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HEAR NO EVIL, SEE NO EVIL: A COMMENT ON PROFESSOR NESSON'S CLAIMS ABOUT EVIDENCE SUPPRESSION

Dale A. Nance*

Charles Nesson's contribution to this symposium points to a potentially serious problem in our system of civil litigation. Motivated by his unsettling experience in working on a major piece of litigation, Nesson levels a serious charge of judicial reluctance to respond to the suppression of adverse evidence by parties.¹ He argues that judges are insufficiently willing to employ the arsenal of available responses to suppression: "judges seem willing, even anxious, to ignore or minimize the role of spoliation rather than to recognize and address it as a serious problem."²

In order to illustrate his claim, Nesson takes us on a tour of the thinking of the amoral calculator, Holmes's "bad man," and illustrates how there are strong incentives to suppress. He argues that there is often a high probability that suppression will not be discovered.³ He then guides us through the litigation process to show that even if the suppression is discovered, the consequences to the suppressor are not serious enough to offset the discount resulting from the chance of not being discovered.⁴ In these claims, Nesson explicitly takes issue with many commentators who argue that, especially in the important case of embarrassing documents, the copy machine and the computer have made the effective suppression of evidence an extraordinarily difficult and risky business.⁵

With regard to his first point, Nesson offers little by way of argument or evidence that his estimate of the likelihood of discovery is more accurate than that of the persons, both practitioners and aca-

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2 Id. Nesson's preferred term is "spoliation," but he clarifies that this includes destruction as well as other modes of suppression. Id. Moreover, his discussion moves relatively freely, and sometimes confusingly, between issues of destruction and issues of withholding of evidence. I shall use the general term "suppression" to refer to either destruction or withholding.
3 Id. at 795-96.
4 Id. at 796-805.
5 Id. at 795.
demics, with whom he disagrees. Nesson is right, of course, that in a given situation the circumstances may point to a high probability that suppression will go undetected, but he gives us little reason to think that the incidence of these situations is great or even that it is great enough to warrant lawyers' and clients' adopting a flexible advice policy that incurs the expenses of investigation necessary to discern whether this is a "good" case to attempt suppression.

Nesson's main argument in this regard is that most cases settle, leaving it very unlikely that suppression will be discovered thereafter because the lawyers lose interest in the case. While it is not so obvious that clients lose interest, there is still reason to believe that the probability of detection drops off after settlement. However, it is somewhat difficult to know what the implications of this difference are in terms of the strength of incentives. If the litigant knows in advance that a case will settle early, then suppression may be a relatively preferred strategy for improving the terms of the anticipated settlement. If the litigant knows that the case will not settle, or will settle only late in the process, suppression would be relatively more likely to be detected. What this means for the general case when settlement prospects can only be gauged in rough probabilistic terms is unclear, except that suppression may be more likely in our system than one that does not allow out-of-court settlement at all. This is not terribly illuminating on the question of who is right—Nesson or those he contradicts—about the risk of detection in our system as it is.

As to the anticipated consequences of detection, Nesson asserts a reluctance on the part of the judiciary to get involved in discovery disputes, as well as a nondeterrent character in those sanctions that the judiciary does impose. The former claim seems plausible enough to me, but the evidence he adduces is not particularly persuasive. For example, he claims that suppression, once discovered, predictably results only in judicial demand that the information in question be turned over to the opponent, there being no judicial motivation to pursue the matter of sanctions if this demand is satisfied. This may

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6 Id. at 796.

7 Settlement might result in a lowering of defensive guards to the revelation of damaging evidence as well as a reduction of incentives to investigate. Nesson does not address the former.

8 Nesson notes that the claims of practitioners, though not reflecting "realistic risk assessment," may "offer rhetorical support for ethical behavior." Id. at 795. I take it this means that lawyers wanting to behave ethically may (knowingly or otherwise) exaggerate the risk of detection in order to convince their clients not to suppress evidence. Nesson does not address the virtue of such conduct, nor the effect of his critique, if widely accepted, upon such efforts of lawyers to control client dishonesty.

9 Id. at 796. Nesson's view suggests that the optimal strategy for the bad-man litigant is
be right, in general, but Nesson offers no significant evidence to support the claim. The only example cited is a ruling in an antitrust case deferring decision on what sanctions to impose for plaintiff's willful suppression of evidence until after the jury reached its verdict, a ruling made in part because the evidence in question ultimately was made available to the opponent for potential use at trial. This example is rather misleading, however, since the court subsequently awarded a very large, clearly punitive sanction against the successful plaintiff, even though the prejudice from the suppression had been eliminated by the disclosure of the evidence. The case exemplifies just the opposite of judicial indifference once the evidence is produced.

Similarly, one senses an element of truth in Nesson's argument that typical sanctions do not fully offset the discounting effect in the bad man's amoral calculations. Again, however, there are reasons to doubt that Nesson's case is well established. Some qualifications focus on the appraisal of what the law is doing; others focus on the bad man's calculations given the prevailing pattern of juridical response.

As to the former qualification, if one bases a conclusion about the severity of the law's response upon the reported results of individual sanction motions, as Nesson seems to do, then one risks underestimating that severity, for the reported determination may not be the exclusive sanction meted out. As Nesson acknowledges early in his paper, there are many possible juridical responses to suppression. For example, the fact that a judge imposes a discovery sanction designed only to compensate the victim of suppression for expenses incurred in pursuing the evidence does not necessarily preclude the

10 withhold, rather than to destroy, the offending evidence in anticipation of settlement, since the former would allow him to turn the information over to his opponent if the suppression is detected. Destruction would leave the party open to the risk that settlement negotiations fail and, as trial approaches, the destruction is discovered, thereby incurring the ire of the trial judge for the litigant's self-imposed inability to reverse the suppression.

11 Litton Sys. v. AT&T, 90 F.R.D. 410 (S.D.N.Y. 1981). Nesson cites several other cases in this context, but they all involve evidence destruction, where his proposition is not tested. Id. at n.21.

12 Litton Sys. v. AT&T, 700 F.2d 785, 827-28 (2d Cir. 1983) (denial of costs and attorneys' fees to which plaintiff would otherwise be entitled by statute), aff'd 91 F.R.D. 574 (S.D.N.Y. 1981). The value of the sanction has been estimated at $25,000,000. Comment, Denial of Millions in Costs and Attorney's Fees as a Discovery Sanction, 1982 UTAH L. REV. 445, 453-54.

13 Similarly, the case law that Nesson cites elsewhere as evidence of judicial reluctance to investigate claims of party complicity in the destruction of evidence by nonparty persons is not convincing, at least not without some further interpretation. The cases indicate tougher standards for sanctions than Nesson would apparently prefer, but they do not show that courts are unwilling to consider seriously such claims of complicity. Nesson, supra note 1, at 799-800.

14 Id. at 794. I elaborate on these responses, see Nance, Missing Evidence, 13 CARDOZO L. REV. 831 (1991).
later use at trial of an adverse inference argument by the opponent or an ancillary jury instruction, or the exclusion of derivative evidence offered by the suppressor, or even a subsequent action in tort. Without a comprehensive look at the litigation in question, it is hard to know whether the integrated response has an adequate deterrent effect. Perhaps Nesson has done the needed investigation of the full course of the litigations upon which he relies to illustrate his claim, but it is not obvious from his paper that he has.\textsuperscript{14}

A similar point arises even if one looks to an isolated instance of juridical response. For example, Nesson relies heavily on the idea that those sanctions thought to be most severe, such as issue preclusion, dismissal of a plaintiff, and default of a defendant, are not effective as deterrents.\textsuperscript{15} His explanation is that the amoral calculator accurately perceives there is nothing to lose by suppressing. But this perception depends on the assumption, never exactly recognized by Nesson, that the evidence in question is perceived to be such that, if presented at trial, it would assure the opponent's victory on the issue upon which preclusion could be anticipated. That kind of evidence must be relatively rare, it seems to me. Much more commonly, an item of evidence, the suppression of which is contemplated, is such that its presentation at trial will significantly improve the opponent's chances of winning, but will not guarantee that result. An issue-preclusive ruling in response to the suppression of such evidence may very well have a deterrent effect, depending upon the perceived likelihood of detection. Thus, before we can conclude that the uses of the indicated sanctions have no deterrent effect, we need to do careful case studies of how they are employed and whether, in particular, they are \textit{all} that is used in the context of suppression of the rare "linchpin" evidence.\textsuperscript{16}

Important qualifications also arise from looking at the response of bad-man litigants to anticipated detection. In the first place, Nesson's illustrative calculations are presented as if the well-counseled litigant is not terribly risk averse. To the contrary, a discount for the probability of detection may be substantially offset by a strongly risk-
averse client or attorney. Clients vary too much to generalize safely, but I will hazard the suggestion that attorneys are, by education if not by general inclination, a relatively risk-averse lot. Moreover, there is little attention in Nesson’s piece to the adverse consequences of detected suppression beyond the confines of the instant litigation, consequences such as adverse publicity. He does consider briefly the issue of publicity for the bad-man lawyer’s calculations, concluding that such a lawyer may view his reputation as a suppressor as not damaging, perhaps even advantageous, in the eyes of potential clients.17 But Nesson fails to recognize that the bad-man client will be more interested in similarly inclined lawyers who do not get caught. These factors need rather more attention before one can accurately gauge the extent to which incentives favor suppression, even from the point of view of the Holmesian bad man.

Of course, I am not suggesting that evidence suppression is not a serious problem. Murder is a serious problem, even if systemic incentives do not strongly favor it as a general practice. Surprisingly, given Nesson’s claims, my main reason for thinking that there is a serious problem of suppression is that the law does so much in trying to respond to it. This fact certainly suggests that there are strong incentives favoring suppression in the absence of such responses, but it leaves open the question of the adequacy or optimality of the prevailing response structure. I should add that I suspect, along with Nesson, that the level of severity of juridical response is (still) substantially below the optimal as a general matter, but my suspicion stems more from the gradually accumulating empirical evidence of the prevalence of suppression than from the rather ambiguous consequences of Nesson’s theoretical analysis of the bad man’s thinking.18

I am also less willing than Nesson to place the responsibility for the situation solely upon the judiciary. I find it odd that Nesson, while maintaining that the problem is not with the rules, makes use of the limitations in the rules in illustrating the weakness of juridical response. The most obvious example is his claim that, if the suppressor can avoid detection until after judgment, it will be difficult for the opponent to obtain redress because of the closure limitations, in particular the one-year limitation placed upon reopening the case under Rule 60(b) of the Federal Rules of Civil Procedure.19 Nesson’s claim certainly seems like a problem with the rules. Of course, one could argue that the judiciary has shown less than the usual ingenuity in

17 Id. at 804-05.
18 Nesson notes at least some of what can be called the empirical evidence. Id. at 793.
19 Id. at 798.
circumventing an unwanted limitation, and indeed one can readily imagine plausible lines of argument to the effect that the strictures of Rule 60(b) apply only to relief that would require a new trial, and not to ancillary discovery sanctions, or to the effect that the one-year limitation does not apply to relief based on active suppression of evidence.\(^\text{20}\) But Nesson does not make such a claim, for he supposes, without citing any authority, that the one-year limitation is clearly applicable to the problem of late discovery of suppression and to all requests for relief based thereon other than a separate action in tort. Yet he makes no recommendation about changing the Rule.

Less obvious examples can be derived from his descriptions, which read more as criticisms, of the evolving common law of sanctions, including various requirements that victims show their prejudice and their suppressors' intent to manipulate the system, as well as the judiciary's tendency to confine sanctions to a compensatory function.\(^\text{21}\) Nesson claims that these features reflect a conflation of the compensatory and punitive rationales for sanctioning suppression.\(^\text{22}\) This claim, though not new, is probably correct insofar as it alleges a degree of continuing confusion in the law.\(^\text{23}\) Again, however, it is a little hard to say that this is a problem of judicial motivation and not a problem of doctrine. One would like to know what Professor Nesson has to say about the reform of these practices, whether we call them doctrinal or not, but his paper is silent on the matter other than to suggest implicitly that they are in need of some reworking. Insofar as his point is that we should liberalize the conditions under which punitive sanctions are imposed, as distinct from increasing the severity of those sanctions, I would suggest caution. Imposing special requirements on the use of such sanctions is an important message to be derived from the whole of criminal law, as well as from the developing law of punitive damages in civil cases.\(^\text{24}\)

Other major doctrinal problems are not addressed even implicitly.

\(^\text{20}\) The ambiguities of Rule 60(b) are well known, especially in regard to the applicability of the one-year limitation on reopening cases. See, e.g., F. James & G. Hazard, Civil Procedure 675-81 (3d ed. 1985).

\(^\text{21}\) Nesson, supra note 1, at 798-803.

\(^\text{22}\) Id. at 799.


\(^\text{24}\) Interestingly, one way in which the institution of substantive, punitive awards in civil cases is changing in many jurisdictions is that the requirements for such awards are being tightened to reflect their quasi-criminal character. See, e.g., Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985) (rejecting claim that punitive award constitutes double jeopardy when it follows a criminal conviction arising out of same act; nevertheless requiring clear and convincing evidence of malice as basis for punitive award, and allowing evidence of criminal penalties already imposed to mitigate punitive award).
in Nesson's paper. For example, a severe limitation noted by previous commentators is that discovery sanctions authorized under the important Rule 37(b) of the Federal Rules of Civil Procedure, and state counterparts, are premised on the violation of an order compelling discovery. This presents rather serious problems when evidence is destroyed prior to the entry of such an order.25 Less thoroughly discussed in the literature is the fact that the detailed specification of alternative sanctions in Rule 37(b) is noticeably weak in the category of punitive monetary sanctions.26 Although such sanctions are not precluded by the language of the rule, this statutory silence cannot help but affect judicial attitudes. There has also been an unfortunate history of constitutional limitations on the punitive response to litigation abuse, which no doubt has been in the background of judicial decisions under Rule 37(b).27

For all my reservations, I should say that I find much of value in Nesson's piece. He has reminded us of, if not alerted us to, a serious problem. His synthesis of practices centering on the problem of suppression provides much illumination for those who want to look at the big picture of civil litigation. It provides us with greater detail concerning the causal mechanisms at work in the suppression of evidence. However, the qualifications I have adduced relate importantly to the prescriptive issue of what, if anything, to do about suppression. To summarize, there is reason to think that the problem may not be as acute as Nesson would have it, and that, to the extent it needs attention, the problem is much more attributable to doctrinal difficulties than he apparently believes.

26 The only explicit mention of monetary sanctions is in the concluding paragraph of rule 37(b), which refers to the payment of "reasonable expenses, including attorney's fees, caused by the failure" to obey court-ordered discovery. FED. R. CIV. P. 37(b)(2). This sanction is unmistakably compensatory, though confusion persists. See, e.g., Carlucci v. Piper Aircraft Corp., 775 F.2d 1440, 1453-54 (11th Cir. 1985) (reversal of attorney fine and remand for redetermination and justification of amount).
27 See J. GORELICK, S. MARZEN & L. SOLUM, supra note 25, at 130-34.