Volume 32

International Society of Barristers Quarterly

Volume 32 **July, 1997** **Number 3**

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International Society of Barristers Quarterly

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Volume 32
Issue Number 3
July, 1997

The INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY (USPS 0074-970) (ISSN 0020-8752) is published quarterly by the International Society of Barristers, 3586 East Huron River Drive, Ann Arbor, MI 48104-4238. Periodicals postage is paid at Ann Arbor and additional mailing offices. Subscription rate: $10 per year. Back issues and volumes available from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, NY 14209-1911. POSTMASTER: Send address changes to the International Society of Barristers, 3586 East Huron River Drive, Ann Arbor, MI 48104-4238.

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IS THERE JUSTICE IN THE CRIMINAL JUSTICE SYSTEM?†

Hugh H. Bownes*

I. Assistance of Counsel

In this country we proudly proclaim in our Pledge of Allegiance to the flag that there is "liberty and justice for all." We have a written Constitution and as part of it a Bill of Rights, which in the sixth amendment makes certain specific guarantees:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the assistance of counsel for his defence.*[1]

In *Gideon v. Wainwright*,[2] the Supreme Court, in a unanimous decision, held that the sixth amendment mandated the assistance of counsel for a defendant in a state criminal case, as it did in federal court. We may wonder why it took 175 years to recognize this, but that is beyond the scope of this talk.

The words are clear, but, unfortunately, the implementation of this constitutional mandate has not been very effective, particularly in the most important trials of all—death penalty cases.

I do not want to bore you with statistics or shock you with horror tales, but a few observations are in order. I quote from a column by Anthony Lewis in the *New York Times*. Lewis covered the Supreme Court for the *Times* when *Gideon v. Wainwright* was decided and wrote the prize-winning book *Gideon's Trumpet*. This is what he had to say twenty-eight years later: "In the real world, the promise of Gideon is not being kept. Poor men and women in large numbers go to trial in this country with lawyers who are so incompetent, drunk, inexperienced, or uninterested that the defendants' right to counsel is a bad joke." In the

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†Address delivered at the Annual Convention of the International Society of Barristers, Westin La Paloma, Tucson, Arizona, March 7, 1997.

*Senior Judge, United States Court of Appeals for the First Circuit.

[1] U.S. Const. amend. VI (emphasis added).

[2] 372 U.S. 335 (1963).

same column Lewis noted: "The pay for appointed lawyers in capital cases is very low; some states limit the total fee for a case to $1,000."

The ABA, after a study, found that one factor was largely responsible for the number of habeas corpus appeals: In capital trials the defendants were represented by underpaid, underprepared, and incompetent defense lawyers. Here are a few examples of the result of such misrepresentation:

1. A man was sentenced to death in Georgia in a trial that started with jury selection at 9 a.m. and ended 17 hours later at 2 a.m. with a death sentence. In between, the jury was deadlocked as to guilt, which would have meant the case would have ended in a mistrial, but the defense lawyer agreed to replace the one holdout juror with an alternate. Three minutes later a guilty verdict was returned.
2. In Mississippi, a man was sentenced to death in a trial in which he was represented by a third-year law student.
3. In North Carolina, a man received a death sentence in a trial in which his attorney took cocaine and other drugs every day of his trial. The attorney's client was executed.
4. In a county in Georgia, capital cases are assigned on a low-bid system. The only qualification other than being the lowest bidder is that the lawyer must be a member of the Georgia bar.
5. A man on death row in Georgia today was represented by a lawyer who did not know that he could present mitigating factors to the jury as a reason not to impose a death sentence. He therefore did not present evidence that the man was mentally retarded, schizophrenic, and had not been taking the medication that controlled his psychosis at the time of the murders.
6. One fourth of those now on death row in Kentucky were represented by lawyers who have since been disbarred, suspended, or imprisoned.

I do not want you to think that underpaid and incompetent counsel are limited to death penalty cases; the fault line cuts across the whole range of criminal law cases. It is my opinion that there is no more demanding and stressful legal work than that of a criminal defense lawyer. As you well know, trial advocacy of any type, civil or criminal, is a highly specialized art that requires a unique combination of mental, emotional, and physical skills. To be a competent trial lawyer you must think with the speed of a computer, and articulate arcane and esoteric concepts with sufficient clarity that both a judge trained in the law and a jury ignorant of the law can understand what you mean. And, of course, you must be able to write with the clarity and style of Justice Holmes. Add to this the additional pressure of defending a person whose life or liberty

depends upon your skills, and you are encased in a pressure box that continues from indictment through final appeal.

What can be done to make the sixth amendment mandate of representation by counsel a working reality rather than an empty promise? The first step is expressed in an old Irish saying that my mother used to repeat: "Money makes the mare go whether she has legs or no." Appointed counsel have to be paid enough that they can prepare and defend the defendants competently. It has long been accepted that talent and money usually go hand in hand.

Clarence Darrow stated many years ago that a wealthy defendant accused of murder did not have to worry about the death penalty because such a person could afford a good lawyer. Darrow then proved this maxim himself in the Bobby Franks case. This was the crime of the century. Two college students, Leopold and Loeb, looking for thrills, decided to torture a young boy to death so they could observe his death throes. Bobby Franks was chosen as the victim. Leopold and Loeb both had wealthy parents and they retained Darrow. He waived a jury trial. Darrow's entire defense, made from a wheelchair, was a lengthy exegesis of the history of the death penalty as applied in England and the United States. He argued that it did not deter crime, that it was barbaric and cruel, and that its application varied with the sex, social position, and race of the defendant. The judge was convinced by Darrow. He sentenced the defendants to life imprisonment without parole. I do not know the amount of Darrow's fee, but I assume it was substantial.

A more up-to-date example of how a wealthy defendant's resources enabled him to retain highly competent counsel, of course, is the O. J. Simpson criminal trial. What do you think the result would have been if O. J. had been a janitor represented by court-appointed counsel?

But you do not get competent counsel just by raising the hourly rate and providing an adequate amount for investigation and preparation. As I have already indicated, there are certain skills needed that not all lawyers, however well-intentioned or motivated, possess. I suggest that court-appointed counsel, especially those assigned to death penalty cases, be screened by a committee of trial lawyers before they are appointed to ensure that they have the training and experience to represent a defendant in the deadly serious matter of a criminal trial. This suggestion does not originate with me. In 1991, a study recommended that Congress set minimum standards for defense counsel in criminal cases. The Attorney General opposed the proposal, and it was killed in the Senate crime bill.

People sent to death row may go to federal court and ask to have their convictions and/or death sentences overturned because their federal constitutional rights were violated—and ineffective assistance of counsel is one such violation. But there are few lawyers with the training or expertise to represent death row inmates at the post-conviction stage either.

The federal judiciary urged Congress to provide funding to recruit and train lawyers for death row inmates. In 1988, Congress did so, funding several death penalty resource centers whose mission was to represent people who had already received death sentences, and to recruit, train, and consult with private lawyers handling trials and appeals. For the first time, defendants in these cases began to receive adequate representation. A number of death sentences were overturned.

This caused a reaction by some state and federal prosecutors who saw their conviction rates begin to fall. They, along with tough-on-crime politicians, called for abolition of the resource centers. They were successful. In 1995, Congress effectively eliminated federal funding for the death penalty resource centers, despite the opposition of the federal judiciary and the American Bar Association. (I interject that the nature of this opposition may have provoked the negative reaction of some lawmakers.)

Ironically, the elimination of the death penalty resource centers will cost the government more money, not less. Richard Arnold, Chief Judge of the Court of Appeals for the Eighth Circuit, who chairs the Budget Committee of the Judicial Conference of the United States, says that elimination of the death penalty centers will increase the cost of representing death row prisoners. The centers were funded by a mix of federal, state, and private funds. In 1994, the federal grants for the centers totalled $19.6 million, and the federal judiciary had requested $21.2 million for 1996. The appointment of separate counsel for each death row prisoner would, according to Judge Arnold, cost the federal government between $37.2 million and $51.1 million a year, and there will be more, rather than less, delay on the road to execution.

So the mandate of the sixth amendment and the promise of *Gideon v. Wainwright* are still far from being realized. I hope it will not take another 175 years for them to be attained.

II. SENTENCING GUIDELINES

The adoption of the United States Sentencing Guidelines by Congress on November 1, 1987, marked a revolutionary change in the sentencing of convicted persons.

In 1984, the United States Congress passed the Sentencing Reform Act of 1984. Its stated objectives were:

1. To promote certainty in sentencing by mandating real-time sentencing and eliminating the possibility of parole before the imposed sentence is fully served;

2. To require district court judges to state their reasons for imposing a sentence;
3. To achieve proportionality in sentencing;
4. To reduce unwarranted sentencing disparity; and
5. To establish a Sentencing Commission charged with the development of guidelines to guide the discretion of judges in imposing sentences.

The fifth objective has been carried out. There are serious questions as to whether any of the others have been attained or can be.

I must confess that at the outset I was in favor of the Guidelines. I remembered the personal struggle I went through as a district court judge when I was sentencing a defendant. The first thing I had to take into account was that the defendant probably would not serve the sentence I decided upon. Under the system then in effect the defendant was eligible for parole after serving one-third of the sentence. So with the probation officer's help, I would adjust the sentence to reflect the time I thought the defendant would actually serve. This was merely a guess because the Parole Commission made its decision without consulting the sentencing judge. The Sentencing Guidelines have taken care of that problem; to paraphrase a common saying, what you get is what you serve. The Parole Commission no longer plays a role in the length of a sentence.

The other pre-Guidelines sentencing problem was determining the appropriate sentence—how much time should the defendant serve? This depended on the type of crime, the background of the defendant, and the philosophy and general attitude of the individual judge. I remember vividly that when I first became a state court judge, an old-timer on the bench, noted for his compassion and wisdom, said to me: "Before you sentence anybody say to yourself, 'There but for the grace of God go I.' "

There can be no doubt that pre-Guidelines sentences for the same offense varied greatly because of the different values and attitudes of the sentencing judges. So we had disparate sentences in the federal system—disparate among the circuits, and disparate even within the same district—for the same offenses. The differences might be as much as ten years—or more—for the same offense. Some judges found it easier to give the maximum sentence for every crime rather than to struggle to find a fair sentence. Sentencing was directly the result of the outlook of the individual judge. And, of course, there was no appeal from a sentence unless there was a clear statutory violation. Because of the disparities, many law school professors and judges started a concerted campaign for uniformity in sentencing, which culminated in the Sentencing Guidelines.

As I have indicated, I favored the Guidelines initially, in part because I remembered what I had gone through as a district court judge and believed that

sentencing by the numbers would lighten the emotional pressure on sentencing judges—and I think it has done that. The judge must base the sentence on a formula designed to cover the type of crime the defendant has committed. The Sentencing Commission has adopted the Gilbert and Sullivan dictum: Let the punishment fit the crime.

The second reason I favored the Guidelines was that the enabling act provided for an appeal from the sentence. As a district court judge and a circuit court judge, I had felt that appeals should be allowed from criminal sentences. I could not understand why a person should not be allowed to appeal a sentence that took away his freedom—the most precious right we have—when appeals were allowed as a matter of course on any grounds in a civil case. (If appeals had been allowed, subject to certain restrictions, we could have developed, over time, a federal common law of sentencing that would have mitigated some of the disparities among the circuits, or at least within the circuits.)

Use of Acquitted Conduct as a Sentencing Factor

The Guidelines do not have my wholehearted support, however. I want to focus first on one aspect of sentencing mandated by the Guidelines that is, in my opinion, patently unfair and unconstitutional as a violation of the double jeopardy guarantee of the fifth amendment. I am referring to the use of acquitted conduct as a factor in sentencing if such conduct is relevant to the offense; that is, the sentencing court considers not only the crime of which the defendant has been convicted but crimes of which the defendant has been acquitted either in the same trial or at a prior one. If a sentencing judge finds on a preponderance of the evidence that the defendant committed the crime of which a jury had acquitted him, the commission of that crime is considered a point factor in the sentence. Let me give you some examples.

The best examples can be found in a recent Supreme Court case in which the use of acquitted conduct as a sentencing factor was upheld, *United States v. Watts*.[3] (There actually were two cases before the court, one involving a defendant named Watts and the other involving one named Putra.) At issue was the Ninth Circuit rule—the only one in the country—that acquitted conduct could not be used as a factor in sentencing. The rule was based on the belief that such use violated the double jeopardy clause of the fifth amendment and collided with the right to a jury determination of guilt or innocence. I read from the per curiam opinion:

> In *Watts,* police discovered cocaine base in a kitchen cabinet and two loaded guns and ammunition hidden in a bedroom closet of Watts' house. A jury

[3] 65 U.S.L.W. 3461 (U.S. Jan. 6, 1997) (per curiam).

> convicted Watts of possessing cocaine base with intent to distribute, in violation of 21 U.S.C. §841(a)(1), but acquitted him of using a firearm in relation to a drug offense, in violation of 18 U.S.C. §924(c). Despite Watts' acquittal on the firearms count, the District Court found by a preponderance of the evidence that Watts had possessed the guns in connection with the drug offense. In calculating Watts' sentence, the court therefore added two points to his base offense level under United States Sentencing Commission, Guidelines Manual §2D1.1(b)(1) (Nov. 1995) (USSG). The Court of Appeals vacated the sentence, holding that "a sentencing judge may not, 'under *any* standard of proof,' rely on facts of which the defendant was acquitted." . . .
>
> In *Putra,* authorities had videotaped two transactions in which Putra and a codefendant (a major drug dealer) sold cocaine to a government informant. The indictment charged Putra with, among other things, one count of aiding and abetting possession with intent to distribute one ounce of cocaine on May 8, 1992; and a second count of aiding and abetting possession with intent to distribute five ounces of cocaine on May 9, 1992, both in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. The jury convicted Putra on the first count but acquitted her on the second. At sentencing, however, the District Court found by a preponderance of the evidence that Putra had indeed been involved in the May 9 transaction. The District Court explained that the second sale was relevant conduct under USSG §1B1.3, and it therefore calculated Putra's base offense level under the Guidelines by aggregating the amounts of both sales. As in *Watts,* the Court of Appeals vacated and remanded for resentencing. Reasoning that the jury's verdict of acquittal manifested an "explicit rejection" of Putra's involvement in the May 9 transaction, the Court of Appeals held that "allowing an increase in Putra's sentence would be effectively punishing her for an offense for which she has been acquitted."

In reversing the Ninth Circuit, the Court first pointed to 18 U.S.C. §3661, which states:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Next, it cited *Williams v. New York,*[4] which upheld the right of the sentencing court to rely on a defendant's criminal behavior even if no conviction resulted from that behavior. (That, of course, was not the issue before the Court in *Watts*.) The Court then took the big leap and quoted from an opinion by Justice Scalia when he was on the Court of Appeals for the District of Columbia, prior to the adoption of the Guidelines, declaring it "'well established that a sentencing judge may take into account facts introduced at

[4] 337 U.S. 241 (1949).

trial relating to other charges, even ones of which the defendant has been acquitted.' "[5]

This justification amounts to a claim that "we did it before, so we can do it again." But, more importantly, I do not know how it can be shown that such a practice was well established. Pre-Guidelines, there were very few appeals from sentences, and judges were not required to give reasons for the sentences. All I know is that I never even thought of using prior acquitted conduct as a factor in sentencing.

After quoting then-Judge Scalia, the Court pointed out that the Guidelines, in effect, mandate the use of prior acquitted relevant conduct. Section 1B1.4 states:

> In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, *unless otherwise prohibited by law.* [Emphasis added.]

The Court clinched its rationale by quoting the comment to section 1B1.3: "'Relying on the entire range of conduct, regardless of the number of counts that are alleged *or on which a conviction is obtained*, appears to be the most reasonable approach to writing workable guidelines for these offenses'. . . (emphasis added)." In other words, the Constitution does not apply to sentencing.

The Court did meet the reasons for the Ninth Circuit rule. The Court explained that the defendant does not suffer double jeopardy because he is not punished "for" the acquitted charge but rather receives an enhanced sentence reflecting the "manner" in which defendant committed the crime of conviction.[6] This characterization of the acquitted conduct as a mere sentencing factor also rationalizes the Court's conclusions that it need not be found by a jury and that the preponderance standard satisfies due process. It is unlikely to make any sense to a defendant who is charged, tried, and acquitted of a crime that it is transformed at sentencing into a "manner" of committing the separate crime of which she was convicted and results in the same sentence she would have received had she been convicted of both crimes.

Responding further to the Ninth Circuit's view that enhancing a sentence for acquitted conduct collides with the right to a jury determination of guilt or innocence, the Court explained that any acquittal "only" reflects reasonable doubt, so that the jury cannot be said to have "necessarily rejected" any facts

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[5] 65 U.S.L.W. at 3461, quoting United States v. Donelson, 695 F.2d 583, 590 (D.C. Cir. 1982) (Scalia, J.).
[6] 65 U.S.L.W. at 3462.

when it returns a not guilty verdict.[7] This logic assumes away acquittals based on actual innocence or failure of proof, or witness credibility, to say nothing of the jury's historic function as a check against arbitrary or oppressive exercises of governmental power. And it totally ignores the presumption of innocence.

In assessing the *Watts* opinion, it is important to point out that the case never reached the formal argument list. It was decided without full briefing or oral argument. Justice Kennedy dissented on the ground that the case should have been set for full briefing and oral argument on the regular calendar.[8] Justice Breyer filed a concurrence, not on the constitutional issues but expressing his belief that the Sentencing Commission had the authority to prohibit the use of acquitted conduct as a factor in sentencing.[9] (Justice Scalia disagreed.[10]) Justice Stevens wrote a ringing dissent, the last paragraph of which I now quote:

> In my opinion the statute should be construed in the light of the traditional requirement that criminal charges must be sustained by proof beyond a reasonable doubt. That requirement has always applied to charges involving multiple offenses as well as a single offense. Whether an allegation of criminal conduct is the sole basis for punishment or merely one of several bases for punishment, we should presume that Congress intended the new sentencing Guidelines that it authorized in 1984 to adhere to longstanding procedural requirements enshrined in our constitutional jurisprudence. *The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence*.[11]

Prosecutorial Control of Sentence

Another disturbing aspect of the Guidelines is that they allow the prosecutor to control the sentence. Because the punishment is calculated on the basis of the crime of conviction, the indictment determines the sentence. What happens in practice illustrates that the prosecutor has become the sentencer: Suppose that four charges are brought against defendants *A*, *B*, and *C*: conspiracy to possess drugs; possession of the same drugs with a conspiracy of intent to distribute; conspiracy to sell the drugs; and use of a firearm in connection with the sale. All of these charges carry different penalties that go up the scale. Defendants *A* and *B* plead not guilty. Defendant *C* and the prosecutor make a deal: *C* will plead guilty to one or two of the minor charges in return for testifying at trial against *A* and *B*. The person the government deals with is one who has

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[7] *Id.*
[8] *Id.* at 3464 (Kennedy, J., dissenting).
[9] *Id.* at 3462 (Breyer, J., concurring).
[10] *Id.* (Scalia, J., concurring).
[11] *Id.* at 3464 (Stevens, J., dissenting) (emphasis added).

knowledge about all the details of the drug transaction and often is the most culpable. *A* and *B*, therefore, have the choice of pleading guilty to the more serious offenses or going to trial and probably being convicted and getting much higher sentences than *C*, who engaged in the same conduct.

Under the Guidelines, the prosecutor has the sole authority to seek or decline to seek a downward departure for substantial assistance. As stated by a defense attorney, "It's dangerous to the system. If guys will lie and cheat and break the law to make a few bucks on the street, what will they do if someone comes along and offers them a way to cut ten years off their sentence? Best case: They embellish. Worst case: They fabricate."

An even worse and related problem arises because the Guidelines do not even require indictment for a sentence increase. In fact, the pertinent guideline requires sentencing for relevant *uncharged* conduct. This encourages prosecutors not to bother including a count in the indictment on a weak charge, secure in the knowledge that they can "establish" that crime by a preponderance of the evidence at sentencing. After a trial or guilty plea, new charges that the defendant didn't even have notice of are used to increase his sentence. The defendant has no right to confront and cross-examine the government's hearsay witnesses, and a probation officer who is largely dependent on the government for the facts, rather than a judge who saw and heard the evidence, "resolves" factual disputes.

Judge Merritt, in dissent in a Sixth Circuit case, described a situation in which after the defendant was indicted for a relatively minor felony to which he pleaded guilty, the prosecutor expanded the charges and forwarded those to the court through the probation officer:

> This was done on the basis of multiple hearsay from unnamed sources, furnished by the prosecution and a DEA agent, concerning additional unconvicted crimes. . . . [A]n unnamed informant tells a police officer, who tells the police chief, who tells a DEA agent, who tells a probation officer, who tells the court, that Silverman was a major dealer in drugs the year before the quarter-ounce transaction for which he is convicted. The amount of drugs in prior unconvicted transactions is then estimated by the probation officer and Silverman's sentence is automatically increased more than five years based on the quintuple hearsay of witnesses who no one suggests were unavailable.[12]

Judge Merritt complained that the prosecutor need not prove the additional crimes by reliable evidence beyond a reasonable doubt. He observed that the court is only the nominal sentencer; the real sentencer is the prosecutor.[13]

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[12] United States v. Silverman, 976 F.2d 1502, 1520 (6th Cir. 1992) (Merritt, J., dissenting).
[13] *Id*. at 1530.

CONCLUSION

The answer to my question—"Is there justice in the criminal justice system?"—is, "Some, but not enough." We still have a long way to go if we are to meet constitutional mandates. You all are members of an elite trial lawyers' association. As such, you have the responsibility to uphold and defend the Constitution and the Bill of Rights. You are the keepers of the Holy Grail. I believe the practice of law is a noble profession, despite the caustic comments and bad jokes about lawyers. As trial lawyers you have a special responsibility to keep the flame of freedom burning brightly so that there is "liberty and justice for all."

GÖTTERDÄMMERUNG FOR THE SECURITIES ACT†

Joel Seligman*

I must confess that I feel a little bit like an impostor. According to your schedule, at this time Richard North Patterson was to speak on the topic "How I Made the *New York Times* Best-Seller List in Only Seventeen Years, or, Don't Quit Your Day Job." This is a topic that I suspect has real appeal to you; I have yet to meet a lawyer whose fantasy wasn't to write a best-selling murder mystery of some sort. So as I prepared today's remarks, I tried to imagine what it would be like to deliver Mr. Patterson's remarks—and I realized I had absolutely no basis for so doing. I've written something like seventeen books. None of them got remotely close to the *New York Times* best-seller list.

I do have the capacity to fantasize, however, and I remember a brief moment in my career when fantasies of best-sellerdom or, even better yet, of filmdom seemed far more appropriate. My publisher for many years was the law division of Little, Brown, which was owned by Time, which a few years back was bought by Warner Brothers. Shortly after the merger I sat by my telephone waiting for the inevitable telephone call. I had already chosen the title of the first film to be based upon my treatise. It was the phrase from my law review articles which, for whatever reason, seems to be most quoted: "The Remediation of Information Asymmetries."

Picture this. In a meeting with the Warner Brothers executives, I'm telling them that I envision Arnold Schwarzenegger as the Remediator. Naturally, they ask, "What weapons will he have?" I explain, "He can use a cease and desist order; he can invoke an administrative proceeding; and he can seek the ultimate weapon, an injunction." I can see them jumping up and down. The harder question, of course, is who should play the female lead, "Information Asymmetries." Wanting a complex, conflicted character, I envision Meryl Streep, as suggested by her role in *Sophie's Choice*.

One somewhat drunken lunchtime, I explained all this to my editor at what was then Little, Brown, and he did as he always seems to do; he said, "Put it in a memo, and I'll forward it." I sent him the memo, and it was forwarded, I am told, to Warner Brothers. I've neither seen nor heard from Warner Brothers since then, so here I am today.

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†Address delivered at the Annual Convention of the International Society of Barristers, Westin La Paloma, Tucson, Arizona, March 6, 1997.

*Dean, University of Arizona College of Law.

THE RISE AND FALL OF THE SECURITIES ACT

The topic I'm going to address today does have at least a quasi-literary theme, Götterdämmerung for the Securities Act. It was suggested by an eighteen-hour cycle of operas that Richard Wagner wrote during the nineteenth century. (Many of you no doubt are humming some of the themes from this opera as we sit here today.) At the conclusion of the eighteen hours of opera a great musical question is posed. Brünnhilde, who has the Meryl Streep part in the cycle, mounts her steed and rides into a conflagration; having grown wise, she sacrifices herself. This clearly is the moment that epitomizes the twilight, indeed maybe the post-twilight, of the gods. But wait. It isn't necessarily the end of the opera, for while the orange flames are licking the back of the stage, symbolizing the conflagration of Valhalla where the gods congregate, you begin to hear the refrain of the Rhine Music with which the opera began eighteen hours before. The Rhine Music perhaps suggests that while the gods may perish, nature is eternal. It's that concept that inspired my topic today. At this point I have to invoke a leap of faith on your part to get from Wagner to the Securities Act, but you strike me as the kind of group who can do this.

The Securities Act of 1933[1] was one of the great events in law making in this country. Before 1933 we essentially had a fundamental choice in legislative or governmental approach to the economy. Many favored a laissez-faire approach of leaving the economy unregulated. The alternative seemed to be government regulation, and there were occasional interventions such as the Interstate Commerce Act, which regulated certain fundamental aspects of interstate business. That duality was clumsy and didn't work terribly well. You couldn't leave the entire economy unregulated, given perceived market imperfections; nor did anyone want to overregulate through a broader I.C.C.-type regulation. The great intellectual breakthrough, I would submit, came in a kind of Zen-like movement when Washington began to appreciate that there was another approach to regulation—not so much by controlling what occurs in the marketplace but by better informing the marketplace. This resulted in the Securities Act of 1933.

The Securities Act is sometimes referred to as the "full disclosure act" or the "truth in securities act." The basic essence was to require business corporations (and foreign governments, too) to fully disclose all important information about a new security before they sold it to the public. This act has been widely imitated and is literally the basis for such laws as freedom of information acts, government in sunshine acts, and many others. In many respects, it has been an extraordinary success. In 1933, as the saying went, "Grass was

[1] Act of May 27, 1933, 15 U.S.C. §§ 77a-77aa.

growing on Wall Street." In the first year of the Securities Act a grand total of $644 million of securities were sold in the entire country. Many individual businesses today—over 12,000 corporations are subject to SEC jurisdiction—will sell more than that amount. Fifty years after the adoption of the Act, in 1984, close to $127 billion of new securities were sold under it. In 1996, over $1 trillion of new securities were sold. Many would argue that under this gentler form of regulation, business activity has flourished.

The Act itself, however, is now significantly reduced in its effectiveness, which seems unprecedented for legislation that has been extraordinarily successful and certainly a model, in this country and abroad, for other legislation. Without attempting to deliver the full course in securities regulation or to paraphrase all fifty-eight hundred pages of my treatise, I suggest that since 1980 there has been a systematic diminution in the effectiveness of the Act in four significant ways. First, there were always exemptions from full registration and full disclosure,[2] the most important of which was called the private placement exemption. This permitted firms that were selling only to people or institutional investors who could fend for themselves not to engage in the full registration process. We have seen a dramatic increase in the private placement of securities. Second, there was a de minimis exemption for so-called small issues—originally only $100,000 or less in securities sales per year. That had grown by 1980 to $5 million, and then a regulation called Regulation D permitted firms to go much further, as long as they limited their sales to so-called accredited investors. Third, and of greater consequence, there was a change in the filing required. Traditionally you had to file a very comprehensive document with the S.E.C. when you sold securities. This document, if not novel length, tended to be the equivalent of a good short story in length. It addressed the finances of the firm, the business, the competition, and so on. Beginning in the mid-1970s and accelerating throughout the 1980s, there has been growth in the availability of truncated registration forms. The current popular form is the equivalent of a haiku, in literary terms. Often two or three pages in length, it just provides data about the specific securities sale and incorporates by reference more comprehensive information from the annual report or other documents filed by a business corporation. Fourth, in 1996 Congress adopted a law with the catchy title "The National Securities Markets Improvement Act."[3] This Act was one of the most interesting Christmas presents ever given by Congress to successful lobbyists in Washington and requires more extended discussion.

The 1996 Act encompassed two themes that were quite consequential to the Securities Act. First, under the 1933 Act the states had had concurrent regulation

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[2] *Id.* §§ 3-4, 15 U.S.C. §§ 77c-77d.
[3] Pub. L. No. 104-290, 110 Stat. 3416 (1996) (to be codified in scattered sections of 15 U.S.C.).

of the sale of new securities.[4] Congress in 1996 decided effectively to end the power of states to go further than the federal government in regulating securities sales when the security was registered with the S.E.C.[5] Of more consequence, conceivably, was a provision that has received a great deal of attention from the current chairman of the S.E.C., a provision permitting the exemption of issuers, classes of securities, or industries from part or all of the '33 Act.[6] Before this, the S.E.C.'s exemptive authority was quite limited; now we've entered, as Cole Porter put it, a kind of "anything goes" era. The American Bar Association is testing the waters here with a far-reaching proposal for broad exemption from almost all aspects of the '33 Act. It is unclear what the S.E.C. will do.

REASONS FOR THE CHANGES

When you see changes of this magnitude (and there are others), it's worth asking, "What happened?" The story of what has happened to this law is complex, and it seems to me there are six factors that bear on the very dramatic changes.

Number one: We have seen an enormous internationalization of the securities markets. When the '33 Act was adopted, there were some sales in the United States by foreign governments, but they dissipated, indeed almost collapsed, during the 1930s and 1940s. What we have seen in recent years has been a dramatic expansion in the ability of United States firms to sell securities abroad, whether it's in Canada, Mexico, Europe, or Japan. This has forced regulators in Washington to realize that if they regulate more stringently than their foreign counterparts, the sale of United States securities will be exported.

Number two: We have seen a dramatic change in the nature of investors in this country. When the Act was adopted, there were approximately 1.25 million people who owned stock in the securities markets. Today, there are over fifty million investors, approximately twenty percent of the population of this country. But the most significant change has not been this enormous expansion in the number of individual investors but the fact that institutions—mutual funds, pension plans, trust departments—have become the dominant force in investment in this country. They simply did not exist when the Act was adopted. Institutions can fend for themselves in a way that, as my co-author liked to say, "your Aunt Minnie in Wichita or your Uncle Harvey in Palm Beach might not be able to." At a simple level, institutions are less interested

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[4] Act of May 27, 1933, § 18, 15 U.S.C. § 77r.
[5] Pub L. No. 104-290, § 102(a), 110 Stat. at 3417.
[6] *Id.* § 105(a), 110 Stat. at 3424.

in full disclosure to everybody and more interested in getting information as quickly as they can for themselves. They do this through means that are exogenous to the securities acts—through telephone calls, through research staff, through attendance at press conferences of issuers. The reality is that the demand from individuals for information, which dominated congressional oversight in the 1930s, has been replaced by quite different demands from the major investors today, institutions.

Number three: Information technology has had a tremendous impact on our securities markets. There is very little that can occur in the securities markets today, whether they are in Singapore, Zurich, London, Toronto, or New York, that isn't instantly known throughout the world. Some sense of this was brought home to me when I was teaching at George Washington a few years back. One of my students was always extraordinarily well-dressed, and one day I overheard one of her fellow students asking her why she was always so dressed up. She explained that she had a job working in the public reference room of the S.E.C. He said, "Oh, that sounds very challenging," and she replied, "Oh, no, it's the easiest job on earth." She explained that for fifty-nine minutes of every hour, she did her homework for law school, she had snacks, she did crossword puzzles, and she read novels. Then for one minute of each hour she swung into action. She first went, with approximately twenty to fifty other similarly well-dressed individuals, to "the desk" where they would learn which business corporations had filed Schedule 13Ds (a form indicating that someone may be attempting a takeover of another corporation), and she immediately hustled to the public phones to get the information to various contacts in New York. It took approximately thirty seconds to go from learning which corporations had made filings to placing these calls. I asked her how long it would then take the recipient of her call to analyze the information, place an order to buy securities if he or she wished to do so, and have the order executed. She shrugged and said, "Maybe another thirty seconds."

We have entered the age of computerized trading. You can execute trades through various mechanisms on Wall Street almost instantly. After the 1987 market crash, everyone became aware of "program trading"; on October 19, 1987, when the market fell 22.6% in one day, in part what had occurred was that the computers had taken over. When certain tipping points were reached, the computers automatically spewed orders onto the floor.

Number four: A factor that has been of great consequence in the transformation of securities trading in recent years is the use of a different way of analyzing the market, by both academics and institutional investors. When the Securities Act was adopted in 1933, the story line as to how to be a successful investor was essentially that suggested by the Horatio Alger novels. You studied investment fundamentals, you mastered them, you picked and bought

securities that had low price-to-earnings ratios or other attractive fundamental features, you held them a long time, you were rewarded for your hard work, and you were able to leave the orphanage in which you grew up and lead a happy life. It was a wonderful, endearing story. Nobody believes it today. These days most people assume that stock trading occurs in what's called an efficient market, and you typically can't outtrade the market. You cannot by dint of hard work place trades before anyone else. Why is that so? One reason is that you're not alone, and another is the information technology already mentioned. There are well over 25,000 professional market analysts in brokerage firms and elsewhere in fast competition with you. All of them have the same computers. All of them get the same information just as quickly from the S.E.C. In selected industries, all of the analysts who follow the industry will be at the same press conferences. These days we've entered the age of the general telephone call; when news—bad news, typically—occurs in a firm, it will be explained to 400 or 500 analysts throughout the country in a simultaneous telephone call.

In the popular version of the efficient market theory, there are only two ways in which you can outtrade the market. One of them is flatly illegal. That's called insider trading. Every one of you can outtrade the market if, through one means or another, you have access to information before it's generally disseminated—but you might have to spend part of your time in a penitentiary if you're caught. The other way to outtrade the market is through risk analysis. At the risk of oversimplifying a complex theory, portfolio theory posits that if you are willing to invest in securities with greater bankruptcy risk, not as individual stocks but in a large portfolio of them, you will be rewarded for your risk taking. This is sometimes referred to as picking stocks with appropriate betas, and it provides the underlying explanation for why growth mutual funds or mutual funds in small firms or in the over-the-counter market tend to outperform mutual funds of a more staid character in years in which the market goes up. There is one important caveat with respect to this theory and that is that these funds also tend to go down faster when the markets decline. But if you examine historical market data, you don't have to be a great genius to realize that if you have a long enough time horizon (some people say that's ten years, some say seven years), the market is likely to go up. Because of this theory, today many mutual funds are more interested in assembling portfolios with the right risk factors and describing those to their investors than in trying to be great stock pickers—and that is a fundamental change. The consequence in relation to the Securities Act is that analysts, while they still love information, have less enthusiasm for it than they did in 1933 when stock picking by fundamentals was the only game in town.

Number five: Another factor that has led, I think, to a diminution or a kind of Götterdämmerung for the Securities Act is blatantly political. In 1933, and indeed in many years in which the securities laws have been amended, we had a much more regulatory Congress than we've had since 1994. At a certain point, the vision of why we have regulation changed. In 1933, the villains in this Manichaean struggle were evil stock manipulators who sold securities while inaccurately or falsely describing them. By 1995 and 1996, the villain had become the plaintiff securities attorney, who brings class actions and handicaps or hinders the legitimate enterprise of self-respecting businesses. That is a dramatic ideological shift. It has certainly contributed to a reduction in enthusiasm for regulation of the securities markets by the SEC and Congress.

Now, I am ready for my final plot twist. The sixth factor in the dramatic changes and acceleration of those changes in recent years takes on real significance. To use the parlance of Wall Street, you can't argue with a rising market. We are now in something like the thirteenth year of the most sustained rising market in the history of this country. I vividly remember being in Ann Arbor, on the tenth floor of the Legal Research Building, on October 19, 1987, the day of the 1987 "crash." The market closed that day at about 1700 for the Dow Jones average. When I drove here this morning, it was flirting with 7000. It doesn't take a great deal of computational ability for one to realize that's over 400% in one decade. Those kinds of gains have, to put it mildly, diminished people's concern about fraud, diminished people's sense that you have to have laws to remedy "information asymmetries."

THE FUTURE

Will this mean that we ultimately will see the full dismantling of the 1933 Act? A true Götterdämmerung for one of the great and successful legislative innovations of this century? I think the answer to that question may turn on how the market does, more than anything else. If the market keeps going up, it's very difficult to care that much about occasional frauds. Wise investors are going to buy stocks in portfolios. If they have a bad experience with one of the stocks in the portfolios, that bad experience will be dwarfed by experiences elsewhere. On the other hand, if the market declines, as it does from time to time, who knows? As the old nautical saying goes, "You don't know what gets left up on the beach till the tide runs out." We may yet hear the Rhine Music, if you will—the reflection of the reality that human cupidity hasn't been abolished from our markets, and we may see a retrenchment or a strengthening of the Act.

Regardless of the future for the Securities Act, the contribution it made, in establishing a new method of regulation through information rather than bureaucratic management of an industry, will live on as one of the great monuments in American legislative history.

AN AMERICA WITHOUT LAWYERS†

Robert A. Stein*

Frank Brixius, your program chairman, invited me to be with you today because of his recollection of my remarks at a 1995 commencement ceremony, when his son graduated from the University of Minnesota Law School. I had prepared a speech for that occasion, but I put aside my prepared remarks because of a very moving experience I had while traveling to Minneapolis.

On the plane to Minneapolis from Orlando, Florida, I sat next to a man and woman from Minnesota who had just had a devastating experience. The day before, they had been involved in a tragic automobile accident in Orlando, and their teenage daughter had been killed. What an unspeakable horror! Perhaps the hardest loss any of us would have to endure is the death of a child. And it had happened to this family in the twinkling of an eye, without warning. One moment they were a happy family enjoying an eagerly awaited vacation in the sun at Disney World, and the next moment their beloved daughter was dead. What a contrast! They were flying back to Minnesota to bury her and try to put their lives back together. Their daughter was also on the plane—in the cargo-hold below, in a coffin.

I was so shaken by this story and the life-shattering experience of this family that the next day I put aside my planned remarks to the graduating class and talked to them about the importance of taking each day one at a time and expressing love to those we care about. We are tremendously blessed by our families and friends, and we need to take the time to express that to them. I hope that the members of that graduating class learned—and all of us will learn—from the tragic experience of that family from Minnesota.

Today, however, I would like to talk to you about quite a different subject: the extraordinary attack on the legal profession in the United States that has occurred in recent years, and is still occurring. Our profession has come under attack from some of the highest elected officials in the land, from the boardrooms of some of America's largest corporations, from the hosts of nightly talk shows, and from the electronic and print media. All around us, we observe lawyers being disparaged and criticized.

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†Address delivered at the Annual Convention of the International Society of Barristers, Westin La Paloma, Tucson, Arizona, March 4, 1997.

*Executive Director, American Bar Association.

This, of course, is not a new phenomenon. Critics frequently quote Shakespeare in their attacks on lawyers. After all, it was Dick the Butcher, in Shakespeare's *Henry VI*, who shouted, "The first thing we do, let's kill all the lawyers."[1] There is much in common between this quotation and lawyers. Both are greatly misunderstood. I think it is instructive to examine the context of the quotation.

Henry was considered a weak ruler by his subjects. Jack Cade, a clothier and rebel, realized all too well the opportunity for power that lay in such fragile governance. He incited the masses by blaming all of their woes on the laws that governed them. He promised them an abundance of everything. His major obstacle was the rule of law. It was in this atmosphere of hatred and incitement to anarchy that Dick, Cade's faithful follower, uttered his now famous line: "[L]et's kill all the lawyers."

In the same scene, the Clerk of Chatham is brought in to Cade for questioning. His crime? Knowing how to write his name. His punishment for admitting this to be so? To be hanged, with his pen and ink-horn about his neck. In the scenes that follow, Cade commands the mob to bring down the Inns of Court.

Shakespeare neither advocated nor condoned the killing of lawyers; quite the contrary. In this scene, "Shakespeare is . . . expounding through the lessons of history . . . his conviction that the breakdown of authority and social order leads only to more and worse cruelties and suffering than before."[2] Shakespeare knew in 1591 what so many have failed to realize at the present time: the critical importance of the rule of law and the essential need for lawyers to maintain it.

The level of criticism and derogatory remarks about lawyers seems to me to be greater now than at any previous time in my lifetime. So I began to think about this question: What if the lawyer-critics had their way, and all of the lawyers in America were eliminated? What would American life be like?

In focusing on this question, I will put aside the impact of the absence of lawyers from all of the community, cultural, religious, and social service organizations in which lawyers serve. Lawyers, perhaps more than any other professional group, are generous with their time and talent, using their training in legal analysis to serve on the boards of their churches and synagogues and mosques, arts and music organizations, hospitals, and other social service providers in their communities. The network of organizations that enrich the

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[1] W. Shakespeare, King Henry VI, part II, act IV, scene 2.
[2] 2 A.L. Rowse, The Annotated Shakespeare 75 (1978).

quality of life in our communities counts large numbers of lawyers in leadership positions. The role that lawyers play in serving their communities makes us all very proud. But let's put that dimension to one side and focus only on the impact of the absence of lawyers on the quality of justice in our society.

What if there were no lawyers in America? A beginning to an answer to this question can be found by looking at other countries that are not governed by the rule of law.

Unfortunately, there are many examples.

COUNTRIES WITHOUT LAWYERS

The atrocities and killings that have occurred in Rwanda in the past two years provide a vivid illustration. Rather than resolve their disputes within an established system of justice, the two major ethnic groups in Rwanda—the Hutus and the Tutsis—have resorted to violence and genocide in response to the wrongs they feel have been committed against them. In 1994, in a period of one hundred days, at least a half million people were killed in Rwanda. Think of it! A half million people killed in just over three months! The level of participation was extraordinarily high. Since most of the killing was done by machetes and other low-tech weapons, it took thousands of people to kill so many. Rwandan prisons now contain 85,000 people charged with involvement in the genocide, and obviously not all who participated are in jail.

In the aftermath of the genocide, the legal system was nonfunctional when it was needed most. Many who had worked in the system either had been killed or had participated in the genocide. The courthouses had been destroyed, either during the fighting or in the subsequent looting by the retreating former army. To supplement the national justice system, the United Nations Security Council set up an International Criminal Tribunal for Rwanda. The Tribunal was established for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law in Rwanda in 1994.

The International Criminal Tribunal for Rwanda shares certain common elements with, but is distinct from, the International Criminal Tribunal for the former Yugoslavia. The American Bar Association, through its Central and Eastern European Legal Initiative program—known by its initials as CEELI—is assisting in the legal research necessary for prosecution of defendants in the former Yugoslavia. In Rwanda, the International Law and Practice Section of the American Bar Association has sent an observer to attend the genocide trials to ensure that due process of law is being applied.

Rwanda is conducting its own investigations and trials of those suspected of committing crimes, but with 85,000 people jailed and a virtually nonexistent

legal system, it is difficult for the government to try all of these cases. As of the beginning of this year, only two defendants had been convicted by the national courts for their participation in the massacres. Unfortunately, in the absence of the effective enforcement of the rule of law, the hostilities and killings between the Hutu and Tutsi peoples have continued right up to the present time and have spread to the neighboring country of Zaire.[3]

Another example of the atrocities associated with the breakdown of the rule of law is the tragedy in Cambodia. Between 1975 and 1978, this small country of six million inhabitants experienced the nightmare of genocide, with the killing of over two million people by the Khmer Rouge. When the Khmer Rouge took over the government of Cambodia, they abolished the rule of law. Cambodians with any education at all were targeted to be killed. The cities were emptied, and the inhabitants were marched into the jungles and fields in an effort to obliterate the culture and history of that country. For those who think that Dick the Butcher's call to kill all the lawyers and Jack Cade's orders to tear down the Inns of Court occur only in the dusty pages of old plays, here is shocking proof to the contrary. The result? The murder of two million Cambodians.

For the past several years, this small country has been attempting to rebuild and establish a government under the rule of law. This is extremely difficult, as most of the educated citizens needed for leadership positions in the government were slaughtered by the Khmer Rouge. A number of expatriate Cambodians have returned to the country to help in the rebuilding effort, and the American Bar Association has a program of technical assistance to help rebuild the legal institutions in Cambodia. Under the direction of our International Law and Practice Section, four American legal advisors and a staff of eight are engaged in this effort, in an office and compound in Phnom Penh.

Recently, I traveled to Phnom Penh and observed first-hand the remarkable program that we have there. Keys to establishing the rule of law in Cambodia are adequate training of judges, assistance to law schools to educate future lawyers adequately, establishment of bar associations to promote a free and independent legal profession, and the drafting of legislation to encourage commercial development and protection of human rights. I am proud of the work of the American Bar Association in helping the fragile democracy of Cambodia and many other newly emerging democracies throughout the world develop the legal infrastructure necessary to permit their citizens to live in freedom with justice.

Perhaps the most dramatic example I can give you of the consequences of the absence of the rule of law is an unforgettable experience I had just over a

[3] On May 17, 1997 (after the date of Mr. Stein's address), the government of Zaire was overthrown and its name was changed to "The Democratic Republic of Congo." *Ed.*

year ago. During the first week of January, 1996, I traveled to Sarajevo to arrange for and attend the first sitting of the Constitutional Court of the Federation of Bosnia-Herzegovina. The Court, although created in the Constitution of the Federation of Bosnia-Herzegovina when the country was established in 1994, had never met. The hostilities in that part of the world among Serbs, Croats, and Muslims had made it impossible for the justice system to operate and had prevented the sitting of the new Constitutional Court.

The structure of the Court itself is quite interesting. Pursuant to the Constitution, six justices must be residents of Bosnia-Herzegovina. Two are required to be Croats, two are required to be Serbs, and two are required to be Muslims. These six are to be joined by three international justices appointed by the International Court of Justice in the Hague. The International Court of Justice had appointed a justice from Syria, a justice from Nigeria, and a justice from Belgium, but these international justices had not been able to travel to Bosnia-Herzegovina for a session of the Court because of the fighting in that country. You will recall that Sarajevo, the capital city, had been under siege and surrounded for two years prior to the Dayton Agreement near the end of 1995.

After the cease-fire produced by the Dayton Agreement, the United Nations decided to attempt to reintroduce the rule of law in that troubled country. Symbolically and operationally, a major step in that process was the convening of the highest court in the land. The American Bar Association had assisted in the development of the Bosnian Constitution and the creation of the Constitutional Court, so I was invited to travel to Sarajevo for this important occasion. Since commercial flights do not go into Sarajevo, my itinerary was to fly to Zagreb, Croatia, where I would meet the three international justices, and together we would travel on a United Nations troop plane into Sarajevo. There we would meet with the resident justices and convene the first session of the Court.

This was only a few weeks after the signing of the Dayton Accord, and, frankly, I was not prepared for what I observed. I hadn't realized that war-like conditions would still prevail at the time of our visit. The experience had a profound effect on me and made me all the more aware of the abundant blessings of the rule of law.

The United Nations troop plane was a Russian propeller plane operated by a non-English-speaking Russian crew. It was the kind of plane in which the tail opened and provided a ramp for tanks and trucks to drive into the body of the plane. There were pull-down benches along each side for troops and other passengers. As we flew into Sarajevo, I sat on a bench along one side with our three international justices and two leaders of the American Bar Association's CEELI program: Mark Ellis, our CEELI Staff Director, and Homer Moyer, a Washington, D.C., lawyer who chairs CEELI's Board of Directors. Our luggage

was under a net in the center of the plane. We flew a vectored flight into Sarajevo so as to avoid flying over some of the most hostile territory, first flying west over Croatia to the Adriatic Sea, then south over the Sea, and then turning to the northeast into Sarajevo.

When we landed, the Russian crew ordered us to move quickly out of the open tail of the plane. Although I could not understand their language, their gestures made it clear that we had to move quickly. Upon emerging from the plane, I was amazed at what I saw. The airport, which had been the scene of some of the fiercest fighting in the preceding two years, was heavily damaged by bombardment. The windows of the control tower were blown out, and the tower itself was heavily damaged, although it was occupied and functioning. The airport terminal was almost completely destroyed; it was only a shell of a building, with sandbag walls replacing the bombed-out ones. Surrounding the tarmac were tanks with their guns pointing toward the surrounding mountains, and there were walls of sandbags to protect machine gun positions. I looked up at the mountains ringing the airport and could see the Serbian guns aimed at the airport and the town. We were ordered to move promptly behind a wall of sandbags, and our luggage was quickly deposited by a forklift tractor into the mud of a winter thaw. Our plane, which was the only one on the tarmac, immediately took off again, as no plane was allowed to remain on the ground for more than twenty minutes.

We were greeted by our hosts from the Bosnian government, and as we drove into town from the airport past numerous military check points, we saw that there was no recognizable highway system. Walls of earth had been erected to create a twisting new road, and we turned and twisted through this maze. We saw a network of trenches which had recently been the front lines of a ferocious, deadly, and extended battle. Along the route into Sarajevo were apartment buildings that were virtually destroyed, with all of the windows broken, and the interiors burned out. It appeared that some people were attempting to live in a few of the habitable portions of some of these bombed-out structures. My gaze kept returning to the mountains surrounding Sarajevo, where I could see the Serbian guns reflecting sunlight. The guns had not yet been removed under the terms of the Dayton Accord.

Within the city itself, electricity was intermittent. The street lights functioned on only one street, and the city was heavily patrolled by the troops of the United Nations peacekeeping force. Under the terms of the Dayton Agreement, Sarajevo was under French control, so French troops, tanks, and trucks were to be seen on nearly every block of the city. Virtually every building in town showed the scars of war; windows were broken in many, and every building had bullet holes. Rubble from mortar shells was everywhere. This,

you will recall, was the fairytale city that had hosted the Winter Olympics just twelve years earlier in 1984. This was the charming city nestled in the mountain valley we all saw on television during those games. It was now reduced to a shocking scene of death and destruction.

Indeed, during the week we were there, mortar shells continued to be fired into the city. Two days after we arrived, a trolley was struck by a shell only a couple of blocks from where we were. One young woman was killed and other passengers on the trolley lost arms and legs. It was a terrible scene of blood and death.

But the physical destruction, as powerful as it was, was not as moving as what had happened to the inhabitants of this city. Almost every person we spoke to had lost loved ones during the two-year siege and bombardment. Indeed, two justices on the Constitutional Court had lost children just a few weeks before we arrived. One justice had the unspeakably tragic experience of having his ten-year-old son killed as he walked out of the front door of their home.

It was an extraordinary week. Each day we worked to arrange for the first session of the Court, and each evening we sat and talked with the justices, their interpreters, and other Court personnel about the experiences that they had had. And we cried together as they told of those experiences. We cried a lot during that week.

We laughed, too. My experience in Sarajevo taught me something about the remarkable human instinct for survival. Despite the devastation, death, and loss, life must go on. And so these people who had suffered so much were in the process of putting their lives back together.

During those talks long into the night, I often asked our Sarajevo hosts, "How did it get like this? What was it like when you were growing up? What caused it to become so violent?" Remember, this was a group not unlike the group here this morning. There were lawyers and judges and spouses in the group. They had a high level of education. Because ethnic representation was mandated on the Court, there were Croats, Serbs, and Bosnian Muslims among them.

They responded to my inquiries by indicating that when they were growing up, they were aware of the different ethnic heritages in their communities, and, of course, the religious differences were clear. The Croats were largely Roman Catholic; the Serbs tended to be Russian Orthodox; and the Muslims attended the Islamic mosques. (There was a measure of religious observance in the former Yugoslavia.) There had been centuries of conflict among these groups. And so my hosts had observed incidents of prejudice and discrimination as they were growing up, but it was not a great deal more than the hate crimes we see from time to time in this country.

They were astounded and shocked by the sudden onset of hostilities in their country. Extremists in each of the ethnic communities had begun to spew their hatred in the early nineties, and almost before the educated classes could react, the war had begun. Initially, the extremists destroyed the television stations and other media, so that each ethnic group began to receive its information only from its own biased source. Each ethnic community was told of the atrocities committed by other ethnic groups, to enrage the people further, and the situation swirled out of control with death and destruction everywhere until the Dayton Peace Accord intervened. Jack Cade was still at work—in the twentieth century in Bosnia.

I wish that every lawyer in America and every person who respects the rule of law could have stood beside me when we were in Sarajevo during that extraordinary week. The judges and lawyers of Bosnia-Herzegovina said over and over again, with great emotion, "Thank God for American lawyers. Thank God for the American Bar Association. You are helping us to restore a system of justice in our country, and that is the only hope we have of ending this nightmare and living in peace."

I will never forget the day the Constitutional Court held its first session. It took place in an ornate room in the presidential palace, one of the few rooms that avoided massive damage during the siege. (There were bullet holes along the beautiful decor near the ceiling.) The entire government of the country was in that room that day. The President and Vice President were there. Their ministers were there. Leaders of the Parliament were there. Ambassadors from many of the countries of the world were there. And when the justices marched in, clothed in black robes, it was a dramatic moment. Tears began to flow. The convening of the highest court in the land, the Constitutional Court of the Federation of Bosnia-Herzegovina, symbolized the return of the rule of law to this very troubled land.

When we were there at the beginning of 1996, it was not clear how the rule of law could be fully restored. How could these people, who had suffered so much, be persuaded to turn to the justice system to resolve their disputes instead of attacking their fellow citizens by force? Even today, it is uncertain whether peace can be maintained after withdrawal of the United Nations peacekeeping forces. Efforts are being made to rebuild as quickly as possible the institutions necessary to maintain a peaceful and orderly society, and the most critical of these institutions is the justice system.

I do not mean to suggest that there is a perfect comparison between what happened in Bosnia-Herzegovina and our situation in the United States. The ethnic conflict there has roots that go back centuries. What happened there is not likely to happen here, thank God. But Bosnia is a stark and dramatic example of what can happen in the absence of the rule of law.

BACK TO AMERICA

In America, we are blessed to live in a land that is governed by the rule of law. No person is above the law, whatever office or title they may hold. All citizens must submit to the legal process and abide by its decisions. Because it has always been this way, most Americans feel it will always be this way. But this is a very fragile blessing that we have, a blessing we must be constantly vigilant to protect.

Lawyers and their judicial colleagues—you and I—compose the profession responsible for ensuring the rule of law in our society. Lawyers vigorously advocate on behalf of the rights of American citizens, and judges resolve disputes between American citizens and between American citizens and their government. Every day and in countless ways, lawyers work to ensure that the rule of law prevails in our country. Our legal system is not perfect—far from it. But for all its problems, America has the best system of justice the world has ever known. The legal profession in this country makes it possible to protect what's right and change what's wrong—peacefully and without bloodshed.

In short, lawyers make possible the rule of law that permits the quality of life we enjoy as Americans. Even the severest critics of the legal profession would not want to live in an America without lawyers. You know that; I know that; and we must continuously strive, through our words and deeds, to make sure that our fellow Americans know that, as well.

STUPID LAWYER TRICKS: AN ESSAY ON DISCOVERY ABUSE†

Charles Yablon*

On May 3, 1995, even the usually unflappable readers of *The Wall Street Journal* undoubtedly were shocked to learn of a new litigation tactic that stretched the already elastic bounds of acceptable advocacy.[1] In a defamation action brought by Philip Morris Company against the American Broadcasting Company, lawyers for ABC alleged Philip Morris had produced twenty-five boxes containing approximately one million documents. These were the "critically sensitive flavoring documents"[2] relating to ABC's charge that Philip Morris spiked its cigarettes with nicotine. The documents had been transferred onto a special dark red paper with squiggly lines, which made them hard to read and impossible to photocopy. ABC's lawyers alleged that the paper gave off noxious fumes that made it "difficult to work with the altered copies for extended periods of time."[3] The smelly paper was reported to have nauseated one partner and given someone else a headache. The extent to which these documents were truly nauseating (that is, more nauseating than any other million documents that have to be reviewed) remains in dispute.[4] Nonetheless, counsel for Philip Morris, New York's Wachtell, Lipton, Rosen & Katz and

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†This article originally appeared at 96 Colum. L. Rev. 1618 (1996). Reprinted by permission.

*Professor of Law, Benjamin N. Cardozo School of Law. I want to thank my colleagues and casebook co-authors, A. Leo Levin and Philip Shuchman, for their advice, insight, and wisdom on all aspects of Civil Procedure. All of the opinions, irascibility, and impudence expressed in this Essay are entirely my own. Most of the jokes, however, are stolen.

[1] See Suein L. Hwang, Sniffing Out Evidence Would Be Quite Easy With This Paper Trail, Wall St. J., May 3, 1995, at Bl; see also Benjamin Wittes, Quite a Discovery: Philip Morris' Papers In ABC Libel Case Leave Foes Fuming, Legal Times, May 1, 1995, at 1 (reporting the consequences arising from Philip Morris' delivery of discovery documents).

[2] Sanctions Denied Against Philip Morris Over Document Production, 9 Mealey's Litig. Rep. (Tobacco) 2, May 22, 1995, available in Westlaw, Legal Newsletter Database.

[3] Wittes, supra note 1, at 22; see also Alison Frankel, Blowing Smoke, Am. Law., July/Aug. 1995, at 68, 75-76 (noting that Philip Morris produced twenty-five boxes of key documents on unphotocopiable paper).

[4] The right to produce sensitive documents on paper that cannot be photocopied or optically scanned, however, appears to be clearly established, at least in the Circuit Court for the City of Richmond. In his order denying ABC's motion for sanctions, Judge Markow, who had viewed samples of the documents, "found that reading from this material is not as comfortable as from the usual black writing on white paper format, but is not unduly difficult." Opinion Denying Sanctions, Philip Morris Co. v. American Broadcasting Co., No. LX-816-3, 1995 WL 348375, at *1 (Cir. Ct. Va. May 5, 1995) (finding that Philip Morris complied with discovery rules) (on file with the Columbia Law Review). He also stated that he "did not observe" any unpleasant odor. Id. Accordingly, the judge concluded that the material had been provided in "reasonably usable form" and did not violate his court's discovery rules. Id. at *3.

Richmond's Hunton & Williams, agreed to produce some of the documents on non-odiferous paper.[5]

This pungent story has done nothing to clear the air regarding the vexing problem of discovery abuse. Responses to the stinky paper ploy revealed a difference of opinion about such tactics among the practicing bar. Some litigators, while not excusing counsels' actions, sought to explain such excesses as an inevitable result of the current litigation climate, where over-aggressiveness is equated with zealous advocacy, and attorneys are expected to win at all costs. Other lawyers had a completely different reaction: they just wanted to know where they could buy some of that smelly paper.

Am I being flippant about a serious problem that threatens the integrity of our entire system of civil justice? You bet. But I submit that discovery abuse has not been addressed with the flippancy and irreverence that it deserves. Instead, we get moralistic sermons about the breakdown of civility in the legal profession and nostalgic yearning for the good old days when lawyers acted like gentlemen and O.J. Simpson was still selling rental cars. On this view, discovery abuse is just a symptom of a general decline in values and coarsening of American society, a problem so severe that it can be cured only by bedtime stories from William Bennett.

This Essay seeks to transcend this simplistic and boring debate and engage in another that, while equally boring, will be far more complicated. In the grand tradition of contemporary law review writing, this piece provides a perspective on discovery abuse so creative and innovative as to be completely preposterous.[6] While my unique approach to discovery abuse draws extensively on ethical theory and sociology, the keys to this analysis are the long car trips I took with my kids when they were five and eight years old. From these trips I developed the fundamental insight about discovery abuse which I now share so that, as with most law review articles, you will not miss anything important when you stop reading after the first three pages.

I submit that the best solution for lawyer misconduct in discovery proceedings is the same one parents use when their kids act up on long car trips—tell them to "shut up and knock it off," preferably in a really loud voice. I know this solution does not sound much like cutting edge legal theory, but give it a chance. After I have jazzed up this straightforward advice with lots of references to obscure cases, theoretical debates, books and articles you have never read (and I have only skimmed), it will sound a lot more clever.

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[5] Wittes, supra note 1, at 22 (quoting a Philip Morris lawyer's statement: "We thought that if there was a one-in-a-trillion chance that someone was getting even a whiff of nausea that we would send it on regular paper."). The court's opinion, however, states: "After much discussion and negotiation, Philip Morris has agreed to produce some of the material on white reproducible paper." *Philip Morris Co.*, 1995 WL 348375, at *2.

[6] This ensures that it will not be taken seriously enough by judges and legislators to cause any real damage.

Hidden in the apparently simple legal directive to "shut up and knock it off" are positions on some of the major issues of contemporary legal theory. In recommending such an order, I assert that discovery abuse is a problem of moral education that can be ameliorated, rather than a prisoners' dilemma in which lawyers maximize value by being nasty, brutish, and short with each other. Telling lawyers to "knock it off" also recognizes a distinction between bad actions and bad lawyers. One problem with current law is that many judges are reluctant to pull out the big strap of discovery sanctions except when convinced that the lawyers involved are so utterly recalcitrant that they deserve a serious whupping. This piece suggests that a major improvement in the moral education of litigators would be effected by increased sanctioning of smaller, more annoying discovery abuses with smaller, more annoying punishments.

In the pages that follow, I elaborate on these ideas in nauseating detail. (The pages themselves, however, should smell just fine.) Part I sets forth a theoretical framework. Part II then examines actual cases in an attempt to reveal the underlying norms and bizarre social customs of lawyers who engage in discovery abuse. Part III follows immediately upon the end of Part II. It will make you smarter and better looking, and give your hair a lustrous shine. It also will contain some suggestions about how to fix lawyers who abuse the discovery process.

I. LITIGATION NASTINESS: MACHIAVELLIAN OR MERELY DUMB?

This Part tries to answer that perennial question: Are lawyers truly bad, or do they just do bad things? Rather than seek a definition of the amorphous mass of misconduct the courts have labeled discovery abuse, it examines the pressures, incentives, and attitudes of lawyers engaged in the litigation process, i.e., litigators,[7] to understand what gets them into trouble in the first place. It concludes that while there are more than a few sleazeballs out there, and some situations in which perfectly nice lawyers are constrained to act like sleazeballs, much discovery abuse consists of lawyers trying to engage in the kind of aggressive, zealous advocacy required to make our adversarial system function properly, *but who have not learned when to stop*. If this assessment is accurate, then telling them to "shut up and knock it off" represents a legal innovation of the first order.

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[7] The term "litigator" is a combination of the Latin *litigare*, "to dispute," and the American *gator*, "to chomp down hard with sharp teeth." Litigators are lawyers who engage ferociously in all aspects of the pretrial process, and then settle.

A. *Why do lawyers fail moral education?*

Consider one of my favorite cases of discovery abuse, *Blank v. Ronson*.[8] In that fairly routine securities class action, the judge, in ruling on a motion to quash the deposition notice of the class representative, was required to actually read the discovery papers previously served. This exercise naturally caused the judge to blow his stack:

> Although we have before us two highly competent law firms, there is, in this vast expanse of paper, no indication that any lawyer (or even moderately competent paralegal) ever looked at the interrogatories or at the answers. It is, on the contrary, obvious that they have all been produced by some word-processing machine's memory of prior litigation. . . .
>
> Accordingly, the Court, on its own motion, strikes both the interrogatories and the purported answers. To the extent that they may have already been filed, we direct the Clerk to return them to the respective parties. The parties are, furthermore, ordered never to refer to them again in this litigation.[9]

The significance of *Blank v. Ronson*, I submit, lies not in the fact that the judge is angry,[10] but that he is surprised that this was the way "two highly competent law firms" would conduct discovery. I suspect that the lawyers were surprised at the judge's surprise. From their perspective, these tactics were perfectly reasonable. After all, the whole point of putting burdensome boilerplate interrogatories in your word processor is to spit them out quickly in case after case. Plaintiff's counsel had developed one-size-fits-all interrogatory objections as a countermeasure to one-size-fits-all interrogatories. Nobody except the judge was complaining about it. All the lawyers wanted from the judge was a nice little ruling about whether the plaintiff's deposition should go forward. They did not expect to get yelled at for being lazy and incompetent. This strange disparity between the way lawyers act and the way judges supervising the process expect them to act is the fundamental fact about discovery abuse which requires an explanation. Ordinarily, we expect lawyers to be rather good at ascertaining judicial expectations and conforming their conduct to the judge's normative perspectives.

But the discovery process is not the only place where people operating in close proximity and in related but hierarchically distinct roles exhibit very different normative perspectives. This should be obvious to anybody who has ever driven an automobile with related, but hierarchically distinct, five and

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[8] 97 F.R.D. 744 (S.D.N.Y. 1983).

[9] Id. at 745.

[10] "Angry" is one of the two most frequent attitudes with which judges hear discovery motions. The other is "asleep."

eight year-olds in close proximity in the back seat. The dominant normative perspective from the front seat (often clearly stated at the beginning of the car trip) is to enjoy the lovely scenery in an atmosphere of peace and quiet. While an inhabitant of the back seat may recognize those parental concerns at a theoretical level, her dominant normative goal is to prevent her mean, horrible, older brother from carrying out his threat to throw her Barbie's head out the window. The most effective way to accomplish this, of course, involves screaming like a banshee. While such conduct will undoubtedly cause her parents to yell at the inhabitants of the back seat, it will also get them to turn around, and will therefore likely result ultimately in the return of Barbie's head to her rightful owner.

From the parents' perspective, such behavior seems like a failure of moral education. Their kids simply have not yet learned how to behave on long car trips. The kids, however, live in a different, more complex moral universe in which the avoidance of parental anger must be weighed against conflicting values like the potential loss of property rights in Barbie's head or the reputational damage that will result from having been gotten last in a game of "Got You Last." Both normative perspectives have some validity, but perhaps not equal amounts.

Similarly, in *Blank v. Ronson*, from the judge's perspective the lawyers have wasted a lot of time and energy on useless papers and have gotten yelled at in the process. But from plaintiff's counsel's perspective, plaintiff's deposition got postponed for at least two months while the lawyers drafted and served new interrogatories and answers, and that obviously *felt* like a victory, even if it had little impact on the ultimate outcome of the case. Defendant's counsel may even feel that they lost, and be looking for a way to even the score. These lawyers also inhabit a complex moral universe in which using a word processor to spit out burdensome, boilerplate interrogatories and thoughtless objections may seem like a good way to litigate aggressively and cheaply, and to avoid being gotten last in their own grown-up version of "Got You Last." Here too, both the court's and counsels' perspectives have some validity, but perhaps not equal amounts.[11]

It would be a mistake to view the lawyers' actions in *Blank v. Ronson* as a

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[11] Some might argue that the child shows greater rationality in the above hypothetical than do the lawyers in *Blank v. Ronson*. After all, she has chosen an effective way to achieve her goal—preserving Barbie's head—while the lawyers have simply gotten the judge angry at them and have achieved no strategic advantage in the case.

I would argue, however, that the two cases are closely analogous. Both the child and the lawyers exhibit perfectly competent end-means rationality, but in support of questionable and shortsighted ends. The child preserves the doll's head at the expense of peace, quiet, and a pleasant afternoon drive—things which she does not value as highly as do her parents. We assume that as she matures she will learn to value quiet more and dolls less, and will change her priorities accordingly. The lawyers got to postpone the deposition and show each other how tough they were, at the expense of annoying the judge and possibly injuring their long-term litigation prospects. The interesting fact is that while most lawyers will say that these long-term goals are most important, they often act as if they are really more interested in scoring points on opposing counsel. It is not clear that these priorities will change as the lawyers mature.

childish game. Contemporary social and economic theory has taught us that games are serious business. If written about with sufficient obscurity and a little calculus, they can even get you tenure. One might portray abusive litigation tactics as a prisoners' dilemma, in which each lawyer perceives that her opponent's optimal strategy is to engage in nasty and wasteful discovery.[12] The nasty and wasteful discovery of both sides then cancels each other out, resulting in a nasty and wasteful, but stable, equilibrium.[13] Many litigators describe their world in just such terms, explaining how they are driven to questionable tactics by the truly horrific behavior their adversaries have taken, are about to take, or might possibly take in the future.

It would be silly to deny that such situations do sometimes exist—and I have been warned not to make this Essay any sillier than is absolutely necessary. Yet, we legitimately may question whether such incentives are present in all or even most instances of discovery abuse. Critical to the "prisoners' dilemma" explanation for discovery abuse is the litigator's perception that if her opponent engages in abusive discovery practices and she does not, she or her client will be worse off. There is much reason to question both whether that is indeed the case, and whether that is what litigators really believe. Many forms of discovery abuse, such as overbroad discovery requests and frivolous claims of privilege, do not provide any obvious benefit to the party on whose behalf they are made. Other forms of abuse, such as hiding key documents or disrupting depositions, might provide a litigation advantage, but only if the other side does not find out or does not do anything about it. A lawyer contemplating such tactics in a rational, profit-maximizing mode, must weigh any benefit they might provide against the likelihood that opposing counsel will have an effective non-abusive response which will destroy any advantage the

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[12] See, e.g., Thomas D. Rowe, Jr., American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation: Background Paper, 1989 Duke L. J. 824, 872 n.160 (1989) ("Lawyers, unfortunately, are somewhat in the position of the jailers in their clients' Prisoners' Dilemma"); John K. Setear, The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse, 69 B.U. L. Rev. 569 (1989) (applying nuclear strategic game theory to discovery abuse); Peter Huber, Book Note, Competition, Conglomerates, and the Evolution of Cooperation, 93 Yale L. J. 1147, 1148-49 (1984) (discussing how corporate egotism is not inconsistent with cooperation despite obvious "prisoner's dilemma" problems existing in laissez-faire capitalism (citing Robert Axelrod, The Evolution of Cooperation 3 (1984))).

[13] Most law professors can now draw some version of the following decision matrix in their sleep:

Lawyer Two

Lawyer One	Nice	Nasty
Nice	3, 3	–5, 5
Nasty	5, –5	–1, 1

The point is that whichever side goes first, and whether or not they have knowledge of the other's actions, each side will be driven by the nature of the payoff matrix to choose nastiness as a strategy.

tactic might provide, will make the abusive lawyer look like a jerk, and might even result in court-ordered sanctions.[14] Given that litigators are pretty good at detecting and informing judges of their adversaries' sleazy tactics, it is not at all clear that such tactics are the most beneficial strategy against an opponent who refuses to fight dirty.

The more cynical might protest that even though discovery abuse may provide little benefit to clients, it provides extrinsic benefits to lawyers, either in the form of additional fees[15] or in the reputational value of being known as mean, vicious, and nasty. The fee explanation seems dubious.[16] It would imply, for example, that we should see less discovery abuse among plaintiffs' counsel operating on a contingency fee than among other counsel.[17] Nobody I

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[14] Many of the game theory models assume that discovery abuse benefits one side by raising the discovery costs of the other. The other side then responds by abusively raising costs for its opponent, and a prisoners' dilemma ensues. Unless discovery abuse is defined as any action which raises litigation costs to the other side, which some of these models seem to do, it seems likely that litigators can raise costs (and anxiety levels) of their opponents more effectively with a well-drafted set of objections, a motion for a protective order, or a motion for sanctions, than they can with an abusive response.

There remains the possibility that lawyers mistakenly believe that abusive discovery maximizes benefits in most litigation situations. If we reject this possibility—on the ground that, as noted above, rational evaluation of an opponent's potential responses will show that the downside risk of such a strategy is generally greater than the potential benefit—we are left to question why lawyers *say* their abusive discovery is designed to benefit the client. The answer is complex and will take up much of Part III of this Essay. The short answer, however, is that the economic distinction between "rational" and "irrational" behavior is simply too crude to capture the psychology of discovery-abusing lawyers, whose post hoc justifications for their actions may be quite different from their actual motivations.

Imagine (or perhaps you have had experience with) a boss with a terrible temper, who flies off the handle and mercilessly berates employees. Although his employees frequently leave, and nicer bosses get better performance, the abusive boss continues to assert that such "toughness" is beneficial, a rational strategy to improve the business or maximize employee performance. Does the boss really believe such actions are benefit-maximizing? I would suggest not, yet such a boss is not simply lying either. Rather, as we will see, the boss is engaging in a form of *akratic* behavior. See infra text accompanying notes 37-38.

[15] Among those who have argued that hourly billing fuels discovery abuse are Wayne D. Brazil, Introduction, Ethical Perspectives on Discovery Reform, 3 Rev. Litig. 51, 76-78 (1982); Frank F. Flegal, Discovery Abuse: Causes, Effects and Reform, 3 Rev. Litig. 1, 29-31 (1982); Michael E. Wolfson, Addressing the Adversarial Dilemma of Civil Discovery, 36 Clev. St. L. Rev. 17, 46 (1988).

[16] While discovery abuse is often found in big commercial litigations where corporate clients can afford to pay big fees, such clients generally have their own internal staff of lawyers, one of whose jobs is to keep down litigation costs.

[17] Contingency fee lawyers could benefit from wasteful discovery if it allowed them credibly to threaten to raise litigation costs relative to settlement costs, and thereby create incentives to settle. See Robert D. Cooter & Daniel L. Rubinfeld, An Economic Model of Legal Discovery, 23 J. Legal Stud. 435, 444-45 (1994). Such a strategy would seem to be effective only in nuisance suits, where defendants' fear of an adverse verdict is small and saving court costs provides the major incentive to settle. Moreover, there is some empirical evidence that defendants tend not to offer any money in suits they view as nuisance suits. See Samuel R. Gross & Kent D. Syverud, Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial, 90 Mich. L. Rev. 319, 358-59 (1991).

[18] Lawyers tend to blame discovery abuse on the fact that their opponents act like jerks, irrespective of the way they are compensated. A fairly recent study of lawyers' attitudes toward discovery in state courts found "near unanimity in the attorneys' opinions concerning what factors in cases tend to lead to problems in the discovery process." Susan Keilitz et al., Attorneys' Views of Civil Discovery, Judges' J., Spring 1993, at 2. State court practitioners in Boston, Kansas City, New Haven, and Seattle all agreed that the factors most likely to predict discovery problems were: (1) personality or style of the opposing attorney, (2) inexperience of the opposing attorney, (3) animosity between the parties, and (4) a large monetary claim. See id. at 35. One scholar criticizes much purportedly empirical work on discovery abuse as simply parroting the attitudes of lawyers who tend to blame their opponents for the problems. See Linda S. Mullenix, Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking, 46 Stan. L. Rev. 1393, 1415 (1994) (characterizing one study as demonstrating "that the discovery abuse debate was in fact nothing more than a finger-pointing contest.").

know of (other than contingency fee lawyers) has yet noted such a disparity.[18] Moreover, to simply assert that lawyers benefit from a nasty reputation assumes the answer to the very issue here raised: To what extent does having such a reputation really benefit its possessor?

Do not get me wrong. I do not deny that there is an advantage to a litigator (and to her client) in being aggressive and resourceful. But the discovery process is premised on the notion that at some point aggressive litigation can be taken too far and become discovery abuse. Granted, commentators have recognized that a tension exists between the cooperative nature of discovery and the adversarial nature of the overall litigation system.[19] Moreover the line between appropriate and inappropriate conduct is often unclear. Nonetheless, judges do police that line, and can be persuaded to impose severe sanctions for serious violations of the discovery rules.[20] Accordingly, getting nasty often causes more discernible cost than benefit to lawyers or their clients, and so economic theory fails to explain the persistence of the practice. To develop a theory of why some lawyers keep acting like jerks, we must turn instead to that oft-invoked authority on moral failings—Aristotle.

B. *Discovery Abuse in Classical Thought*

This has been a very good period for Aristotle in legal scholarship.[21] Whether tackling a complex problem in contemporary torts,[22] contracts,[23]

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[19] See Maurice Rosenberg, Changes Ahead in Federal Pretrial Discovery, 45 F.R.D. 479, 481, 484-86 (1968); Wolfson, supra note 15, at 19-20.

[20] Even if, as we will see, judges rarely utilize the most stringent discovery sanctions, the uncertainty of their application should make them more of a deterrent. For example, for an abusive action which creates a 20% chance of a $500,000 sanction to be worth doing, it would have to provide more than $100,000 of benefit.

[21] If you go to the "LAWREV" library on Lexis and search for 'Aristotle," your search will be interrupted as likely to retrieve more than 1000 documents. If you try "Aristotle and ethics" or "Aristotle and philosophy" you still get over 1000. Even searching "Nicomachean Ethics" gets you 297 documents. Now you know how I did the research for this Essay. Search of LEXIS, Lawrev Library, Allrev File (Sept. 12, 1996).

[22] See, e.g., Jules Coleman, Corrective Justice and Wrongful Gain, 11 J. Legal Stud. 421, 433-36 (1982) (applying Aristotle's principle of corrective justice as theory of tort liability and recovery); Robert Cooter, Torts as the Union of Liberty and Efficiency: An Essay on Causation, 63 Chi.-Kent L. Rev. 523, 546-47 (1987) (discussing conflict between Aristotle's theory of corrective justice and cost-benefit justification for tort compensation).

[23] See, e.g., James Gordley, Enforcing Promises, 83 Cal. L. Rev. 547, 548-51 (1995) (demonstrating correlations between Aristotle's theories of commutative justice and liberality and American courts' concerns with transfer of wealth, as represented by doctrines of consideration, promissory reliance, and offer and acceptance); James Gordley, Equality in Exchange, 69 Cal. L. Rev. 1587, 1588-90 (1981) (discussing origins of doctrine of equality in exchange in Aristotle's Nicomachean Ethics).

[24] See, e.g., Kyron Huigens, Virtue and Inculpation, 108 Harv. L. Rev. 1423, 1444-56 (1995) (showing derivation of doctrine of inculpation from Aristotle's theory of virtue in Nicomachean Ethics); Stephen J. Morse, Excusing the Crazy: The Insanity Defense Reconsidered, 58 S. Cal. L. Rev. 777, 782 (1985) (correlating insanity defense and Aristotelian notions of responsibility); Benjamin B. Sendor, Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime, 74 Geo. L. J. 1371, 1372-73 (1986) (tracing "framework of Anglo-American analysis of exams" to Aristotle).

[25] See, e.g., Ronald Beiner, The Liberal Regime, 66 Chi.-Kent L. Rev. 73 *passim* (1990) (using Aristotelian ethical theory to support claim that classical moral and political categories are not rendered obsolete by liberal theory).

[26] See, e.g., Phyllis Goldfarb, A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education, 75 Minn. L. Rev. 1599, 1662-67 (1991) (employing Aristotelian ideas to support argument that clinical method is best way to teach professional ethics); David Luban, Epistemology and Moral Education, 33 J. Legal Educ. 636, 637, 650-61 (1983) (defending Aristotelian argument for clinical moral education).

criminal law,[24] constitutional theory[25] or clinical education,[26] many scholars turn first to the lecture notes of a 2300 year old Stigirite pedant who toadied to the Macedonians and whose only known legal training was listening to Plato talk about who to keep out of the Republic.[27] Aristotle's insights are frequently invoked in law reviews on such topics as the necessity of following rules,[28] the necessity of not following rules,[29] corrective justice,[30] incorrective justice,[31] friendship,[32] love,[33] and how to run a law firm.[34] Not only that, but he pretty

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[27] This sort of thing can get vicious. A few years ago in the *Harvard Law Review*, one distinguished legal scholar, reviewing a book by another distinguished legal scholar, accused the latter of being "indifferent to the Aristotelian tradition" and further complained that the author "does not seem to be at all concerned about whether he is departing from several key premises in the Nicomachean Ethics." George P. Fletcher, Corrective Justice for Moderns, 106 Harv. L. Rev. 1658, 1667 (1993) (citation omitted) (reviewing Jules Coleman, Risks and Wrongs (1992)).

[28] See, e.g., Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1182 (1989). In that article, Justice Scalia announces that "I stand with Aristotle." Id. This would be difficult for most people, but Justice Scalia might pull it off.

[29] See, e.g., Roger A. Shiner, Aristotle's Theory of Equity, 27 Loy. L.A. L. Rev. 1245, 1251-53 (1994) (using Aristotle's theory of equity to support exercise of individualized judgments); Andrew C. Spiropoulos, Aristotle and the Dilemmas of Feminism, 18 Okla. City U. L. Rev. 1, 8, 56 (1993) (discussing how Aristotelian thought proposes case sensitive political solutions that are not bound by one rule of approach).

[30] See, e.g., Ernest J. Weinrib, The Gains and Losses of Corrective Justice, 44 Duke L. J. 277, 277-79 (1994) (recasting Aristotle's theory of correlativity of gain and loss in order to apply corrective justice to modern private law). Professor Weinrib gets the prize for most committed Aristotelian legal scholar. He does his own translations. See also Peter Benson, The Basis of Corrective Justice and Its Relation to Distributive Justice, 77 Iowa L. Rev. 515, 529-32 (1992) (contrasting widely accepted understanding of corrective justice with Aristotelian conception); Kathryn R. Heidt, Corrective Justice From Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?, 47 Wash. & Lee L. Rev. 347, 347-55 (1990) (using Aristotle's scheme to explore modern concept of corrective justice and its application); Ernest J. Weinrib, Corrective Justice, 77 Iowa L. Rev. 403, 425 (1992) (defending importance of Aristotelian concept of corrective justice to understanding of private law relationships).

[31] See John Lawrence Hill, Exploitation, 79 Cornell L. Rev. 631, 655-57 (1994). Professor Hill attributes to Aristotle the "intellectual roots of the traditional moral psychological-paradigm underlying the theory of excuse in Anglo-American law." Id. at 655 (citation omitted); see also Stephen A. Siegel, The Aristotelian Basis of English Law 1450-1800, 56 N.Y.U. L. Rev. 18, 40 (1981) (arguing that, according to Aristotle, justice is a variable, relative notion).

[32] See Michael J. Kaufman, The Value of Friendship in Law and Literature, 60 Fordham L. Rev. 645, 660-61, 665-66 (1992) (reinvigorating Aristotle's ideal of friendship in legal, literary, and philosophical discourses); Anthony Kronman, Aristotle's Idea of Political Fraternity, 24 Am. J. Juris. 114, 125-38 (1979) (analyzing Aristotle's ideal of friendship as a necessary condition for lasting political association).

[33] See John M. Finnis, Law, Morality, and "Sexual Orientation," 69 Notre Dame L. Rev. 1049, 1061-63 (1994) (critiquing Nussbaum's characterization of Aristotle as tolerant of homosexuals); Martha C. Nussbaum, Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies, 80 Va. L. Rev. 1515, 1553-54, 1581-83, 1603-04 (1994) (using Greek philosophical attitudes toward same-sex relationships to highlight current assumptions).

[34] See Jack L. Sammons, Jr. & Linda H. Edwards, Honoring the Law in Communities of Force: Terrell and Wildman's Teleology of Practice, 41 Emory L. J. 489, 492 n.6, 510 n.50 (1992) (using Aristotle's theories of humor and friendship to argue for law firms as communities of friends); see also Anthony T. Kronman, The Lost Lawyer 132-33 (1993) (describing ideal lawyer-client relationship in Aristotelian terms).

[35] See, e.g., Donald F. Brosnan, Virtue Ethics in a Perfectionist Theory of Law and Justice, 11 Cardozo L. Rev. 335, 341-49 (1989) (relying on Aristotle to support thesis that law should strive to make citizens virtuous); Marlena G. Corcoran, Aristotle's Poetic Justice, 77 Iowa L. Rev. 837, 842-43 (1992) (exploring Aristotle's conception of equity as conception of corrective justice); Miriam Galston, Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy, 82 Cal. L. Rev. 329, 372-78 (1994) (arguing for a return to Aristotelian moral education and deliberative politics); Steven J. Heyman, Aristotle on Political Justice, 77 Iowa L. Rev. 851, 857-59 (1992) (criticizing simple use of Aristotelian corrective justice to support formalist theory of private law); Linda R. Hirshman, The Book of "A," 70 Tex. L. Rev. 971, 986-87 (1992) (describing how feminism can learn from Aristotle); Lawrence B. Solum, Virtues and Voices, 66 Chi.-Kent L. Rev. 111, 114-29 (1990) (reconciling Aristotelian notion of virtue with modern democratic urge to inclusion).

much has the market cornered on virtue.[35]

Why does Aristotle command such attention and respect? In the old pre-post modern era, we would simply have been told that Aristotle was a Great Man. These days, of course, the canons have been silenced, and we no longer accept an immutable, noncontextually-based concept of the "Great." (The concept of "Man" is not doing so hot either.) If we have done away with greatness, however, we certainly have retained the concept of celebrity, and there is no doubt that Aristotle is hot right now. Perhaps it is because, like Madonna and Elvis, he only needs *one name*. Also like Madonna and Elvis, Aristotle's biggest hits keep getting played over and over, frequently performed by younger artists.

Our interest here is in one of Aristotle's oldies but goodies, "Moral Education."[36] Aristotle discovered and categorized a whole bunch of moral failings that people before then did not even know they had. One of his most interesting discoveries is *akrasia*, rendered in one of the standard translations as "incontinence" and in another as "moral weakness."[37] Aristotle tells us not to confuse the akratic or incontinent person with the "self-indulgent" person. The self-indulgent person is doing what she wants to do. She overindulges in pleasures because she believes, wrongly, that pleasure is the best goal to pursue. The akratic or incontinent person, in contrast, has better moral understanding but evidences a certain moral weakness or lack of self-control. She overindulges in pleasures even though she knows that nobility and goodness, not pleasure alone, are the best goals.[38] Following Aristotle, we may distinguish between the lawyer who believes, rightly or wrongly, that it will be beneficial in a certain litigation situation to engage in abusive discovery tactics, and the lawyer who knows that to do so is unlikely to be beneficial, but engages in them anyway out of a lack of self-control.

Some may protest that engaging in abusive, overly aggressive litigation is hardly an excessive pleasure. But Aristotle knew how much fun it could be to fly off the handle. He called it a special form of *akrasia*: "incontinence with respect to anger." It is one of the least disgraceful forms of *akrasia*—far better, Aristotle explains, than being incontinent with respect to appetite:

> For argument or imagination informs us that we have been insulted or slighted,

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[36] Aristotle believed that virtue was acquired, not innate. He thought it could be learned, not by exhortation and not by the study of ethical rules, but by the performance of virtuous acts. See Aristotle, *Ethica Nicomachea*, Book III, ¶ 1103 a-1103 b (W.D. Ross trans.), in 9 The Works of Aristotle (W.D. Ross ed. & trans., Oxford-Clarendon Press, 1925) [hereinafter Nicomachean Ethics]. He also believed that many virtues, but not all, involved the avoidance of extremes and the pursuit of moderation. Id., ¶ 1107 b-1108 a. All of these are interesting ideas, and may even be true. I consider their usefulness in combating discovery abuse in Part III of this Essay.

[37] Compare Aristotle, Nicomachean Ethics, supra note 36, ¶ 1145 a (Ross trans. 1925) with Aristotle, Nicomachean Ethics ¶ 1145 a (Martin Ostwald trans. 1962). In this Essay, I will generally translate *akrasia* as "incontinence" because (1) it better captures the concept of loss of self-control; and (2) it's more in keeping with the poor taste that is a theme of this Essay.

[38] See Nicomachean Ethics, supra note 36, ¶ 1146 b.

> and anger, reasoning as it were that anything like this must be fought against, boils up straightway; while appetite, if argument or perception merely says that an object is pleasant, springs to the enjoyment of it. Therefore anger obeys the argument in a sense, but appetite does not. It is therefore more disgraceful; for the man who is incontinent in respect of anger is in a sense conquered by argument, while the other is conquered by appetite and not by argument.[39]

Such a person is "conquered by argument" because she has enough moral sense to know that slights and wrongs must be fought against, but does not have enough self-control to oppose such slights in the most beneficial way. Aristotle reminds us that virtue is a matter of both reason and emotion. It may be possible for her to understand intellectually that what she is doing is not the most beneficial thing, for either her or her client, but she still may have a powerful impulse to buy some of that smelly paper.

Judges writing about discovery abuse often express puzzlement over the way that certain cases deteriorate into wasteful, counterproductive nastiness that seems to do nobody any good.[40] Unlike the standard prisoners' dilemma, in these cases engaging in unilateral acts of civility or even acting just a little better than your opponent would seem to be excellent strategies for the lawyers involved.[41] Yet they continue sniping and snarling at one another. These akratic lawyers are so involved in fighting with one another that they have been "conquered by argument." Showing contempt for the other side has become more important even than ultimately winning the case. Akratic lawyers may tell themselves they are simply litigating vigorously, much as Aristotle's akratic warrior might claim merely to be defending his honor. Yet these lawyers could adopt better, more effective strategies to achieve better, more desirable goals. The akratic individual, however, has not attained that higher rationality, and just cannot bring herself to stop fighting with the other

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[39] Id., ¶ 1149 a-1149 b.

[40] Justice O'Connor noted the counterproductive nature of such contumacious conduct in a speech to an American Bar Association group: "In my view, incivility disserves the client because it wastes time and energy—time that is billed to the client at hundreds of dollars per hour, and energy that is better spent working on the case than working over the opponent." Justice Sandra Day O'Connor, Address to the American Bar Association Group on Civil Justice Improvements 5 (Dec. 14, 1993) (quoted in Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 52 n.24 (Del. 1993)).

Such a downward spiral of incivility was noted by Judge Weiner in *Vinson v. City of Philadelphia* when he stated: "The activities of the attorneys litigating this matter have fallen into an unfortunate pattern. Each has failed to extend to the other the courtesies expected of the legal profession, or to conduct themselves in an adult manner. The conduct of the Assistant City Solicitor has been particularly egregious." No. 91-1703, 1991 U.S. Dist. LEXIS 12081, at *3 (E.D. Pa. Aug. 30, 1991).

[41] See Lawrence M. Frankel, Disclosure in the Federal Courts: A Cure for Discovery Ills?, 25 Ariz. St. L. J. 249, 263 (1993) (explaining that overemphasis on zealous advocacy and game playing may result in parties pushing discovery to inefficient level despite fact that both sides would be better off with less rather than more discovery); Ronald J. Gilson, The Devolution of the Legal Profession: A Demand Side Perspective, 49 Md. L. Rev. 869, 875-76 (1990) (explaining that certain litigation strategies can result in dead weight loss contrary to all parties' interests in obtaining socially optimal result).

kids in the back seat.

In the cases that follow, we will try to observe the process by which lawyers devolve from forceful advocates to contumacious jerks. The cases will show, first, that the line between acceptable and unacceptable behavior in discovery cases is often rather indistinct. Lawyers lacking proper guidance, either from internal norms or external judges, can easily cross it. The cases also will show that much discovery abuse is counterproductive feuding among counsel which seems more consistent with akratic incontinence than rational strategizing. Finally, the cases will show that lawyers do an awful lot of sleazy stuff.

II. THE RAW AND THE CROOKED: A STUDY OF LITIGATORS IN THEIR UNNATURAL HABITAT

It is a common belief among laypersons that lawyers are not constrained by moral principles. This belief has caused considerable distress within the profession, and provided a lot of good material for Jay Leno and David Letterman. The truth, as always, is more complex than common folklore reveals. Lawyers *do* have moral principles, they are just somewhat *different* moral principles. In the hotly contested environment of high stakes litigation, conduct that might be frowned upon in ordinary social relations can become acceptable. There is, then, a danger that lawyers in the heat of conflict will employ some of these behaviors too aggressively, or incontinently (as Aristotle might put it), without knowing when to stop. In this Part, we will look at three such morally equivocal behaviors commonly engaged in by practicing lawyers: lying, stealing, and name-calling.

A. *Why Truth Is Not Always a Defense*

Everyone is familiar with the oath that witnesses take before testifying. They swear to tell "the truth, the whole truth, and nothing but the truth." To laypeople operating under crude epistemological categories, such phraseology appears redundant. To the trained legal mind, however, these phrases represent three quite different levels of veracity. No self-respecting lawyer would provide "the whole truth" when only "the truth" was being requested. "Nothing but the truth" is a juridical category of discourse so uncommon that most lawyers confuse it with other rarities like "declarations against interest."

As the following case law demonstrates, many problems of discovery abuse derive from uncertainty and confusion as to the appropriate epistemological standard to apply. In *Chrysler Corp. v. Blackmon*, for example, the Supreme

Court of Texas vacated a trial court order which had granted a default judgment based on Chrysler's alleged discovery abuse.[42] The trial court had found that "Chrysler made false and misleading representations to the Court and to opposing counsel indicating that it had made full production of documents and was in full compliance with said Order, when it was not."[43]

At one of numerous discovery hearings, Chrysler represented that "it had produced everything that it was able to produce," including all relevant information about Chrysler's crash tests.[44] Chrysler subsequently produced an additional 11,000 documents, albeit in response to additional court orders and discovery requests, including further information about crash tests.[45] It appears that when it said "we have produced everything," Chrysler had not produced side or rear-impact crash tests, which its lawyer did not consider required, because this case involved a front-end crash.[46] It had not produced crash test files that had been produced by Chrysler in other litigation because, its lawyer asserted, "Chrysler had no way to locate all of the crash tests produced at other times in other lawsuits." (Most of the crash test files held by Chrysler in the ordinary course of business had been destroyed pursuant to Chrysler's "document retention policy.")[47]

The Texas Supreme Court, in vacating the lower court's judgment for the plaintiff, held that Chrysler's misrepresentation did not warrant the drastic sanction of default judgment. It found that there was no "evidence in the record of flagrant bad faith or counsel's callous disregard for the obligations of discovery."[48] In other words, this was just ordinary lying, not the vicious kind of lying that would justify major discovery sanctions.[49]

Further enlightenment on the various categories of legal lies comes

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[42] 841 S.W.2d 844 (Tex. 1992). Technically, the Texas Supreme Court did not grant the mandamus immediately, but provided for a conditional mandamus that would only take effect if the trial court did not "voluntarily" vacate its order. Id. at 853. I "voluntarily" pay my income taxes under similar incentives from the IRS.

[43] Id. at 851 n.13.

[44] Id. at 846. A major area of dispute in this case was the crashworthiness of the Chrysler M-body car. When plaintiff complained, at a hearing on February 15, 1991, about Chrysler's failure to provide crash test files, Chrysler's attorney stated that it had already produced "approximately 250 or 300." Chrysler later revised that number to "some 100 crash test files." Id. at 846 & n.4.

[45] See id. at 848 n.10.

[46] See id. at 847.

[47] See id. at 847. "Document retention policy" is one of the great Orwellian misnomers of modern litigation practice. It invariably refers to a policy requiring periodic destruction of documents.

[48] Id. at 850.

[49] See also Albert Trostel & Sons Co. v. Vanlente, No. 1-93-CV-108, 1993 U.S. Dist. LEXIS 16184 (W.D. Mich. Sept. 15, 1993), in which sanctions were sought for a series of allegedly false statements made by representatives of the plaintiff. One claim involved a statement by a witness for the plaintiff that he had "evaluated" an article written by the defendant. See id. at *10. At the witness's deposition, it turned out that "he had not read the article himself, but he was told about it and he read a synopsis of it." Id. The court concluded that "[w]hile I agree that the use of the verbs 'evaluate' and 'review' are a little misleading in this context, I do not believe that the statements made in affidavit are false or not grounded in fact." Id.

from the Court of Appeals of New Mexico in *Bustillos v. Construction Contracting*.[50] In *Bustillos*, the party seeking workers' compensation had apparently sworn at his deposition that he was unable to perform certain physical activities in which defendants had videotaped him engaging. The opinion distinguishes between lies that are "direct assertions of material elements of a claim or defense" and those that are not.[51] Because the worker's physical condition was such a "material element," lying about it did not constitute discovery abuse. It did not prejudice trial preparation, but merely "served the purpose of informing the interrogating party of contentions it needed to prepare to meet at trial."[52]

The *Bustillos* decision reminds us that every time a judge or jury resolves a disputed factual issue, she is or they are implicitly rejecting one side's version of the facts. That version may not have been a lie, but it was probably not "the whole truth, and nothing but the truth." *Bustillos* leads to the surprising but perfectly logical conclusion that it is okay to lie about the major issues in the lawsuit, such as whether you were injured, but not about minor issues, for example, whether you have produced all relevant documents. One might distinguish the acceptable lies in *Bustillos* as involving substance rather than procedure, arguing that only procedural lies distort the fact finding process. One might argue that permitting false testimony is less egregious than direct lying by the attorney. The real point is that lawyers and judges have a sense of what constitutes acceptable lying—the kind of lying lawyers do as part of their job of presenting disputed factual issues in the best possible light for their clients.

Nitpickers will point out correctly that *Bustillos* does not say it is okay to lie about major issues, it simply states that such lies will not justify dismissal for discovery abuse. It is theoretically possible, although practically unheard of, for a civil litigant who exaggerates his injuries under oath to be prosecuted by the District Attorney for perjury, and his lawyer could be brought before a disciplinary committee for suborning perjury.

This ordinary, everyday lying can easily become self-defeating, as it did in *C & F Packing Co. v. Doskocil Cos.*,[53] a veritable cornucopia of prevarication. The case involved alleged misuse of trade secrets and confidential information with respect to a "unique extruded sausage product" utilized as a pizza topping by the Pizza Hut chain.[54] Judge Rovner noted that the case had "mushroomed [into] an all-out war peppered with serious allegations of attorney

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[50] 866 P.2d 401 (N.M. Ct. App. 1993).
[51] Id. at 404.
[52] Id. at 405 (quoting Sandoval v. Martinez, 780 P.2d 1152, 1158 (N.M. Ct. App. 1989)).
[53] 126 F.R.D. 662 (N.D. Ill. 1989) (Rovner, J.).
[54] Id. at 665.
[55] Id. at 664. Judge Rovner is obviously a sagacious and careful jurist, but I respectfully suggest that she leave the comedy to the professionals.

misconduct."[55]

The issues turned on a series of trivial disputes regarding who was lying about who said what to whom.[56] The judge recognized that both parties were shading the truth, but after reading between the lines of the contradictory affidavits, she concluded that Doskocil's version was closer to veracity. Accordingly, she ruled against the bigger liar.[57] The opinion goes on to consider many charges and countercharges of astonishing pettiness,[58] most involving counsel accusing each other of lying.[59] The question is not which side should win, but why both sides wasted so much time litigating misunderstandings which could have been cleared up in one straightforward telephone call. The minor discovery advantages are almost certainly not worth the risks, time, and expense. And they obviously annoyed this judge. Yet it also is easy to see the akratic principle at work, as the opposing counsels' feud becomes an end in itself.[60] Sometimes, this same incontinence is directed at the judge rather than merely at opposing counsel. Lawyers can go off the deep end in their dealings with judges, with unfortunate results for themselves and their clients.[61]

B. *Why Misappropriation Is Not Always Offensive*

Stealing, unlike lying, is not central to the litigator's role in discovery

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[56] For example, C & F's counsel claimed he had "understood" that a witness for Doskocil would be available only in the morning (and had therefore scheduled a third party deposition for the afternoon). Doskocil's counsel claimed that the deposition initially had been scheduled for the morning, but that Doskocil subsequently had agreed to make the witness available for a full day. Id. at 668.

[57] See id. at 674.

[58] For example, Doskocil's counsel also claimed that he had never been informed that the third party deposition was to take place at the Holiday Inn. See id. at 676. Both of C & F's lawyers said he had been told of the location at that morning's deposition. See id. at 675. They even provided an affidavit by the court reporter. See id. Judge Rovner, however, displaying subtlety worthy of Solomon, concluded:

> [I]f Morse [Doskocil's counsel] had actually known that the deposition was to take place at the Holiday Inn, it is unlikely that instead of representing simply that he did not know the location, he would have offered his belief that the location could be any of three places, including the Holiday Inn.

Id. at 677. She also didn't think much of the court reporter, whose "transcript makes no mention of the Holiday Inn." Id.

[59] My favorite was in a counter-motion for sanctions, where C & F's lawyers claimed that Doskocil's lawyer had lied by denying that he had called one of C & F's lawyers a "liar." By this time, even Judge Rovner was losing patience. In a nice display of ambiguity, she concludes, "[w]hile [Doskocil's lawyer's] statements concerning whether C & F's counsel were liars may not have exhibited the height of professionalism, the Court finds no basis for concluding that [Doskocil's lawyer] is guilty of misrepresentation on this issue." Id. at 682.

[60] Fans of postmodern legal theory will note that this analysis is all perfectly consistent with the Luhmannian concept of "autopoietic law," in which the legal system generates its own internal norms based on the reciprocal expectations of the participants in the system. See Autopoietic Law: A New Approach to Law and Society 3 (Gunther Teubner ed., 1988).

[61] See Ahmed v. Reiss S.S. Co., 761 F.2d 302, 305 (6th Cir. 1985) (attorney held in contempt for falsely stating to two federal judges that he was in the other's courtroom when in fact he was in neither. Attorney's justification was that he "had the screaming itches in the crotch. . . . I wasn't here because I would have been scratching my testicles constantly if I had been here.") (Contempt order affirmed).

proceedings. The whole point of discovery is that you do not have to sneak around stealing information because you are entitled to it. Stealing becomes significant, therefore, only with regard to privileged information. There is a slight disagreement among federal courts as to whether your adversary's privilege is waived if you manage to get your hands on her privileged information. Some courts say it is. Others say it is not. Others say it depends.[62]

An instructive case is *Suburban Sew 'N Sweep v. Swiss-Bernina*,[63] in which the plaintiff's counsel located some interesting documents by rooting around in the defendant's trash dumpster. The magistrate judge supervising discovery, apparently grossed out by this tactic, ordered all the documents returned and prohibited their use as evidence. This, the district court judge explained, was reversible error because all of the discarded nonprivileged documents "could normally be obtained through discovery anyway."[64] As to the privileged stuff, the court said taking those documents "presents a very close question."[65] The court ultimately held that documents found in the trash were not privileged:

> The likelihood that third parties will have the interest, ingenuity, perseverance and stamina, as well as risk possible criminal and civil sanctions, to search through mounds of garbage in hopes of finding privileged communications, and that they will then be successful, is not sufficiently great to deter open attorney-client communication.[66]

The court also noted that the defendant had solved the problem for the future by buying a paper shredder.[67]

Those of you with advanced legal training may point out that there is a difference between stealing something and finding it in the garbage. It is true that while ancient evidence treatises opined that even "purloined" letters waived the privilege,[68] these days, courts seeking to provide a balanced but flexible legal standard hold that privilege is waived only when disclosure occurs "inadvertently" due to a party's failure to take reasonable pre-

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62 See 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2016.2 (2d ed. 1994).
63 91 F.R.D. 254 (N.D. Ill. 1981).
64 Id. at 256. The court apparently ignored the possibility that these documents had been thrown in the dumpster in accordance with defendant's "document retention policy."
65 Id. at 260.
66 Id.
67 Id. at 260 n.6.
68 See John H. McCormick et al., McCormick on Evidence § 75 (Edward Cleary et al. eds., rev. 2d ed. 1972); see also 8 John H. Wigmore, Wigmore on Evidence §§ 2325-2326 (McNaughton rev. 1961). The most recent edition of McCormick disapproves of this harsh older rule, arguing that in big cases with massive discovery, inadvertent disclosure of privileged documents is almost inevitable. See John H. McCormick, McCormick on Evidence § 93 (John Strong et al. rev., 4th ed. 1992).

cautions to prevent such disclosure. In practice, however, this doctrine can create considerable incentives for lawyers to help the "inadvertent disclosure" along.[69]

By considering the adequacy of precautions along a scale of reasonableness, courts treat stealing (or "misappropriation"), like they treat lying, as a matter of degree.[70] Accordingly, it is relatively easy for a lawyer to step over the line by stepping out with a big pile of documents that does not belong to her. That is what happened in *Lipin v. Bender*.[71] The plaintiff, who was then employed by her attorney as a paralegal, went with him to a court hearing on disputed discovery issues. Taking what she described as her "customary place" at the conference table, she happened to land in front of a stack of the other side's memoranda which included witness interview notes and deposition digests.[72] She took the documents and told her counsel what she had done. Her attorney, after consultation, and perhaps a perusal of some of the case law described above, "concluded that any claim of privilege as to the documents had been lost as a result of [opposing counsel's] careless handling of them."[73] The New York courts disagreed. The trial court dismissed the action based on the conduct of plaintiff and her counsel, calling it "heinous" and "egregious," a threat to the attorney-client privilege, to the concept of civilized, orderly conduct among at-

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[69] Courts generally hold that it is the party who has "inadvertently" disclosed who has the burden of showing that reasonable precautions were taken. Parties frequently fail to meet that burden because they usually have no idea how their production of documents got screwed up. One magistrate judge summed it up this way:

> [T]he opinions of the courts in these cases, after a substantial amount of verbiage, can be reduced to a bottom line to the effect that the precautions were inadequate because they were not effective in preventing the disclosure of privileged documents . . . . Frankly, I do not see this result as a significant advance in jurisprudence.

International Digital Sys. v. Digital Equipment Corp., 120 F.R.D. 445, 449 (D. Mass. 1988) (Collings, Mag. J.). The judge went on to hold that, as far as he was concerned, any disclosure that was inadvertent, in the sense of not being compelled, constituted a waiver. See id. at 450.

It is not enough to show that you carefully separated the privileged documents from the others but that through "some unexplained occurrence" some privileged documents were produced. See Liggett Group v. Brown & Williamson Tobacco Corp., 116 F.R.D. 205, 207-08 (M.D.N.C. 1986). It is not even enough to say that you think the documents were "misappropriat[ed]" when the other side claims they just turned up anonymously in the mail. United Mine Workers v. Arch Mineral Corp., 145 F.R.D. 3, 6 (D.D.C. 1992).

[70] O'Leary v. Purcell Co., 108 F.R.D. 641 (M.D.N.C. 1985), involved defendant's privileged documents which had been taken by a former employee at the time he left the company. Defendant said that the former employee "never sought or received . . . permission to remove documents" from the company. Id. at 645. The former employee stated that he had permission to clean out his office and take files and "that no objection to removal of the documents or concerns regarding confidentiality were raised by anyone although his possession of the documents was well known." Id. The Court held the privilege waived for failure to take reasonable precautions. See id. at 646.

[71] 644 N.E.2d 1300 (N.Y. 1994).

[72] See id. at 1301.

[73] Id.

[74] Id. at 1302 (quoting lower court opinion).

[75] Id. at 1302. Because *Lipin v. Bender* is a case decided under New York law, and the prior cases discussed in this section were all federal cases, those unfamiliar with local practice might conclude that New York state courts apply more stringent ethical standards than those imposed in federal courts. Those familiar with New York state practice will find this conclusion to be a hoot.

torneys, and even to the rule of law.[74] The decision was affirmed.[75]

C. *Why Some Lawyers Are Not Defensive About Being Offensive*

Surprisingly, the case law shows that name-calling tends to result in more severe sanctions than does lying and stealing. This is not necessarily because lying and stealing are considered lesser offenses. I suspect that judges simply are so used to vituperative language in litigation that in order for name-calling to constitute discovery abuse it has to involve truly disgusting maledictions. Some of the language disapproved of by these cases is so egregious it cannot be reprinted in the text of a family law review. (Don't worry—I'll put it in the footnotes.)

These cases—which some commentators have termed "Rambo Litigation"[76]—usually involve disruptive speech or conduct at depositions. The reference to Rambo is clearly misguided, as the tactics deployed rarely involve high explosives. Rather, they are prime examples of Aristotelian incontinence. They involve lawyers sitting for long hours in small rooms with other lawyers whose guts they have come to hate. It is not hard to imagine incontinent lawyers saying things at depositions they are likely to regret later (especially when they read them in sanctions opinions). Moreover, although depositions may be conducive to scurrilous remarks, they are also extremely stupid places to make them, because there is a court reporter in the room *writing them all down*.

Nonetheless, the basic structure of these cases shows that, as with lying and stealing, name-calling is a matter of degree. Some cases recognize that a certain amount of coaching, cajoling, and objecting is to be expected in defending a deposition.[77] Yet the case law also contains opinions imposing severe sanctions

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[76] E.g., Applied Telematics v. Sprint Corp., No. 94-CV-4603, 1995 U.S. Dist. LEXIS 2191, at *10 (E.D. Pa. Feb. 22, 1995); Van Pilsum v. Iowa State Univ. of Science & Tech., 152 F.R.D. 179, 181 (S.D. Iowa 1993); see Judicial Conference, Federal Circuit, 146 F.R.D. 205, 216 (1992); Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441, 445 (1992).

[77] In *Calgene, Inc. v. Enzo Biochem*, the court refused to impose sanctions for deposition misconduct. It held that "there may have been some improper coaching of the witness on occasion by the defending attorney, but the level of coaching does not rise to sanctionable conduct—bad faith." No. S-93-0195 EJG/GGH, 1993 U.S. Dist. LEXIS 20217, at *9 (E.D. Cal. Aug. 27, 1993).

[78] In *Castillo v. St. Paul Fire & Marine Ins. Co.*, for example, the plaintiff's lawyer was suspended from practice before that court for one year because, among other things, he had "willfully and contumaciously disobeyed the court's order by interfering with the questions posed by defendants' counsel, and by directing the doctor not to respond to certain questions already approved by the court." 828 F. Supp. 594, 596-97 (N.D. 111. 1992). The court also noted that when opposing counsel sought to use the phone, he was told that if "you step outside this room and touch the telephone. . . . I'll take care of that in the way one does who has possessory rights." Id. at 597. The court was not sure whether this was a threat of "physical violence," but noted that it was at least an example of "professional incivility." Id.

Van Pilsum also involved akratic behavior by the plaintiff's lawyer at the plaintiff's deposition. See 152 F.R.D. at 180. According to the court:

> Mr. Barrett [plaintiff's counsel] consistently interrupted Mr. Young and the witness, interposing "objections" which were thinly veiled instructions to the witness . . . . Mr. Barrett repeatedly objected to the form of Mr. Young's questions. He also engaged in ad hominem attacks on Mr. Young's ethics, liti-

against lawyers whose objections were too frequent, obstreperous, or nasty.[78]

Often these are lawyers who previously have been warned, or even sanctioned, for similar conduct.[79]

In all of these areas, we see a similar pattern. Lawyers, recognizing that they have a certain amount of leeway to engage in questionable litigation practices, try to get away with more extreme and egregious versions of the same conduct. Eventually the conduct becomes so despicable that it warrants powerful sanctions from the judge. Strangely, this nasty and ultimately counterproductive behavior often looks less like calculated litigation strategy than incontinent tantrums or schoolyard brawls. Have not lawyers outgrown such juvenile behavior? The answer, as we shall see in the next Part, is no.

III. MORAL EDUCATION FOR LITIGATORS: INNOVATION OR OXYMORON?

Discerning but grouchy readers may note that this is already the last Part of my Essay and so far I have not actually provided any practical advice for dealing with discovery abuse. All that I have done is make fun of a lot of lawyers and teach you a fancy new Greek word for acting like a jerk.[80] You can relax, however, because in this Part, I am finally going to explain the causes and cures for incontinence among lawyers.

Aristotle himself was a little coy on this subject. Although he spends almost a whole chapter of the *Nicomachean Ethics* describing various aspects of *akrasia*, we never get a straightforward statement as to what causes it or how to fix it.[81] The reason for this omission is unclear. The English philosopher, M.F. Burnyeat, suggests that Aristotle did not need to describe a cause because he considered akratic behavior to reflect a natural but immature state of moral development,[82] like teenagers dying their hair pink or joining the Young Republicans.

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gation experience and honesty. In the course of the 167 page deposition, there are only four segments where five or more pages occur withou t an interruption from Mr. Barrett (footnote omitted).

Id. Not only was opposing counsel's motion to compel and for sanctions granted, but the court implied that it approved of opposing counsel's declaration "that scheduling order deadlines would be strictly adhered to (even though this case was not set for trial and extensions are [ordinarily] freely granted)." Id.

. . . [Footnote paragraph omitted by Quarterly Editor.]

[79] See Castillo v. St. Paul Fire & Marine Ins. Co., 938 F.2d 776, 779 (7th Cir. 1991) (sanctionable conduct by plaintiff's counsel occurred at second deposition after first deposition had resulted in award of $6,317.66 against plaintiff and his counsel for discovery abuse); In re Ramunno, 625 A.2d 248, 248-49 (Del. 1993) (counsel, who had previously been privately reprimanded by Delaware Supreme Court in another matter for "uncivil conduct," was publicly censured for referring to opposing counsel by a "crude, but graphic, anal term").

[80] Actually, it's a very *old* Greek word for acting like a jerk.

[81] See Nicomachean Ethics, supra note 36, ¶ 1145 a-1152 a.

[82] See M.F. Burnyeat, Aristotle: On Learning to Be Good, *in* Philosophy Through Its Past 51 (Ted Honderich ed. 1984).

[83] See Nicomachean Ethics, supra note 36, ¶ 1104 b, 30-35.

Aristotle distinguishes three separate goals of human action: the pleasant, the good, and the noble.[83] Most of us develop an affinity for pleasurable activities at a very early age. Learning to get a kick out of performing noble acts, on the other hand, takes more time and training. Only through the continued performance of such acts do we learn the deep emotional satisfaction that comes from helping old ladies to cross the street or from testifying with complete candor before a Senate subcommittee.[84] Ultimately, Aristotle tells us, the fully mature moral person has learned to integrate her appreciation of the pleasant, the good and the noble, and she derives the greatest satisfaction from acting nobly.[85]

Where does Aristotle's theory leave our akratic legal colleagues? Stuck somewhere in the middle of their moral development. They understand that cooperation and reasonableness are the appropriate ways to conduct discovery. Unfortunately, these lawyers have not yet learned to derive as much satisfaction from representing their clients reasonably and cooperatively as they do from disrupting depositions and fighting with opposing counsel. We might say of them, as I say of my kids in the back seat, that they have not yet learned the appropriate degree of self-control.

It is not hard to see how litigators can get stuck at a stage of moral development where they derive such satisfaction from acrimony and nastiness that they never learn how to work and play well with others.[86] The litigation process tends to attract people who enjoy a good verbal brawl. Litigators then spend most of their time with other litigators, reinforcing each other's aggressive tendencies.[87] Indeed, the only distinct cultural artifact produced and valued by litigators is the "war story,"[88] an oral epic in which tribal elders recount, for the edification of junior associates, the heroic deeds they performed

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[84] See id., 5-20.

[85] See Burnyeat, supra note 82, at 72-74. Nussbaum agrees that the values represented by these different goals are incommensurable, but choices may be made among them through practical reason. See Martha Nussbaum, The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy 294-300 (1986).

[86] Some commentators blame the increased viciousness of litigation culture on the growth of large, impersonal law firms. See Robert G. Bone, The Empirical Turn in Procedural Rule Making: Comment on Walker (1), 23 J. Legal Stud. 595, 603 (1994); Bryant Garth, From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values, 59 Brook. L. Rev. 931, 939-45 (1993); Robert E. Keeton, Times Are Changing for Trials in Court, 21 Fla. St. U. L. Rev. 1, 13 (1993). These commentators tend not to work for large, impersonal law firms.

[87] Aristotle expressly tells us that akratic behavior may be either learned or innate. See Nicomachean Ethics, supra note 36, ¶ 1148a.

[88] See Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?, 140 U. Pa. L. Rev. 1147, 1159-62 (1992) (claiming that lawyers love anecdotal evidence, even though generally worthless).

[89] See Patrick E. Longan, Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators, 73 Neb. L. Rev. 712, 720 (1994) ("There is an entire generation of litigators for whom trial remains theoretical."); see also Kevin C. McMunigal, The Costs of Settlements: The Impact of Scarcity of Adjudication on Litigating Lawyers, 37 UCLA L. Rev. 833, 837 (1990) (noting that lack of trial experience may contribute to discovery abuse).

and the smashing victories they obtained during pretrial discovery in cases which ultimately were settled.[89]

Because litigators rarely win or lose cases, they derive job satisfaction by recasting minor discovery disputes as titanic struggles. Younger lawyers, convinced that their future careers may hinge on how tough they seem while conducting discovery, may conclude that it is more important to look and sound ferocious than to act cooperatively, even if all that huffing and puffing does not help (and sometimes harms) their cases. While unpleasant at first, nastiness, like chewing tobacco, becomes a habit. Furthermore, as we saw in Part II, all this goes on against a case law background in which the line between tough, aggressive lawyering and abusive conduct is far from clear. Without guidance as to appropriate conduct from their elders, either at the firm or on the bench, it is easy for young lawyers not only to stay mired in contumacious, morally immature conduct, but to actually enjoy it.[90]

It is tempting, given the current zeitgeist, to propose we solve discovery abuse through some kind of twelve-step program, a "Discovery Abusers' Anonymous" where frequently sanctioned lawyers meet weekly to talk about their transgressions and resolve never to do it again. I am afraid, however, that few lawyers have the strong desire to change that is necessary for such programs to work. Besides, sitting around and telling war stories about their prior discovery abuses is one of the things that got these lawyers into trouble in the first place.

If therapy is not the answer, what about those old legal standbys, regulation and sanctioning? That, of course, is the current approach, and it has not been a brilliant success. I suggest, however, that educating the morally immature, akratic lawyer to the joys of proper discovery behavior involves a somewhat different approach to regulation and sanctions. Forget both the big, scary sanctions that probably will not get imposed anyway—and forget the moral sermons that

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[90] There is even some empirical support for this view of litigators, and it comes from studies of their own attitudes. Charles Sorenson, writing about Wayne D. Brazil's study on civil discovery, notes a "fascinating twist suggested by the data." Charles W. Sorenson, Jr., Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing?", 46 Hastings L. J. 679, 711 (1995) (commenting on Brazil, Civil Discovery: Lawyer's Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 Am. B. Found. Res. J. 787). He states that "[w]hile attorneys overall identified evasive or incomplete discovery responses as problems in 60% of their cases, only 14% of the cases were believed to involve bad faith or dishonesty by their opponents." Id. Adding this to Brazil's finding that most lawyers believe the biggest problem with discovery is "inadequate judicial management," Sorenson and Brazil both suggest that "attorneys are compelled by the adversarial culture to engage in activities that they recognize are potentially counterproductive and to seek the assistance of the courts to save them from themselves." Id.

[91] Before I explain my new annoying approach to discovery abuse, I just want to mention that even though I seem to know a lot about what goes on in the minds of lawyers who abuse the discovery process, it is not because I have any personal familiarity with such abuse, nor have I ever been involved in, inclined toward, or tempted to engage in, such conduct. Nor have I been caught at it. I just wanted to make that clear in case any judges out there read this and I ever run into them when they have their gavels in hand.

generally go with them. The emphasis should be on telling lawyers to shut up and knock it off—loudly, frequently, and in the most annoying way possible.[91]

The problem, as we have seen, is that for some litigators the immediate enjoyment they get from abusive conduct is greater than their concerns about the dangers and risks of such conduct. The answer, therefore, is simple: find a way to make discovery abuse *less fun*. This obviously requires greater involvement in the discovery process by judges,[92] magistrate judges, and discovery masters. As anyone who has ever gone to a bar association convention knows, the fun quotient decreases substantially as soon as a judge enters the room.

Even more important, however, is a change in the judicial approach to discovery sanctions. These days, as we saw in Part II, only the most disgusting and despicable litigation conduct tends to get sanctioned. By letting the little stuff slide, judges eventually are confronted with conduct so abusive, it requires a really big, dramatic, atomic bomb of a response. Moreover, having dropped the bomb on a particular lawyer, the judge generally feels obligated to justify the severity of the sanctions imposed on the miscreant by writing a blistering opinion excoriating the lawyer's conduct in graphic detail.

This approach to sanctions has a number of unfortunate consequences. Because only the worst abuses get sanctioned, lawyers assume (generally correctly) that they can get away with conduct that is boorish and wasteful so long as it is less repulsive than the stuff they read about in the sanctions opinions. The moralizing tone and emphasis on outrageous conduct which characterize sanctions opinions also give the false impression that only total sleazeballs commit discovery abuses. In fact, we have seen that they are generally committed by partial sleazeballs.

Even worse, most judges have the idea that only truly horrendous conduct warrants discovery sanctions. This is due to the unfortunate judicial habit of following prior opinions.[93] These opinions tend to state that severe sanctions should not be imposed unless the conduct is so egregious it truly shocks the

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[92] The discovery system was designed to be lawyer driven, with judges getting involved only on rare occasions. See Frank F. Flegal & Steven M. Umin, Curbing Discovery Abuse in Civil Litigation: We're Not There Yet, 1981 BYU L. Rev. 597, 613 (1981); Maurice Rosenberg & Warren R. King, Curbing Discovery Abuse in Civil Litigation: Enough Is Enough, 1981 BYU L. Rev. 579, 581 (1981); Sorenson, supra note 90, at 692 ("there would be minimal involvement of the court in conducting discovery or resolving discovery disputes" (citing Paul R. Connolly et al., Judicial Controls and the Civil Litigative Process: Discovery 9-27 (1978))).

But face it, that conception of discovery has been on the ropes for quite some time. See generally Robert F. Peckham, The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 Cal. L. Rev. 770 (1981) (discussing expanding role of judges in managing pretrial procedures).

[93] See, e.g., Wilson v. Volkswagen, 561 F.2d 494, 504 (4th Cir. 1977) ("a default judgment should normally not be imposed . . . save in that rare case where the conduct represents such 'flagrant bad faith' and 'callous disregard' of the party's obligations under the Rules" (quoting NHL v. Metro. Hockey Club, 427 U.S. 639, 643 (1976))).

[94] See Earl C. Dudley, Jr., Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure, 26 U.S.F. L. Rev. 189, 217-18 (1992) (severe sanctions used only in most extreme cases).

conscience. Most judicial consciences have, by now, developed some pretty good shock absorbers.[94]

The emphasis on moral outrage and sermonizing in these opinions is also counterproductive. As every parent and peripatetic philosopher knows, you do not teach moral conduct by lecturing about morality (required Legal Ethics courses notwithstanding). You teach it by telling people what to do and what to knock off. Telling a lawyer he is despicable is unlikely to improve his conduct. Telling him to shut up and knock it off, frequently and in a very loud voice, just might do the trick.

Some have suggested that it is inappropriate to sanction discovery abuse unless lawyers are given clearly articulated rules delineating precisely what conduct is prohibited. This is much like suggesting that Howard Stern be given a clearly articulated set of things he is not allowed to say on the radio. Greater deterrence is obtained not by telling him precisely what he can get away with, but by leaving him guessing. A legal regime in which lawyers get yelled at every time they do something that ticks off a judge creates a similar healthy uncertainty and incentive to better conduct. Lawyers would have to reevaluate constantly their sleazy tactics to see how close they are to the stuff that got them yelled at the last time. Some may be troubled by this notion of regulation without explicit rules, where the judges simply decide what is improper as they go along. Others will recognize that it is pretty much what common law judges have been doing for the last thousand years.

What about those lawyers who are so tough, nasty, and stupid that they do not mind getting yelled at?—those who think that judicial enmity is a sign of how aggressively they are litigating, but fail to recognize it is also a sign that they are *probably going to lose*? These folks need the added disincentive of a little sanction. Not a big, scary, virtually unusable sanction, but a less severe, more annoying punishment to deal with less severe, more annoying discovery abuses.

Judges are developing new ways to become more annoying, despite the widespread view in the legal profession that they have already perfected this skill. Many of these new sanctions involve either embarrassing the abusive litigator or wasting her time, preferably in non-billable form. Some have the added benefit that they can be imposed on both sides at once and the costs cannot be passed on to the client. Much work remains to be done, however, if we are to develop a system in which discovery abuse will be no fun at all. Suggestions for more annoying sanctions include the following:

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[95] See Van Pilsum v. Iowa State Univ. of Science & Tech., 152 F.R.D. 179, 181 (S.D. Iowa 1993) ("all further depositions shall take place in the presence of a discovery master"); Apple Computer v. Microsoft Corp., 779 F. Supp. 133, 136 (N.D. Cal. 1991) ("If counsel are unable to proceed efficiently and professionally with discovery, the court will consider appointment of a discovery master pursuant to F.R.Civ.P. [sic] 53 to monitor discovery *at the parties' expense*."), aff'd, 35 F.3d 1435 (9th Cir. 1994).

(1) Appoint special discovery masters to attend every deposition and glare at the litigators whenever it looks like they are going to get out of line.[95] The cost of such masters, who bill by the hour, can be allocated among the parties however the court deems appropriate.[96] As first-year law students know, there are few things more annoying than paying for someone to yell at you.

(2) Throw the abusive discovery in the garbage, and make the lawyers do it all over again, just like the judge did in *Blank v. Ronson*.[97] I know this seems a little wasteful and duplicative, but you can't make meatloaf without busting some chops.[98]

(3) I call this one "asymmetric courtesy." Who says scheduling orders, filing deadlines, time extensions, and all the other judicial case management rulings must treat both sides equally? I say, if lawyers are abusing the pretrial process, the pretrial process ought to abuse them right back. Give the non-abusive lawyers twice as much time to file papers as the nasty ones, or, less severe but more annoying, make the nice lawyer's papers always due on Friday at noon, and the sleazeball's due on Monday at 9:00 A.M.[99]

(4) Make the abusive lawyers go back and take some remedial law school

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[96] Cf. Gonzales v. Safeway Stores, 882 P.2d 389, 392 (Alaska 1994) (trial court appointed discovery master and ordered that party losing any dispute pay master's fees).

[97] 97 F.R.D. 744, 745-46 (S.D.N.Y. 1983).

[98] See Frazier v. SEPTA, 161 F.R.D. 309, 315, 317 n.9 (E.D. Pa. 1995) (deposition ordered retaken where counsel's abuses in defending prior deposition were "numerous" and "blatant." On re-deposition, it was expected that counsel would meet "the high standard of professionalism and personal decorum expected of an attorney.").

[99] In *Van Pilsum*, the court imposed a form of asymmetric courtesy in which scheduling deadlines would be strictly enforced against the abusive lawyers. 152 F.R.D. at 181. The other side, presumably, could still get all the extensions and accommodations it wanted.

Such scheduling asymmetries, if ordered in response to attorney misconduct and in furtherance of the orderly administration of justice, would be unlikely to raise due process concerns. After all, claims can actually be dismissed or default judgments awarded for misconduct in pretrial discovery without violating due process, at least where willfulness or bad faith is involved. See NHL v. Metro. Hockey Club, Inc., 427 U.S. 639, 642-43 (1976); Societe Internationale v. Rogers, 357 U.S. 197, 208-12 (1958). In upholding an award of counsel fees for failure to comply with a discovery order, the Supreme Court has noted, "[t]he due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers." Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 n.14 (1980). The due process concerns in making lawyers work nights and weekends would seem to be even less compelling than those involved in awarding counsel fees.

[100] See Smith v. Our Lady of the Lake Hosp., 135 F.R.D. 139, 155 (M.D. La. 1991), rev'd on other grounds, 960 F.2d 439 (5th Cir. 1992) (requiring attendance at continuing legal education courses); Stevens v. City of Brockton, 676 F. Supp. 26, 27 (D. Mass. 1987) (same); see also *Curran v. Price*, where the judge ordered a lawyer to:

> copy out, legibly, in his own handwriting . . . the text (*i.e., without footnotes*) of section 3722 in 14A C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure: Civil (1985), together with the text of that section's update at page 43 of the 1993 pocket part of volume 14A. . . . Mr. Umbreit will turn in the resulting product to the Clerk of this Court, with a certification that it was made solely by himself and in his own handwriting.

150 F.R.D. 85, 87 (D. Md. 1993).

courses.[100] Sure they will be unprepared and inattentive, but that won't make them any different from regular third-year law students.

(5) Sentence abusive lawyers to community service on the most unimportant, boring bar committees you can find.[101] Do not worry, there will be lots to choose from.

Can such puny sanctions possibly be effective? Obviously the threat of service on the judicial parking lot committee will not deter a lawyer from taking actions she believes will substantially benefit herself or her client. But that is not the kind of conduct we need to dissuade. If, as this Essay suggests, much abusive behavior consists of counterproductive feuds and tantrums, there may be big benefits to making the results of such conduct a little more annoying and less fun.[102]

Finally, there is one other technique which, although risky, offers additional possibilities for annoyance and disruption of current litigation practice. You could try making jokes and snide comments about those abusive lawyers. You could even write law review articles about them. If you get angry letters in response, however, try *not* to smell the paper on which they are written.

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[101] Texas seems to have pioneered the idea of sanctioning lawyers with community service. In Braden v. Downey, 811 S.W.2d 922, 930 (Tex. 1991), the Supreme Court of Texas refused to criticize the "creative sanction" of ordering a lawyer to perform 10 hours of community service for discovery abuse. It did grant mandamus, however, because the trial court's order required the service to be completed before the trial ended, and therefore foreclosed appellate review. Other Texas courts have since ordered similar sanctions to be performed. E.g., Cap Rock Elec. Coop. v. Texas Utils. Elec. Co., 874 S.W.2d 92, 98 (Tex. Ct. App. 1994).

[102] It may be noted that sanctions like asymmetric courtesy, remedial law courses, and community service are not only annoying but hard to pass on to the client in the form of added fees. Another underutilized sanction which is a little too severe to make my list, but certainly has its uses, is kicking an abusive lawyer off the case. Cf. Schmidt v. Ford Motor Co., 112 F.R.D. 216, 220-21 (D. Colo. 1986) (refusing to dismiss for attorney misconduct, but disqualifying counsel from further representation in the case).

INFORMATION WARFARE: A NEW THREAT TO SOCIETY†

Doyle E. Larson*

I spent thirty-two years engaged in information warfare. For ten years I flew in reconnaissance aircraft around the periphery of the Soviet Union trying to figure out what their capability was and where their forces were, so that we could assess whether or not we could get our Strategic Air Command bombers through to their targets in the event of a war.

We were able to do that job because of the electronic age. Electrons, you see, have no bounds. They travel through walls and through air, so that from a hundred miles off the Arctic coast we could monitor Soviet radar and communication sites just as clear as a bell. In Vietnam, from 35,000 feet in an RC-135, I could monitor a two-watt walkie-talkie on the floor of the Ho Chi Minh Trail with perfect clarity. We were thrilled when the Soviet embassy took delivery of their first IBM Selectric typewriters because the Selectric typewriter emitted everything that was being typed; by driving up to the building in a van with a special antenna and receiver and our own Selectric typewriter, we were able to copy verbatim everything that was being typed by a Soviet typist.

Intelligence gathering has continued to get easier in the electronic warfare world. We now have work stations, the Internet, cell phones—electrons flying through the sky. Congress became so agitated about some reports by John Deutch, the director of the Central Intelligence Agency, that in the Intelligence Authorization Act for Fiscal Year 1995, they required the President to report to Congress each year on the threat to U.S. industry, and they established the National Counterintelligence Policy Board. In June of 1996, a report issued by the National Counterintelligence Policy Board, assisted by the Central Intelligence Agency, the Defense Intelligence Agency, and the National Security Agency, described the threat: Individuals, corporations, and governments from twelve countries are frequently detected spying on U.S. industry.[1] They have made determined efforts, through both illegal and covert means, to get information about our technology. Forty-seven percent of all foreign incidents occurred in England, Canada, and Germany. The top five nationalities involved in that kind of electronic espionage were Chinese, Canadian, French,

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†Address delivered at the Annual Convention of the International Society of Barristers, Westin La Paloma, Tucson, Arizona, March 4, 1997.

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[1] Eleven of the top 12 are the focus of over 90% of the F.B.I.'s investigations. In all, 23 countries—some traditional adversaries and many traditional allies—are the objects of our concern.

Indian, and Japanese. They were attempting to steal critical technologies and data and information.

While listening to the news last night, I found it interesting to hear that Timothy McVeigh's lawyer was charging a Dallas newspaper with using electronic means to pick up the databases that he had assembled for the defense of Mr. McVeigh. I have no idea whether the newspaper did that, but I can tell you it would be easy to do. The Defense Information Systems Agency, part of the Department of Defense, estimates that in 1995 the Department of Defense was attacked electronically 250,000 times. The Central Intelligence Agency has determined that 249 of those were extremely serious, probably involving the compromise of classified information. Even worse, the Defense Information Systems Agency estimates that only one out of 250 attempts is even detected.

The 1996 report I described a minute ago affirmed the theft or misappropriation of proprietary economic information, at a value of two billion dollars a month. I suspect that our banking systems are losing more than that. If you press them hard, they will own up to having some significant losses, but you can never get a number out of them. They apparently don't want us to lose confidence in the banking system, but we pay for it in the cost of banking in order to provide them with insurance.

The loss of our industry information has doubled since 1994. Seventy-four percent of the losses stem from actions—in many cases carelessness—of employees, contractors, or vendors. I have been working with the 3M Corporation on some defensive techniques that can be used to protect databases on computers. As I walked around 3M one day I noticed that at a number of work stations, the password was on a Post-It Note stuck to the screen—3M technology striking back at them, I guess.

The March issue of *Air Force Magazine*, which my association publishes, reported on a computer spy who was initially called the "Datastream Cowboy." In the spring of 1994 he penetrated the Air Force computers at Rome Laboratories in New York from a remote location. He downloaded classified files, compromising thirty computer systems. He penetrated one of the computer systems and downloaded all of the passwords stored in the computer. The Cowboy used the Rome lab's computer net to go all over the world penetrating other computers, many of them overseas. Eventually they caught him—a teenager in London. When the police came for him, he curled up on the floor and cried. In 1991 a farmer burying a dead cow in upstate New York accidentally cut a fiber optic cable and closed down four of the FAA's twenty air traffic control centers for more than five hours. My point is this: If a farmer cutting a single fiber optic cable and a teenager in London can cause these effects, imagine what a hostile government employing skilled experts on a large

scale could do to this country and its technology, its databases.

The United States, rich in information technology, has more vulnerabilities than any other country. Our vulnerabilities include communications, power systems, gas and oil, banking, transportation. In fact, I'm hard pressed to think of any part of our infrastructure that isn't dependent on computers and communications. The information targeted by both our friends and our traditional adversaries includes biotechnology, chemical and biological systems, and of course computer software, information systems, manufacturing processes, and, for a company like 3M Corporation, advanced materials and coding. How, for example, do you put things together to make some artificial stealth material?

Telecommunications technology is another target. The FBI director has reported that government-controlled corporations systematically target information from U.S. telecommunications firms. We are the world leaders.

Most foreign governments collect competitive business information from open source literature as well as from human and electronic spying. We are an incredibly open society, trusting—arguably too trusting, too open. Under current laws U.S. agencies are specifically prohibited from sharing acquired information with commercial organizations. The government is required to be as fair as Solomon, and so they don't give the technology to anybody. They force the commercial companies to work on their own.

Major industry vulnerabilities include wire and fiber optic cables. Cellular phones are a great source of information in Washington. Intercoms in office buildings are spilling electrons out on the street, as are the Internet and faxes. (I think I could park my Jeep Cherokee downtown next to a law firm and, in short order, with just an antenna and a receiver, pretty well tell you what's going on inside the building.) Faxes are particularly useful in collecting intelligence because you get an immediate hard copy. If it's in a different language, all you need is a college-trained linguist to translate it for you. Lap-top computers, particularly if you fly on French airlines, are very vulnerable. More than likely there's a bug in the first-class cabin. More than likely when you go to the hotel room and hook up your laptop, there are bugs there, and they're tapping everything going in and out. And then there's that other source of information I've already talked about, the Selectric typewriter. Unintentional electromagnetic radiation. It's going out, it's emitting from everything electronic. Nobody intends for it to divulge classified or high technology information, but it's going out, and the foreign intelligence agents are getting it.

Modern espionage methods include the traditional sites and sources—the bars, classy-looking women and men, disgruntled, careless, or naive employees (a very important source of information)—but now also the Internet and, of course, incredibly accessible databases. From my home in Burnsville, Min-

nesota, I can get on the Internet and penetrate networks in the Twin Cities that I have no reason or authority to be in, and I can download the information there. Many people keep the same passwords for years, and passwords are very easy to break. Today's powerful computers can process password possibilities so fast that within just a few minutes they can pick up anyone's password. A lot of systems use digits for passwords, but a four-digit code can be broken within seconds.

A prime game at the airport is stealing laptops and, of course, the databases within them. Even if you think you have destroyed the database in your laptop, it's still there and it's readable. Never send your laptop through security first. Put your luggage through first, make sure nobody's holding up traffic ahead of you, and then send your laptop through so you can be there to pick it up.

Even company bulletin boards and home pages are vulnerable targets. Everybody is so proud of things on the home page; it's a wealth of information. Even so-called private areas on the home page can be easily penetrated within just a few minutes.

You in the legal profession need to understand that you're prime targets. If you're building your defense brief and it's on the work station, it's available to the opposing party or any competitor of your client unless you do something to protect it. You need to give some thought to that and make sure that you are using an encryption system. Systems available today on the commercial market are very powerful, very capable.

Most importantly, you've got to educate your employees. They need to understand that information is powerful. There is indeed an information war going on around them in the commercial world. If you're working in any way, shape, or form with a high technology company, you're a particularly high-target operation.

This is a grave new threat. Many times in Washington now, I go to the Hill, and congressmen say, "Well, there's no threat anymore. The Soviet Union is coming apart. We don't need to worry anymore." I have to tell them it's a more dangerous world than it was when I was in uniform worrying about the Soviet Union. We had great confidence in the leaders in the Politburo. They were a very conservative group of generals and admirals. They were impressed with the U.S. military capability to retaliate. They were particularly impressed that the Strategic Air Command was on alert and could penetrate any time it needed to. They didn't do anything very provocative. We recognized that the K.G.B. was everywhere, and we were very much on our toes. Now that's gone. The Berlin Wall is down, and we've let our guard down. Now the threats are coming from all over the world, including Third World powers; the terrorist danger is extremely high; and these electronic capabilities are a major

threat to our country.

In 1977, as the director of the Strategic Air Command's intelligence operations, I decided I wanted to test our database on the Soviet Union, so I picked one district in the Soviet Union, the Riga district in Latvia. I said, "Let's simulate the execution of the war plan just in that district"; and so we did. Using simulation, we launched ICBMs, we launched SLBMs, and then we launched our bombers. I was shocked to discover that when the B-52s arrived at the border of Latvia, the air defense system in Latvia was still about 50% capable, and it had 50% of its fighters launched and going after the B-52s. Our attrition was very high.

When the exercise ended, I called my people in and said, "How can this happen?" And they responded, "The problem is we haven't located some of the key command and control nodes." "Why can't we find them," I asked, "when we have the greatest satellite systems, the greatest electronic monitoring capability the world has ever known?" "We haven't been able to locate some of them because they're in bunkers, buried under the ground." So I said, "Let's take a new tack here. Let's get all the national intelligence agencies working on this district to help us find those key command and control nodes." And so we did. Lo and behold, we found the bunkers and changed our database. I did the exercise again, and this time when the B-52s came in, there were no fighters left. There was no automated air defense system left. We penetrated freely, and we began to do that throughout the Soviet Union.

A few months later I was directed to go to San Antonio, Texas, and establish a new electronic defense command for the Air Force, and I started looking at this electronic threat. I put together some mobile vans. We used excess aircraft equipment, we bought some Radio Shack scanners, we built our own jammers, and then we did an exercise against our own Air Force. Six smart sergeants in three mobile vans parked outside an air base at Osan, Korea, and they began to monitor all of the radio and telephone networks being used on the base. They attacked only two of the networks—the maintenance network and the air police network. When they heard the maintenance troops being told to go to a certain aircraft to get it ready for launch, they penetrated the system, changed the aircraft tail number, and sent them to the wrong airplane. Or they called maintenance and said, "Cancel that. We don't need your help there." They sent air police scurrying from one end of the base to the other with false penetration reports. They began systematically dialing up all the telephones in the command post, keeping them busy so that nobody could call in or out. They began selectively to jam certain telephones and radios. In an hour the commanding general asked me to stop. We had shut the base down. He couldn't launch aircraft, he couldn't do anything. He was paralyzed.

I remember telling the city fathers in San Antonio, Texas, that I could bring

these six smart sergeants back, run their three vans through downtown San Antonio, and shut down the city. The fire department would be helpless, the police department would be thoroughly confused, the city government would be rendered inoperative. I could shut down the banking system with electrons. That's the threat I'm talking about today. It is a very real threat, and I urge you to pay careful attention to it in the future.