negotiate a set of guidelines that will govern the search process and its evaluation. To assemble a dataset of protocols, I searched through advanced databases (including Lex Machina) for protocols related to TAR.[250] I then reviewed areas of overlap between these protocols and guidelines produced by organizations such as the Bolch Institute or the Sedona Conference.[251] Finally, I discussed the existence of guidelines with a dozen practitioners, e-discovery specialists, and scholars.

While the TAR system has provoked profound disagreement over the last ten years, it has also motivated informal understandings around a few commonly used norms, including value, discretion-channeling, coordination, and workaday norms. Again and again, discovery protocols narrow in on similar choices. Even if they are not universal, these guidelines have commanded a wide range of support in the legal community. The following are a few examples of norms for the use of TAR.

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[245] *See* Endo, *supra* note 206, at 837–38.

[246] *See, e.g.*, Progressive Cas. Ins. Co. v. Delaney, No. 11-CV-00678-LRH, 2014 WL 3563467, at *7–8 (D. Nev. July 18, 2014) (agreeing with Grossman that in certain instances, traditional manual review is "ineffective" and predictive coding is more accurate).

[247] Endo, *supra* note 206, at 837–38.

[248] The only guidance comes from FED. R. CIV. P. 26(g).

[249] *Id.*

[250] *See* Discovery Protocols Dataset, *supra* note 197 (containing a dataset of TAR protocols, including brief descriptions of all documents in the dataset); Guha et al., *supra* note 13, at 587–88 (analyzing the dataset to uncover problems in TAR).

[251] *See* BOLCH JUD. INST., *supra* note 232; *Sedona Principles*, *supra* note 211.

- While the law requires "reasonableness" in a discovery search, attorneys nearly always demand that a TAR search achieve a recall rate of at least 70%.[252] This is an example of a discretion-channeling norm. *Norm originator*: Bolch, Grossman.[253]
- Producing parties can choose their own search methodologies and procedures but if the requesting party disagrees, they must negotiate a protocol. For example, parties should agree on how to train a TAR algorithm either with randomly selected documents, a manually reviewed set, or with a synthetic document. A related norm is that the producing party will prepare the "seed" set for itself.[254] This is a combination of discretion-channeling and coordination norms. *Norm originator*: Sedona Principle 6, Bolch.[255]
- Producing parties must also engage in a sampling strategy that ensures the proper training of TAR systems. This is a coordination and workaday norm. *Norm originator*: Grossman, FJC, Bolch.[256]
- Parties must prepare a validation strategy that evidences the proper use of TAR. That strategy should, for example, use randomly selected documents to evaluate performance. The producing party has to quality-control its own search.[257] This is a coordination and workaday norm. *Norm originator*: Bolch, Grossman.[258]

There are also patterns of behavior that straddle the line between best practices and norms. For example, protocols have developed common terms on de-duplication of documents. They also consistently require disclosures

[252] Maura R. Grossman & Gordan V. Cormack, *Vetting and Validation of AI-Enabled Tools for Electronic Discovery*, *in* LITIGATING ARTIFICIAL INTELLIGENCE 465, 481 (Jill Presser, Jesse Beatson & Gerald Chan eds., 2021) (evaluation protocols). Some courts have endorsed protocols with this recall rate. *See, e.g.*, Discovery Protocols Dataset, *supra* note 197.

[253] Grossman & Cormack, *supra* note 252. *But see* Order Regarding Search Methodology for Electronically Stored Information, *supra* note 44, at *6 ("A recall estimate somewhat lower than [70%–80%] does not necessarily indicate that a review is inadequate"); LAU & LEE, *supra* note 243, at 12 ("Though a recall or precision of 80% may be appropriate for one particular review, this does not mean that 80% is a benchmark for all other reviews").

[254] *See* Order Regarding Search Methodology for Electronically Stored Information, *supra* note 44, at *2; LAU & LEE, *supra* note 243, at 9. Some of this is making its way into doctrine. Guha et al., *supra* note 13, at 597.

[255] *See Sedona Principles*, *supra* note 211, at 118; BOLCH JUD. INST., *supra* note 232, at 40.

[256] *See* Grossman & Cormack, *supra* note 252; LAU & LEE, *supra* note 243, at 4; BOLCH JUD. INST., *supra* note 232, at 20.

[257] *See* BOLCH JUD. INST., *supra* note 232, at 24–25.

[258] *See id.*; Grossman & Cormack, *supra* note 252.

of documents not processed electronically, culling parameters, and TAR vendor and software names, among other things.[259]

These norms, and many others, have become internalized obligations and have a compelling power on the profession. To reach the level of a norm as described above, these standards need to be informally enforced. And the protocols show that they indeed are—attorneys who fail to comply with these norms may fail to agree on protocol terms and can end up in motion practice. Indirectly, some judicial decisions enforce these norms and even cite the *Sedona Principles*.[260]

The procedural norms, however, remain contested, flexible, and informal. Indeed, these rules may only be temporary because of existing pressures from lawyers on both sides. While the stakes are clear—transparency and access versus costliness and delay—it is culture, ethos, conventions, and norms where the stakes are sorted out.

B. The Clash Between a Norm Against Sanctions and the Text of Rule 11

This Section describes the clash between a judicial and lawyerly aversion to sanctions and the changing text of Rule 11. My contention is that a few textual changes to Rule 11 in 1983 and 1993—often heralded as responsible for a change in practice—are less than half of the story. The more important development in the 1990s, as evidenced by judicial surveys and practitioner reports, was the hardening of a norm against sanctions. In the end, the norm became entrenched and won out against the Rule's text.[261] The Rule 11 saga exhibits several lessons, including the existence of extremely powerful procedural norms that can subvert textual rules and the perils of challenging an entrenched norm without a legal consensus around reforms.

Before diving into this case study, one important point of clarification is in order. It remains unclear whether debates over Rule 11 amendments *created* the norm or whether the norm *pre-existed* even the 1983 reforms. I take no position on this scholarly debate in this Section. For our purposes, the Rule 11 saga is useful as an illustration of the dynamic interaction between norms and law. This subsection considers (1) the tension between the rule on sanctions and the norms limiting its use in practice, (2) the FRCP

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[259] *See, e.g.*, Order Regarding Search Methodology for Electronically Stored Information, *supra* note 44, at *2 (requiring disclosure of information about TAR software and vendor, culling parameters, quality control measures, and how the algorithm was trained, among other things).

[260] *See, e.g.*, John B. v. Goetz, 531 F.3d 448, 459 (6th Cir. 2008) (citing the *Sedona Principles* for the idea that a party has a duty to preserve certain information).

[261] In law and economics, they often refer to this kind of norm as a "sticky norm." *See* Kahan, *supra* note 45, at 619.

Advisory Committee's amendments to account for these norms, and (3) the subsequent hardening against using sanctions.

1. Evidence of an Unwritten Aversion to Sanctions

There is something peculiar about Rule 11—the text seems much more capacious or potentially punitive than the actual practice.[262] And this is not necessarily about the doctrine that has developed around Rule 11, which is itself quite flexible. By way of reminder, Rule 11 allows judges to sanction parties for failure to perform "an inquiry reasonable under the circumstances" and for presenting a case for "improper purpose."[263] But practitioners, empirical studies, and even the case law all evidence an obvious gap between the law on the books and the law in action. This gap became a matter of public discussion after the 2020 election law cases, when some observers criticized the federal courts for not immediately sanctioning election litigation.[264]

It turns out that those criticisms are partially supported by the available evidence—several threads do indeed suggest that Rule 11 is in practice much weaker than what the text of the Rule or even the case law would imply. Academic commentators and practitioners have repeatedly observed a "judicial culture" that seems uncomfortable and generally averse to granting sanctions under the Rule. Judges themselves admit this, routinely noting that "[c]ourts maintain a high bar for establishing a Rule 11 violation given judicial concern for encouraging zealous advocacy."[265] The canonical treatise by Wright and Miller similarly notes that "[t]here is no doubt that . . . [the] post-1993 version has been accompanied by a significant change in judicial attitude toward the application of the rule," away from routine grants of sanctions.[266] Practitioner publications sometimes advise attorneys to avoid

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[262] For a sample of the literature on judges and attorney misconduct, see Arthur F. Greenbaum, *Judicial Reporting of Lawyer Misconduct*, 77 UMKC L. REV. 537, 537 (2009), which discusses the failure of judges to report lawyer misconduct in adherence with mandatory reporting rules; Judith A. McMorrow, Jackie A. Gardina & Salvatore Ricciardone, *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1427–28, 1439–40, 1447 (2004); Leslie W. Abramson, *The Judge's Ethical Duty to Report Misconduct by Other Judges and Lawyers and Its Effect on Judicial Independence*, 25 HOFSTRA L. REV. 751, 779–80 (1997); and Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 794–800 (1993).

[263] FED. R. CIV. P. 11.

[264] *See* Wehle, *supra* note 41; Cummings et al., *supra* note 41.

[265] Antolini v. McCloskey, 335 F.R.D. 361, 364 n.1 (S.D.N.Y. 2020) (quoting Int'l Techs. Mktg., Inc. v. Verint Sys., Ltd., No. 1:15-cv-2457-GHW, 2019 WL 1244493, at *7 (S.D.N.Y. Mar. 18, 2019)).

[266] CHARLES ALAN WRIGHT, ARTHUR R. MILLER & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE § 1336.1 (4th ed. 2021). *But see* Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1, 3 (2002) (arguing that Rule 11 sanctions are used to target civil rights plaintiffs).

filing Rule 11 motions because they are allegedly harmful to the profession and legal morale.[267]

A few empirical studies point in the same direction—finding a dramatic underenforcement of the Rule in some contexts, even in cases where one would expect routine application. For example, in the 1990s the "Congressional Research Service could find only three cases in history in which Rule 11 attorneys sanctions were ever actually applied in securities Rule 10b-5 cases."[268] For that reason, the Private Securities Litigation Reform Act imposed a requirement that judges "include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b)."[269] Even then, however, the Senate Committee on Banking, Housing, and Urban Affairs Report expected no change "since the provision still relies upon the action of judges who have so far demonstrated little interest in imposing such sanctions."[270] As predicted, an empirical study by Professors William Hubbard and Todd Henderson found that the required certification of Rule 11 compliance was dramatically underenforced—judges apparently comply less than 14% of the time.[271] Again, this supports a general perception that judges are not interested in awarding sanctions.

Over and over, surveys and legislation proponents find that judges are opposed to making Rule 11 sanctions mandatory or harsher. For example, a 2005 FJC survey found that 91% of judges surveyed "opposed [a] proposed requirement that sanctions be imposed for every Rule 11 violation" and 87% wanted to retain the current Rule 11.[272] The legislative history of the proposed Lawsuit Abuse Reduction Act of 2017 notes that, at a "major 2-day conference" hosted by the Judicial Conference's Civil Rules Advisory Committee, "no research paper or participant suggested that frivolous lawsuits were a problem or that Rule 11 was inadequate and needed to be

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[267] *See, e.g.*, Drew Erteschik & Colin McGrath, *The Rule 11 Motion: Don't Do It*, LAWS. MUTUAL INS. CO. (Mar. 24, 2017), https://www.lawyersmutualnc.com/risk-management-resources/articles/the-rule-11-motion-dont-do-it [https://perma.cc/7EY6-FABF] ("This profession we've chosen is hard enough without Rule 11 motions . . . . Even if you believe your opposing counsel is the worst human being you've ever met, stop for a minute and consider what your Rule 11 motion will put them through.").

[268] S. Rep No. 104-98, at 34 (1995).

[269] Private Securities Litigation Reform Act, Pub. L. No. 104-67, § 101(c)(1), 109 Stat. 742.

[270] *See* S. Rep No. 104-98, at 34.

[271] Henderson & Hubbard, *supra* note 3, at S90.

[272] DAVID RAUMA & THOMAS E. WILLGING, FED. JUD. CTR., REPORT OF A SURVEY OF UNITED STATES DISTRICT JUDGES' EXPERIENCES AND VIEWS CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE 2 (2005), https://www.uscourts.gov/sites/default/files/rule1105_1.pdf [https://perma.cc/N2JG-G844].

amended."[273] In these and other surveys discussed below, there appears to be a consistent judicial attitude against harsher sanctions.

If there is indeed a gap between the law on the books and law in action, one potential explanation is a norm that constrains Rule 11. It is hard to define this shadow norm with precision, but it appears that judges are strongly averse to issuing sanctions except in extreme circumstances. This aversion is not grounded in Rule 11 text or case law but emerged out of a consensus in the profession that sanctions are demoralizing and unwarranted.

2. Changes to Rule 11 from 1983 to 1993

To understand how the procedural norms of Rule 11 solidified, it is important to trace the Rule's lineage. The argument here is that while the Rule's text changed in 1993, a norm evolved in the mid-to-late 1990s that counseled judges to avoid sanctions.

The story of Rule 11 reforms has been told many times. It mostly involves an underused Rule that existed from 1938 to 1983;[274] reforms that made it much easier to grant sanctions from 1983 to 1993; and then the final post-1993 iteration that shied away from mandatory sanctions. According to Wright & Miller, "the 1983 amendment[s] . . . reflected a deliberate effort to reduce delay and expense and to 'dam the flood of litigation that [threatened] . . . to inundate the courts,'" and "a response to more than a decade of self-criticism by the American legal establishment generated by a sense that there was a lack of professionalism and growing incivility among lawyers engaged in civil litigation, particularly during the discovery process."[275]

The Rule version that reigned from 1983 to 1993 was particularly punitive, especially because it required mandatory sanctions and covered "any improper purpose."[276] There is a general consensus that the 1983 version led to a different kind of overlitigation—increasing grants of sanctions from dozens of cases pre-1983 to over 6,000 cases in the span of ten years.[277] One study found that in the span of a single year, nearly a quarter

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[273] H.R. Rep No. 115-16, at 25–26 (2017).

[274] *See* D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 5 (1976).

[275] CHARLES ALAN WRIGHT ET AL., *supra* note 266, § 1311, 1331, 1315 (quoting Robert L. Carter, *The History and Purposes of Rule 11*, 54 FORDHAM L. REV. 4, 4 (1985)).

[276] Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 780–81 (2004) (quoting the 1983 version of Rule 11, FED. R. CIV. P. 11 (Supp. IV 1986) (effective Aug. 1, 1983)).

[277] Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155, 157 (1999) (citation omitted).

of attorneys had been involved in Rule 11 motions or orders.[278] Another study found that 82% of litigators in a few circuits "reported having been affected in some way by the Rule."[279]

But even in the midst of this hot Rule 11 period, there was some resistance to Rule 11 sanctions among the bar and judiciary. An empirical study of the effect of the 1983 rules argued that "much of the bar's resistance to Rule 11 ha[d] its source in the stigma attached to being labelled a Rule 11 violator."[280] And some judges were still perceived to be "overly tolerant" even under the 1983 rules. As Chief Justice Warren Burger noted in 1976, there was a "widespread feeling that the legal profession and judges are overly tolerant of lawyers who exploit the inherently contentious aspects of the adversary system to their own private advantage."[281] Similarly, Justice Antonin Scalia's dissent to the 1993 amendment to Rule 11 (joined by Justice Clarence Thomas and partially joined by Justice David Souter) also captured a cultural anti-sanction attitude: "Judges, like other human beings, do not like imposing punishment when their duty does not require it, especially upon their own acquaintances and members of their own profession."[282]

The 1983 textual changes provoked a backlash and several proposed reforms to make the Rule less punitive. In 1991, an FJC study found that half of all federal judges believed that Rule 11 sanctions "exacerbate[] unnecessarily contentious behavior between opposing counsel."[283] The Advisory Committee itself noted that "widespread criticisms of the 1983 version of the rule . . . were not without some merit."[284] As Professor Peter Joy summarized, the "stepped-up application of sanctions under the 1983 version . . . became the subject of 'vociferous debate' . . . [and] led the Advisory Committee . . . to 'scale back the more draconian aspects of Rule 11' and amend it once more in 1993."[285] The textual changes in the 1993

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[278] Joy, *supra* note 276, at 781.

[279] Lawrence C. Marshall, Herbert M. Kritzer & Frances Kahn Zemans, *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 985 (1992).

[280] *Id.* at 957.

[281] Warren E. Burger, *Agenda for 2000 A.D.—Need for Systematic Anticipation*, 15 JUDGES' J. 27, 31 (1976).

[282] 1993 Amendments to the Rules of Civil Procedure, 146 F.R.D. 401, 508 (Scalia, J., dissenting).

[283] *See* ELIZABETH C. WIGGINS & THOMAS WILLGING, FED. JUD. CTR., RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES § 2A (1991), https://www.ojp.gov/pdffiles1/Digitization/133855NCJRS.pdf [https://perma.cc/K8NC-KKJQ].

[284] Joy, *supra* note 276, at 782 (quoting Letter to Honorable Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure, *reprinted in* 146 F.R.D. 401, 523 (1993)).

[285] *Id.* at 766 (quoting Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 594 (1998)).

version included switching from mandatory to discretionary imposition of sanctions and a safe harbor provision.[286]

The general consensus among scholars, judges, and practitioners is that after 1993, Rule 11 practice became significantly less heated and much more tolerant of zealous advocacy. A leading casebook notes that "the 1993 amendments had the desired effect of cutting down substantially the cases and commentary under the prior version of the rule. Several studies and articles indicate general satisfaction with the functioning of the new rule."[287] Again, the Wright and Miller treatise similarly notes that "[t]here is no doubt that . . . the post-1993 version has been accompanied by a significant change in judicial attitude," away from routine grants of sanctions.[288] And several articles have found that sanctions grants declined.[289]

Yet, despite the change in practice, it is not at all clear that textual changes to the Rule are responsible for the more lenient Rule 11 environment. The text, by itself, is not enough to account for the changes. The most significant alteration, from mandatory to discretionary sanctions, would affect practice only if judges generally disagreed with the imposition of sanctions but felt bound by the Rule. But, as discussed further below, in 1990 a survey found that an overwhelming majority (80.9%) of federal judges had a positive view of the 1983 version's effect on litigation.[290] To be sure, it is difficult to square this survey's result with other evidence of a backlash among both lawyers and some judges. This shows that norms around Rule 11 sanctions were in flux in the early 1990s.

Nor can the change be attributed solely to doctrine, because judges continue to treat Rule 11 as quite flexible and punitive of a range of violations, including minor ones. Take, for instance, a series of Rule 11 cases that penalize the minor infraction of insufficient legal research. The Sixth Circuit has found that sanctions against an attorney for "not research[ing] the law at all" are "entirely appropriate."[291] This flexible application of Rule 11 sits beside more serious penalties on attorneys for failing to answer a judge's

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[286] *Id.* at 782–83.

[287] BARBARA A. BABCOCK, TONI M. MASSARO, NORMAN W. SPAULDING & MYRIAM GILLES, CIVIL PROCEDURE 448 (7th ed. 2021).

[288] WRIGHT, *supra* note 266, at 434. *See generally* Stephen B. Burbank, *The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11: An Update*, 19 SETON HALL L. REV. 511 (1989) (discussing the importance of judicial attitudes and local legal culture on Rule 11); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989) (doing the same).

[289] *See, e.g.*, Theodore C. Hirt, *A Second Look at Amended Rule 11*, 48 AM. U. L. REV. 1007, 1026 (1999) (reporting anecdotal evidence that "there are fewer sanctions motions filed under the amended Rule").

[290] H.R. REP. NO. 104-62, at 9 (1995).

[291] Frank v. D'Ambrosi, 4 F.3d 1378, 1387 (6th Cir. 1993).

direct questions, admitting that a complaint is frivolous, or making "sensational allegations with respect to a defendant without any factual basis whatsoever . . . ."[292] The point is that judges are quite free to apply Rule 11 sanctions to a range of behaviors, and appellate courts will regularly affirm those decisions.[293]

If the textual changes to Rule 11 in 1993 were not dispositive and the doctrine continues to be flexible, what explains the change in practice? What else is there to study in procedure?

3. The Mid-to-Late 1990s Hardening of an Unwritten Aversion to Sanctions

My contention is that the more important change to Rule 11 was the emergence of a norm against sanctions related to the 1993 text but fully in place only after the mid-1990s. The 1983 and 1993 changes provoked a debate within the profession and the judiciary about the role of sanctions.[294] By the late 1990s, a consensus appeared that hardened a procedural norm against sanctions. Whether this norm pre-existed the 1983 changes in some form or not is irrelevant here. It took a generational cohort change over the 1990s to fully solidify a norm that is informal, sociological, cultural, and attitudinal.

Again, several threads of evidence support the idea that a norm or cultural practice has built a strong aversion to Rule 11 sanctions. To begin, judicial surveys from the 1990s and 2000s capture an evolving attitude towards sanctions that transforms from support for the 1983 version of Rule 11 to opposition against it. A 1990 FJC study "found that a strong majority of federal judges believe that . . . the 1983 version of Rule 11 had a positive effect on litigation in the federal courts (80.9%)" and "should be retained in its then-current form."[295] In other words, in 1990 the surveyed judges were generally in favor of a harsh version of Rule 11. This judicial attitude did not instantly change after 1993. A 1995 FJC study "consisting of 148 Federal judges and over 1,000 trial attorneys," found that 52% of judges believed that Rule 11 "is just right as it now stands" and 66% "supported

[292] Clark v. Mortenson, 93 F. App'x 643, 651 (5th Cir. 2004) (upholding district court's sanctions, though not determining whether they were imposed under Rule 11 authority or inherent court authority); Carswell v. Air Line Pilots Ass'n, Int'l, 248 F.R.D. 325, 330 (D.D.C. 2008).

[293] 47 AM. JUR. TRIALS § 25 (2023).

[294] *See, e.g.*, Nancy H. Wilder, Note, *1983 Amendments to Rule 11: Answering the Critics' Concerns with Judicial Self-Restraint*, 63 NOTRE DAME L. REV. 798, 800–01 (1986); H.R REP. NO. 104-62, at 10 (1995).

[295] H.R. REP. NO. 104-62, at 9–10.

restoring Rule 11's compensatory functions once again."[296] And 40% of judges "indicated that the problem with groundless litigation was moderate to very large."[297]

By 2005, however, judicial attitudes had solidified toward a general aversion to Rule 11 sanctions. In another representative survey study, the FJC found the following beliefs by federal judges: 85% opined that "groundless litigation" was no more than a small problem on their individual docket; and 91% believed that sanctions should not be required for every Rule 11 violation.[298] Indeed, the contrast between 1995 and 2005 is noticeable: "In 1995, 22% of the judges thought that a sanction should be required for every Rule 11 violation, compared with 9% who think so [in 2005]."[299] Furthermore, while in 1995 66% of judges "thought that Rule 11 should include both compensatory and deterrent purposes," by 2005 this had dropped to 55% of surveyed judges; "the percentage of judges supporting the safe harbor . . . increased from 70% to 86%."[300] Finally, while in 1995 40% of judges described groundless litigation as a moderate to very large problem, less than 15% of judges in 2005 believed the same.[301] These attitudes towards Rule 11 continued in 2017 when Congress considered a proposal to strengthen sanctions.[302] During hearings, the Judicial Conference communicated to Congress that mandatory sanctions and a harsher approach "creates a cure worse than the problem it is meant to solve."[303]

There are several potential explanations for this apparent shift in judicial attitudes towards Rule 11. Some of the shift may be explained by differences in the sampling of judges or actual changes in the legal profession (and statutory requirements) that reduced frivolous litigation.[304] But some of it could be capturing contestation over the role of sanctions, with the eventual solidification of a norm. It appears, however, that judicial attitudes towards Rule 11 do not fully align with the Rule's changes—the 1993 version of the

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[296] H.R. REP. NO. 115-16, at 4–5 (2017); JOHN SHAPARD, GEORGE CORT, MARIE CORDISCO, THOMAS WILLGING, ELIZABETH WIGGINS & KIM MCLAURIN, FED. JUD. CTR., REPORT OF A SURVEY CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE 7 (1995), https://www.uscourts.gov/sites/default/files/rule11_1.pdf [https://perma.cc/HX2B-GC4U].

[297] RAUMA & WILLGING, *supra* note 272, at 4.

[298] *Id.* at 3, 7.

[299] *Id.* at 7.

[300] *Id.* at 5, 8, 9.

[301] *Id.* at 3.

[302] H.R. REP. NO. 115-16, at 20 (2017).

[303] *Id.* (quoting letter from David G. Campbell, U.S. Dist. J., D. Ariz., Chair, Advisory Comm. on Rules of Prac. and Proc., & John Bates, U.S. Dist. J., D.D.C., Chair, Advisory Comm. on Civ. Rules, to John Conyers Jr., Ranking Member, H. Comm. on the Judiciary (Feb. 1, 2017) (on file with the H. Comm. on the Judiciary Democratic staff)).

[304] Suja A. Thomas, *Frivolous Cases*, 59 DEPAUL L. REV. 633, 635–41 (2010).

text may have served only as a platform for a broader set of norms around sanctions. This may have been influenced by President Bill Clinton's Democratic appointments and subterranean norms developed within the profession.[305] In line with this generational change, the House Report attributes some of the change to the fact that half of the 2005 respondents had no experience with the prior rule—in effect, they did not know what they were missing.[306]

At the end of the day, there is support for the idea that a procedural norm shadows Rule 11 and creates a cultural aversion to sanctions. Commentators have not missed this development—over and over, the literature and judges have referred to the influence of culture or norms on Rule 11 sanctions. Still, we see contestation around the norm in the 1980s and 1990s and the eventual solidification by 2005 of a strong aversion to sanctions. One lesson is that textual changes to the FRCP cannot eliminate or create new norms. Instead, rule changes need a broader cultural consensus to succeed.

IV. THE PIVOT TO NORM-MAKING AND THE SUBVERSIVE NATURE OF NORMS

Once the role of procedural norms is appreciated, can the legal system better take them into account or weaken their role? There may well be certain procedural domains that need norms while others need rules. As this Part explores, one potential downside is that norms can either promote the values of the FRCP or they can, alternatively, subvert the FRCP by promoting a separate set of values. Still, that need not mean that we should weaken the role of norms. Rather, we should embrace a set of norm-making principles, oriented around the REA, that channel norms and take advantage of their flexibility.

Section IV.A begins with the observation that norms are ineliminable—they will always exist in one way or another. But they carry real costs: exclusivity, opacity, and the empowerment of elites. Taking that into account, Section IV.B then argues that proceduralists can harness the power of norms to make progress across a range of areas. Norm-making can provide a more flexible alternative to the paralysis of the REA process. In a sense, we may see the flourishing of norms as a hydraulic consequence of REA failure. Moreover, norms can be either harmonious or, by contrast, can embrace subversive values that promote innovation and cooperation. Instead

[305] *See* RAUMA & WILLGING, *supra* note 272, at 4 (describing the changed views of judges appointed after January 1, 1992).

[306] H.R. REP NO. 115-16, at 6 (2017).

of encouraging the same values that the FRCP promotes—adversarialism, predictability, and judicial discretion, among others—procedural norms sometimes promote expertise, flexibility, and party control. At times, this creates a healthy competition between norms and formal law for coordination of litigation. Norms also show that institutions shaping procedure extend beyond courts and the Advisory Committee—they include gatherings such as the Sedona Conference, where norms are hashed out. The key question is how to harness the benefit of subversive norms while decreasing their costs.

A. The Nature and Cost of Norm-Making

1. Norms Are Ineliminable and Can Be Harmonious or Subversive

The civil procedure rules are by their very nature permissive—judges have a lot of discretion to develop their own practices unless the rules prohibit it. Civil procedure is not a field governed by the old German proverb that "everything which is not allowed is forbidden." Even without relying on inherent authority, the starting question for any judge seeking to innovate is whether there is a rule that forbids the activity. And there simply isn't one for most procedural norms.

Civil procedure depends on unwritten norms even more than fields where norms have flourished, such as property and constitutional law. Procedure has evolved towards increasing pockets of delegated discretion to federal judges. But in the face of discretion, judges need some level of guidance. And procedural norms step into that void.[307] Having clear-cut rules in every area of procedure would be impossible. Discretion, again, is the *sine qua non* of litigation, and district judges need room to innovate. Take, again, the example of e-discovery. Since 1997, plaintiffs and defense counsel have lobbied the Advisory Committee to adopt rules.[308] But other than some general guidance, the committee has refused to intervene in a heavy-handed way for good reason: Any rules it may craft have the potential to stifle technological development and innovations. Moreover, sticky rules are likely to be outdated the moment they become effective.[309]

Norms can be in harmony with the general goals of the FRCP or they can be subversive (i.e., they emphasize different values). To back up, the

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[307] *Cf.* Renan, *supra* note 29, at 2193 (describing how presidential norms guide and enable judicial review).

[308] *See* Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, 37 BALT. L. REV. 321, 330 (2008).

[309] *See* Richard Marcus, *"Looking Backward" to 1938*, 162 U. PA. L. REV. 1691, 1723–26 (2014) (discussing how the digital revolution has provoked rapid changes to discovery procedures and the FRCP).

FRCP and statutes are generally guided by a common set of values embraced in Rule 1 and a legion of decisions. Some of these are easy to spot, especially Rule 1's emphasis on "the just, speedy, and inexpensive determination of every action."[310] Courts and scholars have often discussed other values such as trans-substantivity, accuracy, accessibility, simplicity, participation, and fairness.[311] And, of course, an even more fundamental value that undergirds the system is a reliance on adversarialism. To be sure, not everyone agrees on the importance of these values or whether there is a hierarchy among them. But at the very least there is agreement that FRCP values can be contrasted with litigation systems in other countries, where, for instance, adversarialism and accessibility are not paramount.[312]

Stacking up many of these procedural values against the procedural norms explored above reveals both harmony and dissonance. In general, there appears to be no necessary relationship between the norms' agenda and the systemic goals of the FRCP. Sometimes norms do promote traditional FRCP values such as accessibility. But often, in contrast to the FRCP and case law, procedural norms seem to value cooperation as a fundamental value rather than adversarialism, flexibility instead of stability, standardization across cases in place of discretion or delegation, party control of information rather than boundless transparency, and opaque technocracy as a substitute to the REA process. As discussed below, subversive norms can solve procedural problems by challenging rules that have ossified or are outdated.

Still, many norms do promote general FRCP values such as accessibility, simplicity, and fairness. Norms that govern the relationship between state and federal judges are aimed at simplifying complex litigation, increasing fairness, and promoting equal treatment. Same, too, for procedural norms in TAR, which aim to simplify the process and achieve uniformity across cases. Consider, again, discretion-channeling norms that work with the federal rules to narrow choices for judges. Many of these norms, and others, are appendages to the FRCP and work in harmony with basic procedural values.

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310 FED. R. CIV. P. 1.

311 *See generally* Solum, *supra* note 23, at 244–45 & nn.157–68 (accuracy and fairness); Michalski, *supra* note 23, at 325 n.11, 354–84 (trans-substantivity, accessibility, accuracy, participation, and efficiency); Frederic M. Bloom, *Information Lost and Found*, 100 CALIF. L. REV. 635, 650 (2012) (adversarialism).

312 *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824 (1985) (though the contrast between procedures has been "overdrawn," the Continental tradition allocates "greater responsibility of the bench for fact-gathering").

2. The Costs of Norms

In light of their inevitable nature, some may worry that norm development empowers a small set of elites to substitute an opaque norm-making process for the REA. It seems clear that procedural norms create an alternative process to formal rulemaking. As discussed above in the context of discovery, groups such as the Sedona Conference or the Bolch Institute can organize judges and attorneys to coalesce around new conventions and practices. Of course, these practices then must command a consensus in the legal profession. But groups like Sedona can serve as signal leaders, amplifiers, or originators of procedural norms. This is true for other organizations—the FJC similarly creates influential guides, including the *Manual for Complex Litigation*, with the cooperation of judges (but without the formalities of rulemaking). At the extreme, the Supreme Court can eliminate norms—such as deference to the rulemaking process—without any formal checks on its power.

A potential critique of procedural norms is that they allow judges and attorneys to safeguard their power at the expense of the more democratic REA process. The darkest portrayal of the story would go as follows: (A) Congressional amendments to the REA in 1988 required a much more transparent rulemaking process, including notice and comment, that deprived the judicial conference of their power to unilaterally change the FRCP; (B) this led to ossification and polarization in the rulemaking process among plaintiffs and defense counsel; (C) in the face of these problems, judges and legal elites have sought to reclaim their power through an opaque alternative—norm-making. In this portrayal, Sedona and the FJC are parallel organizations that sidestep the REA. A critic might support this portrayal by drawing on congressional statements that have argued that the "[f]ederal judiciary seems to have a flat policy of opposing *any* legal reforms that it does not itself propose."[313] Still more, some legislators have complained that the Judicial Conference of the United States safeguards its rulemaking power jealously, especially from Congress.[314]

Finally, critics could argue that this opaque system favors repeat players and sophisticated attorneys who can attend the right conferences and influence the right judges.[315] At worst, norms may allow insiders to dodge accountability. As discussed above, to the extent that legal actors like to be good sports with one another, they may refuse to punish acquaintances for

[313] H.R. REP. NO. 115-16, at 8 (2017).

[314] *Id.*

[315] *See* Helen Hershkoff & Luke Norris, *The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline*, 122 MICH. L. REV. 1, 44–49 (2023) (exploring how professional, institutional, and cultural forms of influence shaping legal decision-making).

rule violations. We may worry about exclusionary norms that serve the interests of insiders at the cost of access to outsiders.[316] Relatedly, when procedural norms place cases into pre-prepared litigation packages, they promote standardization rather than case-specific tailoring. The best example of this phenomenon occurs in MDLs, where norms push judges to preside over global settlements at the cost of litigants who want to proceed to trial.

But while these critiques are strong, we may be able to channel norm-making into areas where expertise outweighs the value of more transparent processes and can be checked by other means.

B. Channeling Norms as Solutions to Procedural Problems: Norms-Law Dialogue and Competition

An increased emphasis on norms to resolve litigation problems creates two potential benefits for civil procedure: the emergence of expertise-based solutions and flexibility in informal rulemaking. Some scholars have argued that the federal rulemaking process has collapsed and become paralyzed.[317] Yet litigation continues to generate demand for innovations to resolve complex cases. When this demand goes unmet by the formal law, lawyers and judges develop coordination mechanisms through norms. In this sense, norms and formal law compete as tools for coordination. And this includes a competition between norms and rules—if the rulemaking process is no longer realistically a forum for policymaking, we may potentially see norm development taking the lead. As described below, both harmonious and subversive norms can bring benefits to procedure.

1. Norms Can Be Flexible and Adaptable in the Face of Paralysis and Ossification

Start, then, with norms' potential to infuse flexibility into a system where rulemaking is difficult. Proceduralists of every stripe look to written rules to resolve perceived problems with the litigation process.[318] There is no better example than Judge Chhabria calling for the Advisory Committee to craft "a rule that brings some semblance of order and predictability to [MDL compensation]."[319] But in the face of this ever-present demand, the FRCP and Advisory Committee have found it increasingly difficult to amend the

[316] These costs might be especially pronounced for junior attorneys in the wake of COVID-19. With the rise of remote work and fewer interactions with senior attorneys—who are familiar with, and could convey the institutional knowledge of, the litigation norms—junior attorneys are at risk of failing to grasp and acclimate to a norms-oriented practice.

[317] Marcus, *supra* note 46, at 2487.

[318] Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 897 (1999).

[319] *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 953 (N.D. Cal. 2021).

rules.[320] As discussed above, the Civil Justice Reform Act required a much more extensive rulemaking process that centers on notice and comment. This has provoked delays and even paralysis in rulemaking in the last decade. The committee has repeatedly avoided rulemaking on the most contentious topics, including pleadings after *Twombly* and *Iqbal*, and MDLs.

The possibility of norms provides a more flexible alternative to the paralysis of the REA process. In a sense, we may see the flourishing of norms as a natural or almost hydraulic consequence of the REA failure. Norms serve a crucial purpose when formal rules are missing or too difficult to adjust. This flexibility is especially useful for areas with technological changes because procedural norms are adaptable and vary in their stickiness. Although norms need to build consensus before establishing themselves, they can also change quickly in response to a prominent conference or technological development. On the one hand, Rule 11 changes after the mid-1990s entrenched a norm that does not seem to budge even in the face of statutory requirements. On the other, norms in MDL have changed in response to single decisions.[321] This range stands in radical contrast to the stickiness of federal rules and statutes which are nearly impossible to change. Witness, for instance, decades of debates about the discovery rules, culminating with 2015 amendments that were relatively small. This process provoked thousands of comments by practicing attorneys and commentators, even though the amendments boiled down to the movement of proportionality from one part of the rule to another.[322] The rules are almost always sticky and create status quo bias.

Norms allow judges and practicing attorneys to apply their expertise directly into the creation of new guidelines. That is the case, for instance, in Maura Grossman's single-handed creation of the *Broiler Chicken* Protocol, which has become a norm-setter in discovery tech.[323] It is quite appropriate for the emergence of norms to be in a less transparent setting because they can be worked out over time. To be sure, one potential danger in the discovery tech context is the self-interest of vendors who want to maximize their profits and not necessarily improve complex litigation. But the norm-making process can check biased input by exposing norms to different audiences, including both defense and plaintiff-side lawyers.

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[320] Marcus, *supra* note 46, at 2487.

[321] Engstrom, *supra* note 24, at 15–17 (discussing how the *Lone Pine* decision created a new dismissal mechanism).

[322] Supreme Court of the United States, Order of April 29, 2015, https://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf [https://perma.cc/99S4-ZNQ7]; Comm. on Rules of Practice and Procedure, Draft Minutes as of September 22, 2014 (2014).

[323] *See generally* Order Regarding Search Methodology for Electronically Stored Information, *supra* note 44.

2. Norms Can Be Piloted Among Small Groups and Repeat Players, then Validated by the REA Process

In many procedural contexts, norm-making should begin a process of experimentation among small groups of litigants that, if successful, ends with rulemaking. While the norm-making process is necessarily elitist or can even empower self-interested repeat players, it may also in the right settings empower relevant experts. When norm entrepreneurs focus on informal norm-making, they make the process more opaque than the REA alternative, which includes notice and comment and public meetings. The danger is that the norm-making process can be captured by parties and elites who do not have the general public's interests in mind. But this process can also emphasize expertise. Both MDLs and the discovery tech process have been influenced by scholars, attorneys, and organizations that are ultimately experts in complex litigation, even if some are also self-interested.

At their best, norms go through a small-group meritocratic contest that selects for innovations that improve litigation. When judges attempt to change norms around some area of law—say, discovery—their innovations will either be endorsed by other litigants or judges, or rejected. That process can select for improvements in a narrow context. We can see the potential targeted usefulness of norms in the self-contained context of discovery tech that is dominated by repeat players. The procedural norms that govern discovery tech are, by definition, procedure-specific. But, beyond that, they are doubly specific to complex litigation with sophisticated attorneys. This laser-focus means that norms can develop without impacting a large percentage of the federal docket or unrepresented one-shotters. And norms can go through a tournament-like process that will weed out inefficient norms and select those that simplify discovery.

To the extent that self-interested elites corrupt the process and other problems emerge, then—but *only then*—Congress or the Advisory Committee can step in. But, at first, we should prefer the experimentation and flexibility that comes with small group norms. This is especially true in areas such as MDLs or discovery tech, where formal rulemaking would inevitably crimp the development of new technologies or fall behind the times. By relying on flexibility and elite management, discovery tech may have a better chance of flourishing and improving. In other words, rulemaking should come at the end of a judge and practitioner-led process—not at the beginning. If this were reliably the case, then procedural norms would turn out to be just the process by which formal rules are piloted or tested.

3. Fostering Harmonious Norms and Norm-Law Dialogue

One key feature of harmonious norms is that they are in dialogue with formal law and often cross-pollinate, improving both rules and norms in the process. The best example of this is the long relationship between norms and law in judicial case management. As discussed above, the growth of managerial judges was at first a norm-led development: judges in the 1970s and 1980s increasingly felt that they should carefully supervise and manage complex litigation. The development of norms around this process resulted in law-making when the Advisory Committee adopted Rule 16 as a way to formalize established norms. Rule 16 allowed for the "early and continuing control" and management of cases, as well as the "adopti[on of] special procedures."[324] But the process did not stop there. This broad language of control, management, and special procedures then served as a platform for new norms to develop and grow. The result of this dialogue has led to a norm-filled world of MDL, ad hoc procedure, and proliferating conventions and practices in complex litigation. And the culmination of all of this is now the potential demand for a new round of formal rules. This dialogue remains one of the key interactions of norms and law.

4. Harnessing Subversive Norms as Problem-Solvers

Beyond harmony, however, procedural norms can often challenge FRCP values—and this can potentially be harnessed to resolve current problems. Begin, then, with the contrast between the rules' commitment to adversarialism and norms' commitment to cooperation.[325] Commitment to the adversary system is at the heart of civil procedure. The FRCP both assume and build an adversarial system.[326] In general, the rules are sharp and empower parties to aggressively press their cases and police their opponents. Parties can file motions against each other, police compliance with discovery and ethical boundaries, and put pressure on opponents' cases by filing summary judgment or motions to dismiss. Repeatedly, judges justify the rules and sharp nature of the process with references to the adversarial system. As Roscoe Pound argued, "[w]ith respect to . . . rules of procedure, we should make nothing depend upon them beyond securing to each party his substantive rights—a fair chance to meet his adversary's case and a full

[324] FED. R. CIV. P. 16.

[325] *See* David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 U. PA. L. REV. 1001, 1086 (2021).

[326] Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 513 (1986).

opportunity to present his own."[327] Of course, the rules also promote cooperation at different stages.[328]

The rules seem organized to maximize each party's opportunity to lay out their case and probe their opponent's case. For example, one of the big problems in class action settlements is that lawyers on both sides may be eager to endorse the agreement even if most class members would not. In order to generate more adversarial contestation, Rule 23(e) mandates a settlement hearing where the judge is expected to scrutinize the deal on behalf of absent class members.[329] But, of course, the rules also encourage agreement, including Rule 37(a) urging that parties should compromise their discovery disputes and Rule 16's authorization of efforts to achieve settlement.[330] Still, as Judge Henry Friendly once noted, "[u]nder our adversary system the role of counsel is not to make sure that truth is ascertained but to advance his client's cause by any ethical means."[331]

One particular example of adversarial zealotry is the concept of "gamesmanship," which means that lawyers are allowed and even encouraged to "exploit every advantage."[332] In the context of discovery, gamesmanship can be seen as "any effort to violate the cooperative spirit of discovery by unnecessarily increasing costs, delay, and hostility."[333] Gamesmanship has accepted boundaries—attorneys are allowed to underproduce documents that may be relevant in discovery or engage in well-worn "document dumps."[334] None of this is sanctionable because it is seen as the essence of adversarialism, even though it is a direct affront to cooperation or professionalism.[335] Despite the hostile spirit behind these behaviors, courts have often tolerated them as permissible gamesmanship well within the boundaries of the FRCP and related statutes.[336]

Yet, a focus on procedural norms reveals a rejection of adversarialism and gamesmanship, and, instead, a push for attorneys and judges to achieve maximum cooperation. Return, again, to a prime example of this—the

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[327] Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 401 (1910).

[328] *See, e.g.*, FED. R. CIV. P. 26 (requiring a good faith meet and confer).

[329] *Id.* R. 23(e).

[330] *Id.* RR. 16, 37(a).

[331] Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1288 (1975).

[332] *See* Bloom, *supra* note 311, at 647.

[333] Guha et al., *supra* note 13, at 602; *see also* Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1401–02 (2008) (describing the history of adversarialism).

[334] *See* Guha et al., *supra* note 13, at 625.

[335] *See id.* at 602–03 (quotation marks and citations omitted).

[336] *But see* Spaulding, *Due Process*, *supra* note 169, at 2255–58 (noting that there has always been a powerful strand of anti-adversarialism in procedure).

Cooperation Proclamation's injunction in favor of "cooperation by all parties to the discovery process to achieve the goal of a 'just, speedy, and inexpensive determination of every action.'"[337] This proclamation came from the Sedona Conference with significant backing by judges, prominent attorneys, and scholars. Importantly, the explicit goal of the proclamation was to enshrine cooperation as a definitional quality of Rule 1's values of justice, speediness, and inexpensive adjudication. One judge explicitly endorsed this, noting that "[i]ndeed, the Sedona Principles' injunction that parties should collaborate . . . underscores that cooperation is the *keystone* to any successful ESI discovery strategy."[338] By emphasizing cooperation, the *Sedona Principles* have simplified electronic discovery and made it more predictable. To be sure, the settlement literature has long noted the trend towards judicially supervised settlement agreements.[339] But procedural norms go beyond mere promotion of settlement and stress the value of cooperation as the foundation of civil procedure. Again and again, procedural norms push the parties to agree with each other and to arrive at consensus rather than bringing disputes to the judge.

Another example of the emphasis on cooperation is, again, in MDLs. Abbe Gluck has noted that "MDLs operate by consent in almost every respect," and "[interviewed] judges described their own relationships with counsel as unusually collaborative."[340] Both judges and attorneys "emphasiz[e] cooperation and being less adversarial."[341] Note that this unusual level of cooperation is not inevitable. According to interviewed judges, "class actions did not foster these same kinds of relationships."[342] It may well be because MDLs are run via procedural norms, rather than the FRCP, that cooperation and consent have emerged as key features. Gluck, for instance, attributes the collaborative spirit to MDL judges' power to select lead counsel, a norm-filled power that is rooted in the work of norm entrepreneurs who created the *Manual for Complex Litigation*.[343]

Indeed, it may well be that the main goal of procedural norms is to avoid highly individualized disputes.[344] Take several examples discussed above:

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[337] THE SEDONA CONF., THE SEDONA CONFERENCE COOPERATION PROCLAMATION (2008), https://thesedonaconference.org/sites/default/files/publications/The_Sedona_Conference_Cooperation_Proclamation.pdf [https://perma.cc/8R8T-MYKX].

[338] Lawson v. Love's Travel Stops & Country Stores, Inc., No. 17-CV-1266, 2019 WL 7102450, at *1 (M.D. Pa. Dec. 23, 2019) (emphasis added).

[339] Resnik, *supra* note 9, at 376–77.

[340] Gluck, *supra* note 4, at 1699–1700.

[341] *See id.* at 1701.

[342] *Id.* at 1700.

[343] *See id.* at 1700–01.

[344] *See* Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2220 (1989).

the avoidance of Rule 11 sanctions, coordination between federal and state judges, consensus around the requirements of TAR, and the mechanics of a steering committee in MDL cases. At every instance, the priority is to achieve agreement between the parties over minute or technical questions rather than devolve into motion practice. As one MDL judge reported, the high quality of lawyers in MDLs allows them to "pick battles wisely and agree on many things, and focus on battles on things that really matter."[345] Same, too, for state-federal judicial coordination. MDL judges have "emphasized their processes of coordinating with state courts with parallel proceedings."[346] The goal is to, again, "cooperate and coordinate" to avoid pointless disputes.[347] As Professor Samuel Issacharoff recently noted, in litigation "[w]e can avoid the 'tragedy of the commons,' or more fiercely, the war of 'all against all,' through cooperation. But such cooperation, especially among dispersed strangers, requires an institutional mechanism."[348] Sometimes the federal rules provide that institutional mechanism, including via Rule 23 class actions, but at other times we rely on norms.

Procedural norms also promote several secondary values. First, they are geared towards preserving judicial attention away from distractions. In that sense, judicial economy is near the forefront of these unwritten rules. Here, of course, we see the high-level value of judicial economy in tension with the adversarial nature of litigation, and the desire for judicial economy is overriding.

Second, and relatedly, procedural norms can save counsel, too, from needless motion practice and provide ready-made options that speed up litigation. In other words, norms can provide consensual defaults that save negotiating time. Take, for instance, the emerging norms of discovery tech. In every single case, attorneys at the beginning of discovery are faced with the tricky issues of negotiating discovery protocols, engaging vendors or technologists to train a TAR system, and determining the parameters of the search, including technical details about TAR. There is significant room in these choices for gamesmanship and even abuse of the process.[349] But a series of norms step in at that stage to resolve potential disputes between the parties over the proper validation of TAR or whether the producing party must disclose seed-set documents. Rather than allowing the parties to engage in a

[345] Gluck, *supra* note 4, at 1701.

[346] *Id.* at 1703.

[347] *Id.* at 1705.

[348] Samuel Issacharoff, *Rule 23 and the Triumph of Experience*, 84 LAW & CONTEMP. PROBS. 161, 165 (2021).

[349] Guha et al., *supra* note 13, at 602–03.

free-for-all negotiation, procedural norms provide a pre-made package of provisions that parties are obligated to consider, lest they be regarded as uncooperative or rubes. They come with normative weight and a sense of obligation.

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On the whole, as Table 2 below summarizes, procedural norms can solve problems by building an infrastructure that is less rigid and focused on efficient dispute resolution. But they can clash against other values in their emphasis on substance-specific guidelines rather than trans-substantive or even trans-procedural rules, prioritization of flexibility instead of stability, and standardization across cases over discretion or delegation.

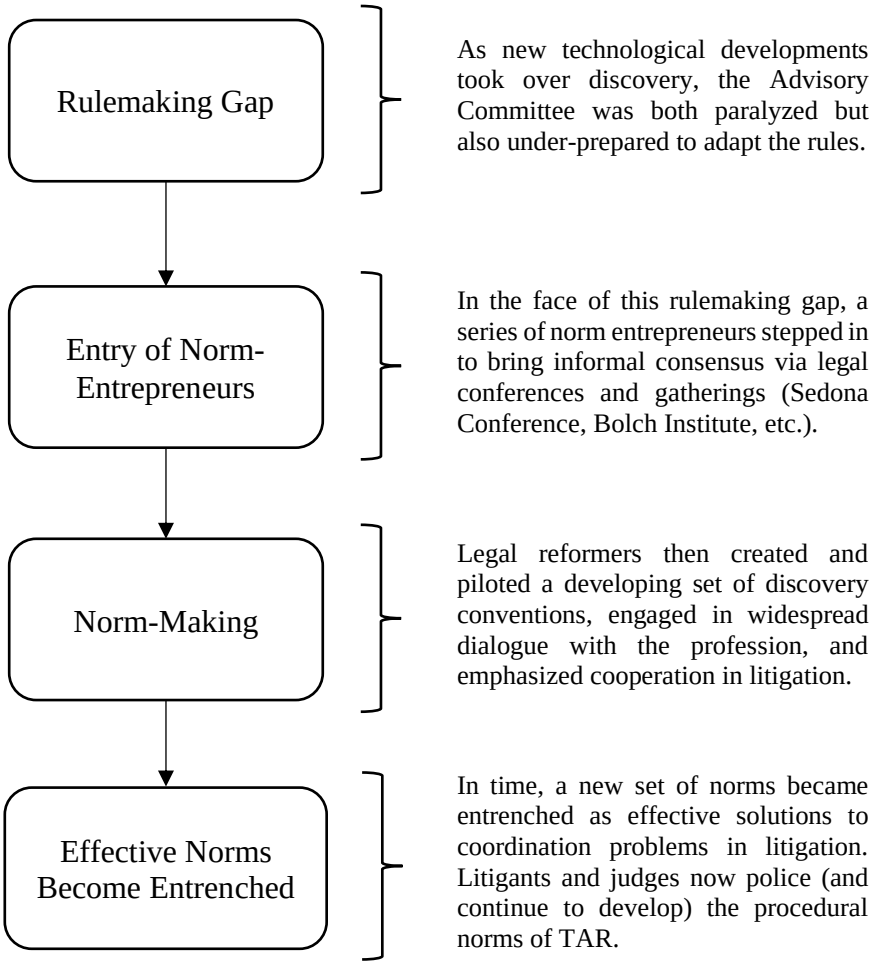
TABLE 2: HOW NORMS CAN SOLVE PROBLEMS

Norms as Solutions: Mechanism	Problem-Solving Potential	Costs
Flexible and Adaptable	In the face of rulemaking paralysis, norms can provide a flexible alternative. For example: areas involving technological change (discovery), MDLs, etc.	Opacity, rejection of REA process.
Norms Can Be Piloted, Spurring a Meritocratic Contest and Tournament Effect	Norms can be experimental, temporary, and subject to a meritocratic contest. Rules cannot easily be piloted. Emphasis is on expertise.	Danger of capture by self-interested insiders.
Norm-Law Dialogue and Cross-Pollination	Norms can inform rules, and vice versa. This dialogue allows cross pollination, allowing norms to inform new rules and to respond to new rules dynamically.	Lack of predictability, no formal oversight.
Subversive Norms Can Challenge Ossified Rules	When norms are subversive, they can challenge rule ossification and allow for new innovations.	Subversive norms can sabotage the rules, empowering repeat players.

5. Discovery and TAR as Examples of Norm-Making

To conclude, we can see the problem-solving power of procedural norms most clearly in the context of electronic discovery and TAR. The Figure below combines Parts II, III, and IV of the Article to describe the progression from rulemaking gaps to norm-making.

FIGURE 2: THE NORM-MAKING PROCESS IN DISCOVERY AND TAR



Because of norms' flexibility, they can often step in when the Advisory Committee is paralyzed. And, if entrepreneurs successfully convince the legal community to accept new norms, they can become entrenched solutions to coordination problems in litigation.

C. A Research Agenda: Principles of Procedural Norm-Making

In order to fully harness the benefits of norms while decreasing their costs, a broader research agenda must identify a set of design principles for norm-making. While a full discussion of those principles is beyond the scope of this piece, the study above suggests that norms are appropriate: when the formal rules are ossified and difficult to enact or amend (as in MDLs); when a small group of judges and attorneys can experiment with new procedures without impacting a large percentage of the federal docket (as in discovery tech); when cases mostly involve sophisticated repeat players on both sides, rather than consumers or one-shotters who may be harmed by exclusive norms; and when technological development is at the cutting edge and rulemaking would weaken it. But even outside of these domains, reliance on norms is inevitable. The research question going forward is how to channel norms to the right places while limiting their costs.

CONCLUSION

As this study of modern litigation reveals, norms have a surprising amount of influence in civil procedure. Evolving procedural norms coordinate the litigation pipeline, shape the behavior of state and federal judges, organize day-to-day interactions between attorneys, and govern much of electronic discovery and MDLs. And these norms appear to be related to broader legal norms that scholars have mapped in contexts such as constitutional law, property, or bankruptcy.

Most importantly, harnessing the power of norm-making can help resolve problems in litigation. Traditionally, proceduralists have looked to written rules to resolve most coordination problems.[350] The problem with this approach, however, is that the Advisory Committee is increasingly paralyzed and faces enormous barriers to the adoption of new rules.[351] This lack of rulemaking has created a vacuum that invites creative norms. And, as Part III discussed, we have already seen successful norm-making in contexts such as discovery and sanctions.

A pivot towards procedural norms and norm-making can both inform debates roiling civil procedure and help create new solutions. Debates over MDLs, for instance, should focus on norms: informal practices, beliefs, and customs. Many debates center on a handful of key norms, like: speed is the marker of success of MDLs, parties and judges should settle and avoid trials, judges should discard traditional litigant autonomy, judges should select and

[350] *See* Bone, *supra* note 318, at 894–95, 897; *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 953 (N.D. Cal. 2021); Spencer, *supra* note 47, at 607.

[351] Marcus, *supra* note 46, at 2487.

compensate attorneys on the steering committee, and the steering committee (and defense counsel) have power to impose settlements on other plaintiffs.[352] Relatedly, the MDL world has also spawned a debate over so-called "ad hoc" or "unorthodox" procedures.[353] Some scholars argue that judges have created a set of new procedures to manage complex litigation, leading to potential unfairness for plaintiffs and defendants alike.[354] By contrast, an alternative view is that ad hoc or unorthodox procedures are not new and are just part of our old common law tradition.[355] A pivot to norms can restructure this debate. Many ad hoc or unorthodox procedures are just the instantiation or operationalization of norms. These devices are tools that implement deeper norms—for example, to promote settlements, reward lead counsel, and aggregate cases at all costs.

Even more broadly, norms can shed light on one of the greatest procedural debates—over "procedural retrenchment," a series of Supreme Court changes that make it more difficult to file claims in federal court.[356] Scholars have mostly criticized these changes as closing access to justice.[357] While debates mostly center on either the doctrinal developments or the broader political underpinnings of this process, some scholars have highlighted a change in "ethos."[358] As Professor Benjamin Spencer has argued, these changes represent a deeper shift towards a "restrictive ethos" that rejects the older "liberal ethos" of the federal rules.[359] This is, in the terms of this Article, a change in norms. Specifically, procedural retrenchment has rejected and contested key norms: that judges should err on the side of allowing plaintiffs to access discovery, that class actions are a key vehicle for the enforcement of law and policy, and that significant procedural change

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[352] Gluck, *supra* note 4, at 1692, 1698–1700.

[353] Bookman & Noll, *supra* note 75, at 772–73; Gluck, *supra* note 4, at 1671.

[354] *See* Gluck, *supra* note 4, at 1674, 1676 (cataloging concerns around MDL procedures, including unfairness).

[355] *Cf.* Alexandra Lahav, *Multidistrict Litigation and Common Law Procedure*, 24 LEWIS & CLARK L. REV. 531, 532 (2020) (arguing that procedural rules, including those used in MDL, develop according to a common law fashion).

[356] *See* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 16 (2017). Cases include *Bell Atlantic Corp. v. Twombly*, *Ashcroft v. Iqbal*, *Walmart v. Dukes*, *AT&T v. Concepcion*, and others. *Twombly*, 550 U.S. 544 (2007) (establishing a stricter "plausibility pleading" standard); *Iqbal*, 556 U.S. 662 (2009) (affirming plausibility pleading); *Dukes*, 564 U.S. 338 (2011) (requiring a common injury to qualify for class certification); *Concepcion*, 563 U.S. 333 (2011) (allowing corporations to bypass class actions by including arbitration clauses in standard contract terms).

[357] *See, e.g.*, Miller, *supra* note 6, at 14.

[358] A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353–54 (2010).

[359] *Id.* at 354.

should come from a democratic debate that involves the Advisory Committee or Congress (and not solely the Supreme Court).

In all of these areas, procedural norms are powerful because written law cannot govern every detail of litigation. That is why focusing on norms is pivotal to advancing modern debates over the role of aggregate litigation, discovery, and repeat players. For some of these debates, norms may even provide solutions that the rulemaking process cannot provide. But, either way, we cannot begin to understand civil procedure without first glimpsing at the norms that sit just behind the text.