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TRIAL BY AMBUSH OR AVALANCHE? THE DISCOVERY DEBACLE

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I fell in love with the law in 1946, during my first week in law school. It has been a torrid affair ever since. "Ever since" has entailed seven years of law practice followed by thirty-two years of law professing, eight of these as a dean. Against this backdrop of fealty, I had occasion recently to encounter the legal process as it presently, honest-to-God, exists. This encounter was not as a lawyer, not as a law professor, not as a consultant, not, that is, as a professional impersonally involved, but as the father of the mother in a child-custody case. It was a *client* exposure. I came away from the experience not merely angry and disillusioned, but *outraged.* Why?

It had nothing to do with the quality of the performers involved. The judge was a person of the highest quality, as were the lawyers on each side, and indeed the parties themselves. It had to do with the *system* of justice I encountered on this highly sensitized return to the lists—a system not only "flawed," to use Harvard President Derek Bok's catching phrase,[1] but *indefensible*—an utterly appropriate target for the infamy being visited upon it.

That custody case would have been tried back in the early fifties in my native city of Detroit, Michigan, in not more than a day, maybe half a day; the total attorney fees, *both* sides included, would have been in the neighborhood of a thousand dollars, probably less; and the decision in the case would have been the same because it *should* have been the same.

Tried under the present scheme of things, that custody case, while still weeks away from trial, had accumulated a pile of depositions several inches

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1. Bok, *A Flawed System*, HARVARD MAGAZINE 38 (May-June 1983); Bok, *Law and Its Discontents: A Critical Look At Our Legal System*, 38 REC. A.B. CITY OF N.Y. 12, 13 (1983).

high. Testimony under oath showed that the other side already had thirty thousand dollars invested in the case. Our side, defending against the avalanche of paper, had less than that but much too much invested—the lesser amount being attributable to the friendship and charity of our lawyers. The "trial" itself took two full days, probably *three* times its length before the discovery reform, despite the fulsome "pretrial" preparation.

Nor was the cost in money alone. Litigation abrades. Those who are drawn into it, even as witnesses, are apt to leave it with a sense of grievance, sometimes deep. Regard for the law, lawyers, judges, and the legal process is apt to be inversely proportional to the degree of litigative exposure. This negative reaction is particularly true for "deposees," because of the greatly increased area for probing under the relaxed standards for relevance.[2] The probers begin with questions as to name and address, escalating into semi-relevant and irrelevant personal history, with scant protection to the deposee even when that person has a lawyer present (typically the lawyer for the *party* whose "side" the deposee is presumed to be on). Irrelevant invasion of the deposee's *privacy* is highly apt to be treated as irrelevant also by the lawyers involved—a part of the discovery *convention*. The alternative is a catfight at the deposition or motion-warfare to get the issue into a courtroom, where it is likely to be lost in any event *and* to antagonize the judge. (The "convention" is not merely "I'll scratch your back if you'll scratch mine," but also the variant "I'll spare your back, lower down, if you'll spare mine.")

In the custody case, I and other members of my family were deposed, as well as testifying at the trial; all of us came out of the process with lasting bitterness (despite having won!)—the product of overly broad and redundant probing. The redundance was inbuilt; we testified at the trial as we had at the depositions. The truth does not change with revisitation. It just costs more. And some of the people deposed were not even called as witnesses; they were gratuitously abraded by a discovery net cast too far.

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2. For example, under the Federal Rules of Civil Procedure, adopted initially in 1938, a party may obtain discovery by "depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission." Fed. R. Civ. P. 26(a). As to the scope of discovery:

> [p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. *It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.*

Id. at (b)(1) (emphasis added).

In the course of this fresh client-contact with the law, I "went to school" again, this time as one caught in the trappings of the current legal process. The elements of my frustration and anger were clear to me at an early point: the proceedings were irresponsibly expensive and hurtful (one member of my family, a non-party, suffered serious and gratuitous emotional distress). What I "went to school" on was: *Why* this *senseless* pattern? *How* had things got this way in the quarter-plus of a century since I had last had the client-type exposure to the system?

I early perceived the crucial difference between the trying of this custody case today and the way it would have been tried some thirty years ago. In the "old days," the evidence would have been presented in the presence of the judge. Since the judge had a busy docket to attend to, he was motivated to maintain firm control over the scope, the *relevance*, of the evidence sought to be introduced. There was, as a consequence, a kind of built-in economizer for everyone involved in the proceedings—judge, lawyers, parties, witnesses.

The situation was strikingly different today, I discovered. The judge not only was not around when most of the testimony was taken, he never even had to read it. Indeed, the judge had very little to do with the discovery process. The lawyers on each side accommodated one another; each side could depose whom it chose. The only way to achieve a forum on the issue of relevancy was to file a formal objection; and this, as I gathered after strenuous argument (fueled by incredulity) with *our* lawyer, was not only not quite "cricket," but also losing "chess." In effect, the relevancy standard under the rules now in place is too low to justify challenge, except in ultimate cases, of which, by definition, there are few.'

What all of this boiled down to was that the *lawyers* were in charge of the gathering and presentation of the evidence. If they went beyond reasonable bounds, the operative "sanction" was higher fees. I was reminded of that classical version of negative incentive: "Goats in charge of the cabbage patch." But these were, in a manner of speaking, *my* goats—my *beloved* goats—in *my beloved cabbage patch*! *Lawyers engaged in the legal process*!

One of the implications of lawyers being in charge of the gathering of the evidence and of the *potential* evidence, i.e., of the discovery, now rang clear to me. As a law school dean, I had for several years regularly dined with the recruiters who came to our campus from law firms across the country, screening our students for possible employment with their firms. Two things were true of those firms, wherever they were from, coast to coast: they were exploding in size, and the explosion was in something they called their "litigation department." No longer were the people who tried cases called "trial lawyers," as they had been when I practiced law; now they were called "litigators." Most of them, most of the time, never got to court. Their "court" was lawyers' offices and hotel rooms; they took depositions and framed interrogatories. There was, it dawned on me, a rather

clear relation between my disturbing experience in that custody suit and *the expansion in the population of lawyers* (from 1951 to 1985 a three-fold increase).[3]

I have never taught in the civil procedure, evidence, or trial practice areas, so I had no sharp understanding of the discovery "reform" movement which I now belatedly learned had so revolutionized the practice of law. Research revealed that the modern reforms had their advent in 1938 with the adoption of the Federal Rules of Civil Procedure.[4] These have been widely copied by the states. The impetus for these reforms came from high-minded students of the legal process: judges, law professors, lawyers.[5] They wanted to improve the quality of trials by eliminating the surprise and trickery, by sharpening the focus on the real issues and eliminating the false ones, and by having more of the relevant evidence brought to bear and less of the irrelevant. In short, the reformers were focused upon the streamlining and facilitation of the *trial*, hoping also for a concomitant reduction in the expense of the *trial*, perhaps by avoiding it completely by way of pretrial settlement. Trial by *ambush* was the perceived problem, pretrial discovery the answer.

The error of the reformers—from whence the *debacle*—was substantially definitional in nature: they defined the "trial" they wanted to improve *narrowly*, excluding everything that transpired between the time the suit was started and the time the court convened to consider the fruit of the discovery harvest. To the extent this pretrial process was considered at all, it was scrutinized not for itself, but for the contribution it could make to the elevation of the trial proper. In retrospect, this seems a remarkably myopic, indeed frivolous, view of the litigative process—a view which makes judges of lawyers and bystanders of judges.

The primal assumption was that lawyers could be put in charge of the discovery process, with little judicial supervision, and thereby produce positive societal results. A correlative assumption was that the standard for relevance could be almost totally relaxed without adverse effect.[6] The trust which these two assumptions placed in lawyers is not only incredible, but touching. I say this without the slightest intention to impugn lawyers individually or the bar generally. The weight of the professional responsibility

3. The lawyer population in 1951 was 221,605, with a ratio to the general popultation of 1/695; the lawyer population in 1985 was 675,000, with a ratio of 1/354. The 1985 figures are estimates. *See* B. CURRAN, THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980s, table 1.1.1 at 4 (1985).

4. *See generally* 4 J. MOORE, J. LUCAS & G. GROTHEER, MOORE'S FEDERAL PRACTICE 26 (2d ed. 1986).

5. *See, e.g.*, Pike & Willis, *The New Federal Deposition-Discovery Procedure* (pts. 1 & 2), 38 COLUM. L. REV. 1179, 1436 (1938).

6. *See supra* note 2.

thus placed upon lawyers is simply too heavy for human carriage.

We ask the lawyer simultaneously: (1) to champion the client's cause to the full extent of the law; (2) to ferret out, in the process, all *arguably* relevant evidence by seining through all *potentially* arguably relevant evidence; (3) to conduct the case throughout in a manner which will minimize the exposure to charges of malpractice; and (4) *not to abuse discovery*. The product of such a system is inevitably too much law, too much lawyering, too much "litigation," too much expense. We have asked lawyers to play "God," and they have responded in the only way human beings playing "God" can respond—inadequately.

The fact that discovery can also be used for tactical reasons, *as an end in itself*, simply aggravates the situation. "Bury them!" a client may say—i.e., the other side, *in paper*. But this aggravation is, like a cancer scab, only a *symptom* of malignancy. The problem is not with the manipulation, but with the *manipulability*—with the *system*, the *norms* of the system, the fact that the lawyer is charged in the adversarial role with the *professional responsibility* to press the client's cause to the limits of the rules under which the system operates, and the further fact that those rules are too amorphous both in substance and procedure to achieve the essential containment.

As with malignancies generally, that of discovery has been worsening over time. When the federal discovery reform was launched in 1938, the existing bar was, as might be expected, conservative in its reaction thereto. A lawyer who has been trying cases for a substantial period of time does not start trying them differently overnight. Indeed, the bar of the first couple of decades following that federal launching continued to implement discovery conservatively. Moreover, the adoption of the federal discovery "reforms" by the *states* lagged; procedural means for the obtaining of discovery had long been in place, but they were severely limited, applicable, for example, to the parties only and to situations where the testimony of a witness might otherwise be unobtainable by reason of geographical distance or feared supervening death. But, gradually, several currents merged to produce what has now become a snowballing torrent of discovery, in both federal and state courts, yielding an *avalanche* of "evidence" and even more of "non-evidence," paid for by the pound—even in a little runny-nosed custody case!

Ironically, only a small fraction of the "evidence" discovered ever sees the light of introduction at the "trial" itself. Implementing the irony, the present generation of lawyers has been raised in an ethos where discovery is the norm. It is easier than the old-fashioned system of tracking down witnesses, *pen and pad in hand*. Now, in addition, the witness comes to you in response to what amounts to a court order, *hat in hand*. Why *not* work each witness over more broadly than may prove really necessary or than you *could* in the old days when the witness's good will had to be maintained as a condition precedent to obtaining the witness' statement? Why *not*, indeed,

over-discover, just to make certain you have thrown your net widely enough? Why *not* put those extra "billable" hours on the time-pad? Who knows, maybe you *will* find something. You have, indeed, the professional responsibility to essay to the *hilt*, wherever inquisition may demonstrate that hilt to be.

Is it any wonder that the cost of litigation has sky-rocketed? So much so that the counter-reform movement is, ironically, "alternative methods of dispute resolution."[7] The irony is that we have spent, literally, centuries in developing a system of litigation, adversarial in nature, which will achieve justice in private disputes. To this end, we have succeeded so well, created a system so precious, that most of us can no longer afford to use it!

Nor is that expense readily measurable. It entails not only the cost of additional lawyering and "court"-reporters' fees, but also an incalculable cost in the time of deposees and "interrogatees" called upon to rally the broadly defined "evidence," to make themselves available for deposition and for answering interrogatories.

The call now is to create a *new* system for handling the "little" cases (those under twenty-five or thirty thousand dollars?—the "floor" rises dizzyingly) in some more expeditious fashion than our system of litigation now assures, without loss of justice.[8] To handle, that is, the legal problems of the vast majority of the people, the problems for which a society develops a legal system in the first place. In other words, we must recreate the wheel. One way of doing this is to turn back to the evidence-producing procedures of pre-1938. Indeed, that is essentially what the suggested "alternative" solutions are motivated to achieve: techniques for avoiding the expense and delay of discovery.

How did things get this way? The potential was in place with the advent of the Federal Rules in 1938, followed by the state adoptions of those rules. But the bar itself had to "go to school" on this new system. The "teachers" were the pioneers who first experimented with the new strategies and tactics now available, not merely for *trying* a law suit, but also for *discovering* one by poking around in other people's minds and papers. Where such poking around produced causes of action, counter-poking might produce defenses and counterclaims. Once the other side comes after you with a strategy of paper warfare, there is no retreat but counter-paper.

The amount of time it takes to master this quite awesome array of discovery weaponry, to master the strategy and tactics of paper war, to develop the *audacity* necessary for its fullest exploitation, impedes the early

7. Law school courses are now developing for the teaching of this movement. *See, e.g.*, RISKIN & WESTBROOK, DISPUTE RESOLUTION AND LAWYERS (1987) (coursebook); KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION (1986) (casebook).

8. *See* sources cited *supra* note 7.

implementation. The costs do also, but not for the client sufficiently wealthy to make the very expense of the paper war a weapon of its own. Where the paper war involves the *business* of clients, most notably corporations, the costs of litigation are tax-deductible, and other taxpayers, in effect, pay for it. The attacking corporation is happy; the attacked corporation has no choice but to respond in kind. The lawyers on each side have a money-tree.

The same is true in certain non-business-type litigation, e.g., medical malpractice actions. Some lawyer, a paper warrior of sufficient prowess to have a bankroll, bankrolls (on a contingent-fee basis) the impecunious client against (in the background) some insurance company. Again, both the plaintiff's attorney and the insurance company "write-off" the costs involved as tax deductions.

The more successful the attorney or law firm, the more skillful it is in the use of the discovery weaponry. Success begets emulation: the lawyers' road to heaven is discovery; everyone wants to go to heaven. In such fashion has discovery escalated and consolidated. The custody case, seen in perspective, is no longer incredible—just cockeyed!

The escalation and consolidation of discovery has not only lengthened the litigation of lawsuits, but also produced *more* lawsuits. This is particularly true in what used to be called "strike" suits—malpractice, antitrust, products liability, class actions of various sorts, i.e., *big* lawsuits, *attacking*. What is sought to be found is not merely evidence of a claimed cause of action, but a cause of action to be claimed—a quest by no means vain. If A and B have any close relationship and each is given carte blanche to winnow through the other's mind, papers, friends, and acquaintances, the likelihood of finding something to complain lawfully about is not minimal. And where the pockets being winnowed through are deep, the incentive for winnowing is wonderfully quickened.

In other words, the discovery reforms of 1938 et seq. have changed dramatically, in ways utterly unforeseen, the entire system of American justice.

After almost fifty years of implementation, these changes, though well-intended, fail on any cost-benefit analysis. Any good that has come from the *refining* of "trials" is grossly offset by the *bloating* of "litigation." The "truth," it turns out, can be pursued too far for toleration. Unlike the third passing of a *fish* seine through the same waters, where a diminished number, but *some*, fresh fish may be caught, a third passing of a *fact* seine through the same waters may produce *no* fresh facts, only redundancy *and* enhanced abrasion. In the search for *relevant* "truth," a search which inherently exploits at least neighboring *irrelevancies*, the point of diminishing returns may be reached rather quickly. The search continues only because of the ease and scope of the fishing licenses now in place. As the other side presses the fishing beyond the point of reasonableness, you respond in kind—caught in

a process which attenuates in sense while it augments in expense, including attorney fees, thereby creating a dilemma which neutralizes lawyers in any effort at significant reform.

I once taught a course on "Science, Technology, and Law."[9] One of the things I learned in that engagement was that well-meant change frequently begets more *ill* than *well*. The change is focused upon some evil in the pertinent environment. However successful it may be in eradicating that evil, it may, concomitantly, produce, over time, secondary and tertiary results more negative in their impact than the good of the primary benefit sought. The insecticide DDT is a case in point. It eradicated most effectively the crop-destroying insects against which it was, in tunnel-vision, directed; it took some time to discover the disastrous ecological price of that insecticidal deliverance.[10] This lesson has been repeated, as we all know, many times.

Lawyers as "Gods," pursuing, inexorably, the "truth," however tangentially it may be sought! That is a frightening proposition to me, a lover of lawyers, of law, i.e., of a process seeking justice between and among human beings in a social system honoring freedom. The tension between law and freedom is inherent, classic, even when well-managed. Putting self (client)-serving lawyers in control of that truth-seeking mission is, to mince no words, *folly*. All of life is potentially relevant to all else of life. To the extent we put lawyers in charge of the determination of relevance, indeed of *potential* relevance, in that truth-seeking, we license them to intrude where the deepest interests of a free society should fear most their intruding. And witnesses, parties or otherwise, being deposed, when called upon (as the discovery ethic inherently calls upon them to do) to disclose their innermost *potentially* relevant evidence (perhaps in a personal diary, directed by the discovery process to be produced; there was one such in our case), are torn between disclosure of that which should not be disclosable because not *really* relevant and revolt against a system requiring *over*-disclosure of the *potentially* relevant.

The invasion of *privacy* by *lawyers*, inherent in the current system, is bad for society *and* for lawyers.

What to do about the foregoing dilemma? Leave it to the "goats" to preserve the cabbage patch? Incongruously, this is essentially what the latest "reforms" of the discovery process propose.[11] While well-intended and per-

9. *See* Hanslowe & Oberer, *Science, Technology, Law: The Good Life*, 26 J. LEGAL EDUC. 32 (1973); Hanslowe & Oberer, *Methodology for a Course on "Science, Technology, and Law" (or Other Exotic Subject) to be Taught by Innocents*, 26 J. LEGAL EDUC. 44 (1973).

10. *See, e.g.*, 7 MCGRAW-HILL ENCYCLOPEDIA OF SCIENCE & TECHNOLOGY 204 (5th ed. 1982).

11. *See, e.g.*, Brazil, *Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1315 (1978); LOUISELL, HAZARD, & TAIT,

ceptive of the discovery problem as it currently exists, these reforms are premised on the same misassumptions which have created the discovery dilemma: (1) that lawyers in their self (client)-serving capacities can be depended upon to "castrate" themselves, or one another; and (2) that judges, already overburdened with teeming dockets, can be depended upon to assume the responsibility of taking on the now-additional burden of "riding herd" on the relevance of the discovery sought.

The lamentable truth of the current system of litigation is that it is *out of control.* To the extent that anyone controls it, *lawyers* control it. And since lawyers are, by the very definition of their roles, adversarially oriented, there is no objective, neutral, society-serving interest at work to preserve the

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CASES AND MATERIALS ON PLEADING AND PROCEDURE, STATE AND FEDERAL 870-73 (5th ed. 1983).

See also the amendments to the Federal Rules approved by the Supreme Court in 1980. 446 U.S. 997, 1003. Justice Powell, joined by Justices Rehnquist and Stewart, filed a "dissenting statement," which included the following:

> When the Federal Rules first appeared in 1938, the discovery provisions properly were viewed as a constructive improvement. But experience under the discovery Rules demonstrates that "not infrequently [they have been] exploited to the disadvantage of justice." Herbert v. Lando, 441 U.S. 153, 179 (1979) (Powell, J., concurring). Properly limited and controlled discovery is necessary in most civil litigation. The present Rules, however, invite discovery of such scope and duration that district judges often cannot keep the practice within reasonable bounds. Even in a relatively simple case, discovery through depositions, interrogatories, and demands for documents may take weeks. In complex litigation, discovery can continue for years. One must doubt whether empirical evidence would demonstrate that untrammeled discovery actually contributes to the just resolution of disputes. If there is disagreement about that, there is none whatever about the effect of discovery practices upon the average citizen's ability to afford legal remedies.
>
> Delay and excessive expense now characterize a large percentage of all civil litigation. The problems arise in significant part, as every judge and litigator knows, from abuse of the discovery procedures available under the Rules. . . . Lawyers devote an enormous number of "chargeable hours" to the practice of discovery. We may assume that discovery usually is conducted in good faith. Yet all too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. . . . Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system.
>
> I . . . do not dissent because the modest amendments recommended by the Judicial Conference are undesirable. I simply believe that Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms. . . .
>
> The amendments to Rules 26, 33, 34, and 37 recommended by the Judicial Conference should be rejected, and the Conference should be directed to initiate a thorough re-examination of the discovery Rules that have become so central to the conduct of modern civil litigation.

Id. at 999-1001.

search for justice at a cost which is socially acceptable, in dollars *and* in the human values which a free society exists to preserve. The further, more lamentable, truth is that there is little hope of turning the tide; the "discovery reform" has so consolidated, has so changed the landscape of the pursuit of "justice," has so increased the population of lawyers and so vested that increased population with a material interest in the "flawed" status quo as to render reform of the "reform" *by the bar* a highly dubious prospect.

Similarly, the already overburdened judiciary is an unlikely source, or bearer of the burden, of reform. Riding herd on the problem of *relevance*, which is at the heart of the discovery dilemma, is a monstrous task to *re*impose on judges who have, by the very logic of the discovery ethic, been so far removed from what there is to ride herd on that they no longer know where the herd *is*, or *why*, and consequently *how* to ride herd. The discovery ethos has, indeed, evolved to the point where many judges, perhaps most, no longer consider the problem even *theirs* in any meaningful sense.

The "activism" of the courts which has been the subject of so much social commentary in the last twenty-some years is, upon reflection, less the activism of judges than of lawyers, unleashed by the discovery reform to make the law their own. That reform has created an avalanche of change, defensible in some contexts, but in total impact a catastrophe for the resolution of the mine-run disputes between and among the people of a free society.

The "game" of "trial," vilified by the reformers, has simply been displaced by a *new* game, that of "pretrial"—longer, more expensive, more invasive and abrasive, and even *more* subject to "gamesmanship" because of less clear rules and no effective umpire.

Is the answer a return to "trial by ambush" except in highly selected cases under greatly increased judicial supervision—i.e., a strictly limited use of DDT? Or is there no answer, the avalanche being simply unstoppable? In any event, it is time to declare: The problem is not the *abuse* of discovery; the problem is a discovery *system inherently* abusive. What I mean to say is: "THE EMPEROR HAS NO CLOTHES!"