Multiplicity

*by Jacob A Stein **

In his book *Six Memos for the Next Millennium*, Italo Calvino, the Italian novelist, describes an aspect of the modern novel he calls Multiplicity. He says the contemporary novel employs a method where "the least thing is seen as the centre of a network of relationships that the writer cannot restrain himself from following, multiplying the detail so that his descriptions and digressions become infinite. Whatever the starting point, the matter in hand spreads out and out, encompassing ever vaster horizons, and if it were permitted to go on further and further in every direction, it would end by embracing the entire universe."

Calvino's words immediately clarified nebulous thoughts I have been carrying around concerning the litigation process.

I became acquainted with the process in the late forties, when I first went to court. In those days the trial lawyers were practical people, a somewhat roguish bunch who had never heard the word "litigator" and who took neither themselves nor their calling too seriously. It was a matter of faith with them to be kind to those met on the way up because you met them all over again on the way down. They worked their cases with a bundle of key facts and a few documents. The court file did not amount to much in the way of paper. There were the pleadings, a deposition or two, and that was it. Litigation did not take very long and it was inexpensive.

There was another group of lawyers who saw the law as a branch of jurisprudence, a demanding intellectual pursuit conferring an opportunity to exercise great powers of analysis. They shied away from trial work, which they considered somewhat vulgar. Trial work required spending time with witnesses who were never at home and never on time for a meeting.

Then in the sixties the big law firms discovered there was real money in trial work if properly understood. This drew into the game those who should have pursued solipsistic philosophy, astronomy or experimental biochemistry. All people untrained to grasp the obvious. Such minds when hooked up to $250 an hour produce trouble. Let me repeat Calvino's words: "Whatever the starting point, the matter in hand spreads out and out, encompassing ever vaster horizons, and if it were permitted to go on further and further in every direction, it would end by embracing the entire universe." There is the trouble.

Lawyers called litigators appeared and found that the rules of discovery encourage the matter in hand to go on further and further in every direction. Each fact discovered, each deposition taken, each expert opinion rendered, requires further exploration. So many facts, so many opinions, so many legal memoranda. So much Lexis, Westlaw, Prodigy and CD-ROM. A concoction inviting one to select, manipulate, and create in accordance with the wishes of the well-funded client. Those with a gift for bringing about the convergence of infinite relationships, past and future, real or possible, gradually took charge of the game.

The principle of Multiplicity is also at work in events such as the Kennedy assassination. Too many lines of inquiry are pursued. Disagreements are created rather than resolved. Too many witnesses who cannot be found are identified. Experts discover ways to disagree on key issues. The information expands so no clear conclusion is possible no matter how obvious the events were at the beginning. The seeker after truth passes it by without suspecting he or she has seen it.

I offer two solutions. First, the law. There is too much of it that has no promise of present likelihood.

Samuel Johnson, known as Dictionary Johnson, liked to talk law with his lawyer friend and biographer, James Boswell. Boswell recorded a conversation in which Johnson made the point that when there were few legal precedents, a lawyer's ability to reason logically was prized, but with the increase in precedents, a lawyer's skill depended less on the ability to reason and more on a talent for finding a controlling precedent. If true when Johnson said it, circa 1776, what is the situation today? We are asphyxiated by legal precedent.

For every decision supporting a legal theory there is a countervailing decision discrediting it. All those five-to-four decisions of the Supreme Court chill the tendency toward warm stability. What can we do about it?

I suggest that a lawyer who wishes to cite a case decided before 1950 must pay a fine of $250. A lawyer who wishes to cite any law review article must pay a fine of $1,000. It would be a felony to cite a case decided before 1935.

Now the facts. The rule of relevance must be changed. As one commentator said, the rule of relevance is the concession of the law to the shortness of life. Things must be brought to a conclusion by excluding evidence. Rule 401 of the US Federal Rules of Evidence says, "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

That is much too low a standard, given the enormous resources of information that surround us. Try this modification: "Relevant evidence means evidence having some real likelihood of making the existence of a fact of consequence to a determination of the action significantly more or significantly less probable than it would be without the evidence, having in mind the backlog." Any thoughts? ❑

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