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# COMMENT

## DISCOVERY AS ABUSE

FRANK H. EASTERBROOK\*

That discovery is war comes as no surprise. That discovery is nuclear war, as John Setear suggests, is.<sup>1</sup> Discovery more often calls to mind the trench warfare of World War I, the war of attrition. During World War I cooperative patterns evolved, as soldiers called time-out and even sang holiday carols to the other side.<sup>2</sup> The cooperation broke down as fresh troops, or worse, new officers, arrived on the scene and disregarded the established patterns. Robert Axelrod views such patterns of cooperation and conflict as logical outcomes of repeated plays of the game Prisoner's Dilemma.<sup>3</sup> John Setear invites us to view discovery the same way and draws out the implications: the farther in the future the resolution of the case, the fewer "plays" of the game per case, and the more atomistic the profession, the less cooperation there will be. He recommends methods to increase the number of interactions between members of the bar to augment the probability of cooperation.

This is not a novel program. Gordon Tullock applied game theory to the process of deciding how much to invest in litigation, the equivalent of deciding whether to make costly discovery requests.<sup>4</sup> Every student of the subject owes a debt to Thomas Schelling, whose treatment of limited war can be transferred to discovery.<sup>5</sup> Setear, however, deserves credit for translating a few of the essential ideas of game theory for a legal audience. Unfortunately, the translation is labored, lengthy, and cute; headings such as "*We at Dewey, Screwtham have a truly national practice*"<sup>6</sup> draw yuks but repel scholars; the difference in style between this paper and one that could be published in *The Journal of Conflict Resolution* illustrates a reason why many social scientists want to hold lawyers at arms' length.

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\* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago. I thank Douglas G. Baird, Richard A. Epstein, Larry Kramer, William M. Landes, Richard A. Posner, Jack B. Weinstein, Samuel A. Wilkins, Diane P. Wood, and Ari S. Zymelman for their helpful comments on an earlier version of this essay.

<sup>1</sup> Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U.L. REV. 569 (1989).

<sup>2</sup> J. ELLIS, *EYE-DEEP IN HELL: TRENCH WARFARE IN WORLD WAR I* 170-73 (1976).

<sup>3</sup> R. AXELROD, *THE EVOLUTION OF COOPERATION* 20, 54 (1984).

<sup>4</sup> G. TULLOCK, *TRIALS ON TRIAL* 49-69 (1980).

<sup>5</sup> T. SCHELLING, *THE STRATEGY OF CONFLICT* 53-80, 119-61 (rev. ed. 1980).

<sup>6</sup> Setear, *supra* note 1, at 619.

More surprising than Setear's analysis is Judge Weinstein's conclusion that discovery abuse isn't worth worrying about.<sup>7</sup> The Harris Poll unveiled at this conference shows that 33% of federal judges think that there are "a lot" of problems in discovery; another 50% say there are "some" problems; only 3% think there are "no" problems.<sup>8</sup> As 84% of federal judges have imposed sanctions on improper motions or tactics,<sup>9</sup> and 84% think that the bifurcation of trials is beneficial,<sup>10</sup> it is tempting to suppose that there is a ready answer to the woes of discovery. Lawyers who engage in discovery abuse should be bifurcated. Judge Weinstein, however, is in the 3%. One day he polled the magistrates in the Eastern District of New York. These magistrates are in charge of discovery in Judge Weinstein's bailiwick; the judges of his court view managing discovery and resolving disputes about it as beneath their station (more neutrally, they believe there are better uses of their time). "Do you allow discovery abuse?" the judge asked; "No!" the answer rang out. Well, there you have it. Nirvana has been located, and it is in Brooklyn. I would be inclined to discount the word of magistrates whose jobs would have been in jeopardy if they owned that they knew about and tolerated abusive tactics in discovery. More, I doubt that magistrates could recognize excessive discovery. Discovery presents intractable problems because it may be tagged "excessive" only in retrospect, a subject to which I return.

## I

Setear, like most of us, sees discovery as both a tool for uncovering facts essential to accurate adjudication and a weapon capable of imposing large and unjustifiable costs on one's adversary. Litigants with weak cases have little use for bringing the facts to light and every reason to heap costs on the adverse party—on this supposition, the one in the right. The prospect of these higher costs leads the other side to settle on favorable terms. All of the models of settlement imply that parties divide between them the gains from avoiding litigation.<sup>11</sup> More discovery (better: the credible threat of more

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<sup>7</sup> Weinstein, *What Discovery Abuse?: A Comment on John Setear's The Barrister and The Bomb*, 69 B.U.L. REV. 649, 653-54 (1989).

<sup>8</sup> Louis Harris & Associates, *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B.U.L. REV. 731, 737 (Table 2.1) (1989) [hereinafter *Judges' Opinions*].

<sup>9</sup> Available upon request from Louis Harris and Associates, Inc.

<sup>10</sup> *Judges' Opinions*, *supra* note 8, at 744 (Table 5.3).

<sup>11</sup> There are so many papers elaborating on the groundbreaking work of William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971), that it is not worthwhile to catalog them. Most of the contributions since 1971 are collected in Wittman, *Dispute Resolution, Bargaining and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data*, 17 J. LEGAL STUD. 313 (1988), which adds insights.

discovery) increases these “savings,” which the parties share in a ratio determined by their endurance, capacity to bluff, and so on—in other words, by factors unrelated to their legal entitlements. The party in a position to threaten exhaustive discovery can claim for itself in settlement a portion of the costs that should not have been imposed in the first place. Sometimes threats must be carried out; as in war, both sides lose. It is the (credible) threat rather than the reality of discovery that affects the settlement of cases; and when there is some discovery, the threat is “more of the same.” The change in the terms of settlements attributable to unnecessary discovery is invisible to judges and magistrates but is a real diminution in the quality of justice nonetheless. Data showing that most cases settle without substantial discovery are not reassuring; the terms of settlement are affected the most when the parties threaten discovery (explicitly or implicitly) but never use it.

I must define some terms. A normal discovery request is one in which the demander’s costs of pursuing the request (as it sees things) are less than the increase in the value of the anticipated judgment that the demander expects the new information to produce.<sup>12</sup> For example, if it costs \$1,000 to make and follow up a demand for information, the stakes of the case are \$20,000, and the requester expects that the information will increase from 60% to 70% the probability of prevailing, the request is cost-justified from the perspective of the seeker. It costs \$1,000 to make but augments the anticipated judgment by \$2,000. Note that the requester ignores the costs its adversary incurs in fulfilling the demand for information. The discovery rules do not require the requester to consider these costs, even though the sum of the parties’ costs easily can exceed \$2,000. An impositional (excessive, abusive) discovery request is one “justified” from the demander’s perspective not by its contribution to an anticipated judgment but by its contribution to an anticipated settlement. If the demand costs \$1,000 to make and follow up but the (anticipated) information would increase the chance of winning \$20,000 only from 60% to 61%, the requester sees this as a net loss (spending \$1,000 to pursue \$200) unless the high costs of producing the information lead the adverse party to increase its settlement offer by more than \$1,000. Stated differently, an impositional request is one justified by the costs it imposes on

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<sup>12</sup> Discovery has two other benefits that should be counted in defining a “normal” request: (1) sharing information increases the extent to which parties agree on the likely outcome of the case if it goes to trial, which facilitates settlement even if the parties’ costs of pre-trial preparation are held constant; (2) the prospect of obtaining information through discovery and so enforcing legal rules more accurately leads to additional compliance with the rules, reducing the number of cases that must be litigated. See Kaplow & Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565, 594 (1989). I disregard these complications in the text because they do not alter the substance of the argument.

one's adversary rather than by the gains to the requester derived from the contribution the information will make to the accuracy of the judicial process.

Notice that both normal and impositional requests may inflict on the responding party costs substantially greater than the social value of the information.<sup>13</sup> They may inflict costs greater than the private value of the information (the requester who spends \$1,000 to pursue \$2,000 is making a normal request even though the producing party must spend \$10,000 to comply with the demand). From the perspective of the producing party, normal and impositional requests are hard to distinguish—and for the producing party's purposes the difference is immaterial, because they have identical effects. So both categories may be effectively impositional (that is, they may yield an increase in the settlement offer out of proportion to the value of the information in improving accuracy).

Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves. The timing is all wrong. The plaintiff files a sketchy complaint (the Rules of Civil Procedure discourage fulsome documents), and discovery is launched. A judicial officer does not know the details of the case the parties will present and in theory *cannot* know the details. Discovery is used to find the details. The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find. A magistrate supervising discovery does not—cannot—know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow.<sup>14</sup> We

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<sup>13</sup> Subject to the caveat in note 12, *supra*, the social value is smaller than the value to the requester alone, because the judgment in the case is simply a transfer payment between the parties. The social value of litigation lies in its formulation of rules of conduct and its inducement of compliance with those rules. The prospect of the transfer payment may lead parties to invest resources greatly exceeding the social value of the case. See Shavell, *The Social versus Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333, 333 (1982); Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 361-64.

<sup>14</sup> Rule 26(g) requires the requester to make only appropriate demands on pain of sanctions, and Rule 26(c) allows the court to trim back demands for information on several grounds. Although the need to use this power is sometimes clear, see *Powers v. Chicago Transit Authority*, 846 F.2d 1139, 1143 (7th Cir. 1988); *Marrese v.*

cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define "abusive" discovery except in theory, because in practice we lack essential information. Even in retrospect it is hard to label requests as abusive. How can a judge distinguish a dry hole (common in litigation as well as in the oil business) from a request that was not justified at the time? Ex post perspectives are no answer to problems that must be solved ex ante. It is easy to detect "abuse" if in a securities case the plaintiff tenders interrogatories asking the defendant whether it was raining when the prospectus was signed, but this is not a problem in real cases. So it is no wonder that the magistrates answered "no" when Judge Weinstein asked them whether there is abuse in the Eastern District of New York. They have no way to evaluate the costs and benefits of discovery ex ante, and they rarely examine their handiwork ex post (because the case either settles or passes to the judge for disposition).

A division of labor in which magistrates handle discovery and judges handle "the merits" is unwise. One common form of unnecessary discovery (and therefore a ready source of threatened discovery) is delving into ten issues when one will be dispositive. A magistrate lacks the authority to carve off the nine unnecessary issues; for all the magistrate knows, the judge may want evidence on any one of them. So the magistrate stands back and lets the parties have at it. Pursuit of factual and legal issues that will not matter to the outcome of the case is a source of enormous unnecessary costs, yet it is one hard to conquer in a system of notice pleading and even harder to limit when an officer lacking the power to decide the case supervises discovery.

A modest test: does allocating discovery to magistrates and "the merits" to judges cut the time needed to litigate a case? In the Eastern District of New York, the median time between filing and disposition of a civil case is 10 months (with 90% closed in 35 months).<sup>15</sup> Cases closed during pretrial (that is, by settlement, summary judgment, or judgment on the pleadings) last a median of 17 months (90% within 42 months); cases tried on the merits last a median of 25 months (90% within 55 months). In the Northern District of Illinois judges usually supervise discovery. The Northern District of Illinois is slightly larger than the Eastern District of New York, and its judges handle more cases apiece of greater complexity (as the Administrative Office of the United States Courts measures such things). Yet the average time to disposition of a civil case in the Northern District is four months (90% within 19 months). The median disposition time of a case closed in pretrial is 12 months (90% within 38 months), and of a case tried to

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American Academy of Orthopaedic Surgeons, 726 F.2d 1150, 1159-62 (7th Cir. 1984) (en banc), *rev'd in part on other grounds*, 470 U.S. 373 (1985), it is rarely employed because of the informational shortfalls discussed in the text.

<sup>15</sup> The data here are from Director, *Administrative Office of the United States Courts, Annual Report 1987*, at Table C-5.

judgment 24 months (90% within 68 months). Figures of this kind are subject to many interpretations, but a simple inference is that judges who handle discovery bring cases to a faster conclusion than do judges who delegate discovery to magistrates. No surprise, for a judge can say "Issue X will be irrelevant, don't pursue it" in a way a magistrate cannot. Yet, records in cases coming from the Northern District of Illinois are larded with discovery that was pointless, at least in retrospect. Time and again litigants take dozens of depositions, only to see the case go off on documents alone. These depositions are costly in legal time and, frequently, in the time they divert from the party's ongoing affairs. Engineers and CEOs tied up in discovery are not contributing to useful products. Deposition costs are not measured in time and money alone. "[B]eing deposed is scarcely less unpleasant than being cross-examined—indeed, often it is more unpleasant, because the examining lawyer is not inhibited by the presence of a judge or jury who might resent hectoring tactics. The transcripts of depositions are often very ugly documents."<sup>16</sup>

Supervision by the judge is no panacea, for even the judge who resorts to all of the tactics in the *Manual for Complex Litigation* cannot do much about the plasticity of legal rules that lie at the heart of modern discovery—both the need for discovery and the inability to define (and therefore detect and prevent) impositional discovery. Justice Holmes thought that a developing legal system would subject more and more questions to decision by rule. Progress lay in the transition from requiring "reasonable" conduct to defining what "reasonableness" consisted of.<sup>17</sup> Holmes was a lousy prophet even if he was right in defining progress. Many complex disputes are governed not by rules but by standards—amorphous agglomerations of "factors" that must be "balanced," usually without any way to reduce the factors to a common metric or attach weights to them when they conflict, as they invariably do. Some of these laundry lists stem from the need to resolve cases in an institution that even in principle cannot yield consistent decisions; the list of factors hides the court's inability to produce a rule.<sup>18</sup> Some of the imprecision arises because judges believe that "considering everything" is a virtue beyond price.<sup>19</sup>

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<sup>16</sup> *DF Activities Corp. v. Brown*, 851 F.2d 920, 923 (7th Cir. 1988) (Posner, J.).

<sup>17</sup> O.W. HOLMES, *THE COMMON LAW* 111-13, 123-26 (1881).

<sup>18</sup> Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 811-30 (1982).

<sup>19</sup> See, e.g., *Basic, Inc. v. Levinson*, 108 S. Ct. 978, 983-86 (1988). *But see* *Trident Center v. Connecticut General Life Ins. Co.*, 847 F.2d 564, 569-70 (9th Cir. 1988) (Kozinski, J.) (pointing out the high social costs of rules requiring courts to consider everything).

Multi-factor standards cut down on loopholes—the bane of rules—but at great cost.<sup>20</sup> When there is no rule of decision but only an injunction to consider everything that turns out to matter, lawyers and clients cannot tell in advance—that is, when planning conduct and conducting litigation—what the judge or jury will think matters. Lawyers cannot limit their search for information in discovery, because they do not know what they are looking for. They do not know when to stop, because they never know when they have enough. The problem is especially acute when they do not even know who will be the weighmaster at the scales: the jury is yet to be selected. When the stakes are high—and often the stakes for corporations are many times the ad damnum of the complaint<sup>21</sup>—it is worthwhile to invest the legal resources needed to produce even a small change in the probable outcome. Lawyers practicing in good faith, therefore, engage in extensive discovery; anything less is foolish. When our system of legal rules induces lawyers to make requests that are extensive but justified, and therefore cannot be called abusive, it also offers the perfect “cover” for making requests designed only to impose costs (or to impose costs excessive in relation to the gains). A judicial officer cannot separate one from the other either ex ante or ex post. Indeed, many lawyers do not know whether their own discovery requests are proper or impositional; it is almost impossible to tell one from the other, and both are in the interests of the lawyer’s client. The recipients of discovery requests often cannot see what the requester is getting at, and for strategic reasons the requester will not tell. So the recipient smells “abuse” even though he may have diagnosed only his own lack of comprehension. No wonder there is both a widespread perception that there is a “problem” with discovery and a belief among those who supervise it, such as the magistrates in the Eastern District of New York, that the abuse isn’t happening in *my* court.

## II

What is to be done? Limiting the number of interrogatories will make no headway because requests may be subdivided, because a universal limit (say, 20 in all cases) neglects important differences among kinds of litigation, and because a requirement that the judge set the “right” number case-by-case runs smack into the informational problem: the parties (likely) and judge (certainly) do not know the “right” number. If the judge knew the right amount, discovery could be controlled without the need for devices of

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<sup>20</sup> See generally Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974).

<sup>21</sup> See Engelmann & Cornell, *Measuring the Cost of Corporate Litigation: Five Case Studies*, 17 J. LEGAL STUD. 377, 398-99 (1988); Jarrell & Peltzman, *The Impact of Product Recalls on the Wealth of Sellers*, 93 J. POL. ECON. 512, 533-36 (1985); Peltzman, *The Effects of FTC Advertising Regulation*, 24 J.L. & ECON. 403, 447-48 (1981).



this character. So too with proposals to penalize the abuse of discovery. The difficulty is that in a world in which everything is relevant and no one knows what lies in the adversary's bosom, it is impossible for outsiders accurately to identify impositional discovery requests, if indeed the lawyers can tell the difference. What you cannot detect, you cannot single out for sanctions.

Setear's perspective leads him to make some different suggestions. He proposes, for example, to break the process of discovery into smaller chunks. This would string out the interactions between counsel. A lawyer who knows that he needs the cooperation of his adversary in future rounds will be more reasonable in today's round in order to induce a cooperative reply tomorrow. There is something to the proposal, although it is subject to a problem well known in game theory: unraveling. The chain of interactions is finite. In the last period, someone will defect (fail to cooperate). A, knowing that his rival B will defect in the last period, sees that there are no gains from cooperating in the period before last. So A plans to defect in the penultimate round. B knows that A has this incentive and therefore sees that there is no gain from cooperating in the second-from-last round; he plans to defect in that round. A knows that B will reason thus, so he plans to defect in the third-from-last round, and so on until both parties defect in the very first round. Whether this occurs depends, as Setear observes, on the discount rate and on the length of the chain of interactions. Litigation as a rule does not approach *Jarndyce v. Jarndyce*; the data produced above show that in federal courts the bulk of cases is resolved in less than a year. Discounting the losses from future defections therefore is unlikely to produce cooperation today. Only a dramatic increase in the duration of litigation—objectionable on independent grounds—would make staged discovery a powerful motive for cooperation.

Several of Setear's other suggestions are less attractive still. He says, for example, that large law firms contribute to the problem by reducing the number of interactions among lawyers, implying that a program of reducing the size of firms would help curtail discovery abuse. The argument is flawed. The number of interactions between one lawyer and any other falls as the size of the bar grows, not as the size of law firms grows. Larger firms create sustained interactions that otherwise would not exist. A lawyer at Firm C contemplating serving an impositional discovery request on a lawyer represented by Firm D must contemplate the possibility that the retaliation will come not from the lawyer opposing him in today's case but from some other lawyer in Firm D, in some other case in which Firm C is involved. Firms are like extended families, and systems of primitive law usually relied on the victim's family to exact retribution (and so deter misconduct). In the limit, a large city with only two law firms could be as convivial as a small town with only two lawyers. That limit is never reached; some law firms' internal affairs are run in the same cutthroat manner as their litigation. Still, to the extent firms act as entities, size ameliorates the discovery problem.

I am similarly unpersuaded by Setear's implication that we need special rules to protect small litigants from the large ones. Impositional discovery requests depend on asymmetric costs. If E's demands injure F more than F's demands can injure E, then E has every reason to pepper its adversary with requests. Large litigants have files—warehouses full of files. The adversary can demand that they be searched, at great cost; the adversary can notice the depositions of 20 corporate officers. What can the large litigant do to retaliate? Sure big firms fight tooth and nail, for they stand to lose more than their smaller adversaries stand to win. Large firms are repeat players. Losing has a precedential effect. A judgment that an auto has been designed defectively, or that a clause in an insurance contract covers a given risk, will cost the manufacturer or insurer much more in future cases than the plaintiff gains in today's. To prevent such consequences large firms will use many weapons, including discovery. But in a fight between the big and the small, the big are more likely to be the targets of impositional discovery requests; in a fight between the rich and the poor, money flows in one direction only, no matter who is in the right.<sup>22</sup>

### III

Setear offers only palliatives. No remedy directed at impositional discovery requests *could* be more than a palliative. For excessive discovery is only a symptom of larger problems—the inability of our legal system to define what is relevant to a legal conflict and to make the parties bear the costs of their own endeavors. Relief comes from dealing with the causes. Lawyers respond to the incentives the legal system gives them. Change these incentives, and you change lawyers' conduct. Leave them alone, and efforts to deal with their consequences are doomed.

The principal facilitators of impositional discovery requests are rules (standards, really) that make everything relevant and nothing dispositive. Such approaches engender endless search for . . . well, for something that may turn out to be useful, once lawyers learn what the tribunal thinks important. If we want to cope with the "problem" of discovery, we must do away with multi-factor standards, replacing them with rules that call for inquiry into a limited number of objectively ascertainable facts. Courts are beginning to do this. The Supreme Court recognized that its approach to official immunity led to endless rummaging, undercutting many of the goals of immunity doctrines. It responded by simplifying the rules and making cases turn on objective evidence.<sup>23</sup> The Court has simplified much of anti-trust law in a way that will cut down the need to seek evidence and therefore

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<sup>22</sup> Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 28-29.

<sup>23</sup> Harlow v. Fitzgerald, 457 U.S. 800 (1982); Anderson v. Creighton, 483 U.S. 635 (1987).

the ability to conceal impositional discovery requests under the cover of searching for the needle in the haystack.<sup>24</sup>

Legal uncertainty is the godfather of discovery abuse. Uncertainty comes not only from nebulous rules in traditional subjects such as torts and contracts but also from attempting to handle in the courts, problems amenable to no simple solution. Asbestos litigation, attempts to reform institutions, and the like create problems because it is hard to see even in principle how a court can resolve them. Then there is the prospect (and reality) of legal change. George Priest has documented the effects of actual legal change on the costs of litigation.<sup>25</sup> Anticipated change has additional effects. A litigant fearing that the rules in force today will not apply by the time the case comes to judgment has little alternative but to cast a wider net in discovery, seeking evidence that may be pertinent under whatever rule should apply. Such requests look for all the world like impositional discovery requests, but are not. Yet they impose the same costs as do impositional requests, and to the recipients they are identical. They breed retaliatory requests. By most accounts, the pace of legal change (legislative and judicial) has never been greater. We cannot logically condemn litigants' rational reactions; we cannot do anything about impositional requests that masquerade as proper ones, and we have made it impossible to tell the two apart.

"Impossible" is an overstatement. It is impossible only when the parties are in charge of a system characterized by notice pleading. Impossible, in other words, when discovery precedes the identification of the dispositive legal issues. If pleadings were used to focus legal and factual disputes before discovery began, or if discovery alternated with legal resolution, constantly paring away issues, the process would be more tolerable.<sup>26</sup> Civil law systems do this, and so do many common law systems. A judicial officer (a term that glosses over the difference between "magistrates" and "judges" in our system, and among the kinds of judge in Europe) could decide when discovery is necessary, of what and from whom. Once the officer decides what is likely to make a difference to the outcome, it is easy to decide what ought to be acquired in discovery. If the case is unresolved after the judge applies the

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<sup>24</sup> For example, the Court sustained a grant of summary judgment in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 595-98 (1986), by devising a test that made the mountainous record that had been assembled in the case all but irrelevant. The new approach, requiring the parties to compile only a few readily available facts, will streamline the discovery process in future cases and enable courts to cut off impositional requests by deciding the case on the merits.

<sup>25</sup> Priest, *Measuring Legal Change*, 3 J.L. ECON. & ORG. 193 (1987); see also Cooter, *Why Litigants Disagree: A Comment on George Priest's "Measuring Legal Change"*, 3 J.L. ECON. & ORG. 227 (1987).

<sup>26</sup> Changing Rule 26(b)(1) to limit discovery to matters admissible at trial would be a logical counterpart to a process linking discovery to the resolution of questions identified with specificity.

law to what is discovered in response to this request, the officer ascertains the next appropriate inquiry and directs discovery concerning it. This reverses in two ways the approach now used in the United States: it puts some preliminary assessment of the merits ahead of the decision about discovery, and it puts the judicial officer rather than counsel in charge. Litigants in nations that employ this system do not complain about abusive discovery; to the contrary, they like their process and complain when portions of our system (which they think barbaric) begin to intrude. The judicial officer does not make impositional demands, and the link of discovery to the merits greatly cuts down on the number of demands made for any purpose.

Perhaps a system in which judges pare away issues and focus investigation is too radical to contemplate in this country—although it prevailed here before 1938, when the Federal Rules of Civil Procedure were adopted. The change could not be accomplished without abandoning notice pleading, increasing the number of judicial officers, and giving them more authority (the system depends on the presiding officer having the power to decide). If we are to rule out judge-directed discovery, however, we must be prepared to pay the piper. Part of the price is the high cost of unnecessary discovery—impositional and otherwise.

If neither a simple and stable legal system nor one run by inquiring magistrates is attainable in the United States, then only one change holds significant prospect of curtailing impositional discovery. Impositional discovery depends on asymmetric stakes: the requester incurs lower costs than the person interrogated. The requester saddles its adversary with these costs to improve its bargaining position. We could do what almost every other civilized legal system does and deny the abuser the fruits, requiring it to pay the costs it has imposed. This does not mean “sanctions”; when legitimate and impositional requests look alike, the threat of sanctions is hollow. Only an *automatic* reversal of costs is likely to do the trick. The party always knows better than the judge which requests are legitimate and which are impositional. Even fee-shifting leaves opportunities—for legal costs are only a portion of the full costs of taking employees of a corporation out of work and holding them captive in lawyers’ offices during depositions. But requiring the loser to pay the winner’s legal fees and costs would do a great deal to cut off the attractiveness of unnecessary discovery requests.

Loser-pays is only one of many ways to require those who want discovery to pay for the privilege. We could require the demander to pay the costs of discovery on the spot, as we now require payment when one side wants to depose the other’s expert witness.<sup>27</sup> If the person making the demand prevails (and the court concludes that the discovery contributed to the outcome, an essential qualification), he would recover the costs at the end of the case. Such an approach, and its variants, still requires an assessment of what was necessary. Professor E. Donald Elliott suggested at this conference a variant

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<sup>27</sup> FED. R. CIV. P. 26(b)(4)(C).

of the loser-pays rule based on Rule 68 of the Federal Rules of Civil Procedure. Under Rule 68 either side may make an offer of judgment. If the adversary turns down the offer and then does worse at trial, we learn that the additional proceedings were unnecessary. The "loser" (you can lose by doing less well than you could have done) must bear its own costs and fees incurred after the offer, even if it otherwise would be entitled to recover them.<sup>28</sup> Professor Elliott's variant is that after the commencement of the litigation, each side may tender to the other all documents (and other evidence) it believes is relevant to the case. A litigant believing that information has been withheld may obtain compulsory discovery, but if it loses, must pay fully for the privilege. This ingenious proposal induces litigants to reveal their theories so that their adversaries' disclosures are adequate; it induces everyone to make a core of information available quickly and cheaply; and it discourages impositional and otherwise-unnecessary requests. All of this is accomplished without a full commitment to the loser-pays rule.

A proposal to require losers to pay winners' fees and costs—even one so modest as Professor Elliott's—invariably induces the rejoinder: That would freeze poor persons and those of modest resources out of court! Not likely; the poor routinely are excused from paying costs now, and such an exception would apply to any loser-pays system. The threat of taking from those who have nothing is not serious. Those of modest means rarely participate in the kinds of cases in which there is voluminous discovery even under current rules. More, the bar—which through the contingent fee device offers representation to many who could not pay hourly rates—readily could organize a pool to spread the risk of unsuccessful ventures and cover the costs from successful ones. Many class actions are "syndicated" among the bar for just this reason, and law firms also have pooling characteristics. No matter how efficacious these private responses may be, we cannot allow the legal system to be held hostage to concerns that affect a small fraction of litigants. Impositional discovery is practiced in big-stakes cases between substantial litigants, represented by the most costly legal talent. This problem should be tackled, with the difficulties of impoverished and middle-class litigants carved off for different treatment if need be.

Now the loser-pays system does not simply discourage pointless expense (by requiring it to be borne by the party making the demand), it also reduces the cost of litigation by those who believe that they are more likely than not to prevail. This has the advantage of selectively encouraging the filing and prosecution of meritorious cases.<sup>29</sup> It has the disadvantage of inducing those

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<sup>28</sup> See *Marek v. Chesny*, 473 U.S. 1, 5 (1985); see also Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93, 93 (1986); Priest, *Regulating the Content and Volume of Litigation: An Economic Analysis*, 1 SUP. CT. ECON. REV. 163, 164 (1982).

<sup>29</sup> Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 71-73 (1982).

who believe they have a meritorious case to spend more on litigation, other things being equal.<sup>30</sup> The party that is sure to prevail believes that its tab will be picked up by the other side; with the cost of litigation services now zero, it will splurge. No one thinks the probability of prevailing (and collecting every cent) is 100%; but when the party thinks that the probability exceeds 50% and believes that each side's costs and fees are equal, the loser-pays rule reduces the costs this litigant perceives it incurs by pressing ahead. If the parties agree on the likely outcome (for example, plaintiff and defendant agree that the plaintiff's chance of winning is 60%) it will be easy to settle the case; if each party is optimistic, however, the loser-pays rule may increase the investment in discovery. This is not to say, however, that it aggravates the discovery "problem." The paradigm impositional discovery request comes from a party thinking it has a relatively small chance of prevailing (say, 5% to 10%, a measure of background legal uncertainty) but wanting to convey the message: "This suit will cost you \$1 million whether I win or not; we can split that in settlement." Such tactics are unambiguously discouraged by a loser-pays rule. The target of this request has only to say no, and the demand will stand revealed as a bluff.<sup>31</sup> So too with requests by litigants whose claims are more solid (beyond the strike-suit range), but still less than 50%. Discovery "abuse" rarely is attributed to the party in the right—the one with the greater chance of prevailing at trial. If the party entitled to prevail makes an impositional demand, the adversary can save the cost by capitulating, which it should do anyway given the assumption that it is going to lose the case. The loser-pays rule, therefore, is likely to discourage exactly the kind of demand that should be discouraged, while being neutral toward (even encouraging) discovery by parties with superior legal claims.

#### IV

The source of "discovery abuse" does not lie in the rules regulating discovery. It cannot be fixed by tinkering with Rule 26, Rule 37, or any of their companions. Moving supervision from judges to magistrates, or magistrates to judges, will not help much; neither can detect problematic requests,

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<sup>30</sup> Katz, *Measuring the Demand for Litigation: Is the English Rule Really Cheaper?*, 3 J.L. ECON. & ORG. 143, 144-45 (1987).

<sup>31</sup> Rosenberg & Shavell, *A Model in Which Suits are Brought for their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985) (demonstrating that asymmetric costs of litigation, a consequence of the legal system's failure to shift costs, is the source of leverage employed by litigants who maintain positions that are unlikely to prevail if evaluated on the merits); see also Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437, 448 (1988) (discussing how uncertainty about the decision to go to trial contributes to the phenomenon—an uncertainty that would not be material if costs were allocated to losing parties).

so that neither supervision nor sanctions will make a dent in the problem. The source lies elsewhere—in the structure of legal rules (too much uncertainty), in the allocation of fees and costs (they should be borne by those who cause them to be incurred), and in the operation of the judicial system (there is room for more direction by judicial officers and less by litigants). Unless our legal culture is prepared to address the causes of discovery abuse, it should not caterwaul about the symptoms.