Discovering Rick Marcus

DIEGO ZAMBRANO[†]

No one knows more about discovery than Rick Marcus. Over the course of his career, Rick has authored the defining scholarship on our American procedural institution, from his early work on reforms to contain discovery costs to his recent insights on proportionality.[1] His articles don't just analyze discovery—they have shaped it, influencing both judicial decisions and the Federal Rules of Civil Procedure themselves through his service on the Advisory Committee. It was discovery that connected Rick and me, joining us in the small fraternity of academics who find this procedural device genuinely interesting.

I discovered Rick Marcus at a civil procedure conference in Arizona in 2017, though "discovered" hardly captures it: he was impossible to miss. Tall and lanky, Rick commanded attention both through volume and intellect. I was on the job market that year, so it was quite intimidating for me to meet a titan of the field. On top of that, Rick had already reached out to me before the conference, having somehow gotten hold of my paper and sending me a detailed email with preliminary comments in his characteristic blunt style.

After my presentation, while others made small talk over coffee, Rick approached me to pepper me with thoughtful critiques that built on his earlier feedback. Here was someone busier than anyone—editing law reviews, serving on rule-making committees, teaching dozens of students—yet he had taken the time to engage seriously with the work of an unknown job candidate. Rick was generous and thoughtful, though not necessarily kind in the way most academics perform kindness. And that was a good thing.

From the get-go, I appreciated Rick's candor. His comments were uncompromising: "This argument doesn't follow," he would write, or "Here you're making assumptions about the history that are unwarranted." When Rick emailed me his written feedback, I almost couldn't read it. The font was some bizarre serif typeface that looked like it belonged in a nineteenth century legal

[†] Professor of Law, Stanford Law School.

1. *See generally* Richard L. Marcus, *"Looking Backward" to 1938*, 162 U. PA. L. REV. 1691 (2014) [hereinafter Marcus, *Looking Backward*]; Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998); Richard L. Marcus, *Putting American Procedural Exceptionalism Into a Globalized Context*, 53 AM. J. COMPAR. L. 709 (2005) [hereinafter Marcus, *Globalized Context*]; Richard L. Marcus, *The Magnetic Pull of American Discovery: Second Thoughts About American Exceptionalism?*, *in* PROCESSO CIVILE E COSTITUZIONE 529 (Augusto Chizzini, David Abraham, Neil Andrews, Caterina Silvestri, Rolf Stürner & Vincenzo Varano. eds., 2023) [hereinafter Marcus, *The Magnetic Pull of American Discovery*].

treatise, probably the result of some antiquated word processor he refused to upgrade. But wrestling with that nearly illegible text was worth it because it contained insights that would reshape how I thought about procedure. Rick cared more about precision than politeness, and that intellectual honesty made his mentorship important in ways that mere encouragement ever could have been.

The more I interacted with Rick over the years, the more I understood the depth of his scholarly universe. He has written dozens of papers on discovery, not just covering the obvious topics, but excavating every corner of this procedural tool. We eventually became casebook co-authors, and to this day, he provides comments on every paper I send him with remarkable speed. Those comments still arrive in the same weird font, suggesting he's stubbornly loyal to some ancient word processor.

Over the years, I've also seen that Rick is a human dynamo. I ran into him by chance at a hotel in Arizona in 2023—he was there for an attorneys' conference while I was visiting for a different conference. Yet within seconds, Rick was updating me on recent cases and procedural developments as if his brain never stopped processing the law. He writes yearly teacher's updates as if they are casual weekend projects, somehow synthesizing hundreds of new decisions. The man is constantly reading cases, talking to litigators and rule-makers, and jetting off to international procedure conferences in Zagreb. He's a do-it-all phenomenon who maintains encyclopedic awareness of the entire procedural universe while somehow finding time to mentor, write treatises, draft rules, and respond to emails with superhuman speed, all through that mysterious ancient word processor.

Beneath the technological quirks lies our shared intellectual obsession: we are both smitten with the uniquely American institution of discovery. Where others see dry procedural rules, we see a fascinating experiment in truth-seeking, a system that grants litigants unprecedented power to peer behind the curtain. We both approach discovery from a comparative perspective, constantly asking why American procedure diverges so dramatically from the rest of the world, and we both treat discovery, not as a side note to litigation, but as a central device that influences everything else. In Rick, I found not just a mentor, but a fellow traveler in the strange world of discovery obsession.

THE MARCUS CANON:

Across four decades, Rick has constructed a wide-ranging scholarly framework for understanding American discovery. His work doesn't try to imagine new foundations for discovery, but instead focuses on how discovery actually works, why it developed as it did, and what we should do about its persistent problems. Among others, four intellectual interests define his canon.

1. The 1938 revolution and its unintended consequences.

Rick is fascinated by discovery's historical origins. In *"Looking Backward" to 1938* and related scholarship, he reveals how the Federal Rules drafters created a monster by accident. As Rick mentions, discovery existed in the 1890s, but it was relatively powerless to what it has become. It truly was the 1938 rules that "brought discovery to the fore."[2] Then, other trends seized on discovery to make litigation a regulatory device: the civil rights movement, the expansion of private enforcement, mass torts, and corporate litigation.[3] Rather than paint with a broad brush, however, Rick insists on historical accuracy over mythology. And he has a keen eye for details, especially the development of key discovery tools: disclosures, depositions, proportionality, and the digital revolution. While in my work I've often seen the system evolve towards a regulatory role, Rick emphasizes that evolution happens mostly by accident, not design. The drafters could not foresee e-discovery nor imagine discovery becoming a regulatory engine that would consume litigation budgets and drive settlement dynamics.

Rick has also been quite interested, as many of us have, with efforts to reign in discovery. The second half of the twentieth century (and beyond) was a story of containment. Rick dissects this in a separate piece, *Discovery Containment Redux*.[4] He discusses the rejection of broad discovery after 1970 and efforts to cabin it, including case management and early disclosure requirements. As Associate Reporter and Reporter to the Advisory Committee on Civil Rules since 1996, Rick began to experience these changes personally, including the crucial 2015 reforms that moved proportionality from an obscure subsection to the front of the discovery rules.[5]

Again, one key feature of Rick's work is to pair both an interest in history with a dislike of teleological narratives that make legal evolution seem planned or inevitable. Once you know the details well, you can tell that discovery reform has been reactive, pragmatic, and often clumsy—not the product of grand design but of attempts to shape litigation or control it.

2. Comparative diagnosis and American exceptionalism.

Rick has long been fascinated with comparative questions (although in his characteristically humble fashion, he called himself a "neophyte to comparativism" in 2005). In works like Putting American Procedural Exceptionalism into a Globalized Context[6] or the more recent The Magnetic Pull

2. Marcus, *Looking Backward*, *supra* note 1, at 1695.

3. *Id.* at 1695–1707.

4. Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 747 (1998).

5. *See* Supreme Court Order Approving Proposed Amendments to the Federal Rules of Civil Procedure, U.S. COURTS (Apr. 29, 2015), https://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf.

6. Marcus, *Globalized Context*, supra note 1, at 709.

of American Discovery: Second Thoughts About American Exceptionalism?,[7] Rick refuses to be either defensive or apologetic about American exceptionalism. He takes a more technical approach, understanding why European lawyers view American discovery with suspicion. Some of it is the broad scope, the party's control over fact-gathering, and the absence of judicial supervision that seem designed to maximize costs. But Rick points out that this isn't necessarily about different legal cultures—even Americans have been conflicted about discovery, especially after the 1970s.[8] Indeed, he points out that American discovery has moved "closer to the European view" and away from the supposed 1938 American beast.[9] Moreover, discovery serves uniquely American functions, and the entire litigation system has come to depend on it. Comparative differences, then, are justified, and there is no need for forced convergence.

One of the great features of Rick's thinking is that he refuses to romanticize, well, anything. If you argue that American discovery's breadth is justified, Rick will point out how most reforms have moved away from the fishing expedition towards a more constrained role, including increased case management and proportionality. Clearly, many lawyers and rule-makers think discovery should be narrower.[10] If you, on the other hand, argue that discovery is too broad and needs to be reined in, Rick will tell you how impossible that is in the face of big data—discovery is more expensive today because there is a lot more data to go through. Or he may tell you that your critiques are not grounded and are based on industry speculation. He will also point out that other countries sometimes want to emulate our discovery, so we are not necessarily doing anything wrong. He will probably make some reference to foreign organizations/initiatives that sound like word salads (ELI/UNIDROIT Model European Rules) and tell you that they have moved somewhat toward American-style discovery.

Which is it, then, Rick? After nearly a decade of knowing him, I think I know why Rick can't take a definitive position. He's simply too careful, grounded, and honest to simplify the issue into more or less discovery. Rick's comparative work is scholarly. He is willing to recognize both costs and benefits where too many scholars are content to take sides. Rick is not a romantic at all.

3. The electronic revolution and institutional adaptation.

Rick's colleagues might be forgiven for thinking he is stuck in his old ways. After all, this is a man who still sends comments in fonts that look like they emerged from a nineteenth century typewriter. Yet, this supposed technological

7. Marcus, *The Magnetic Pull of American Discovery*, supra note 1.

8. *Id.* at 533–34.

9. *Id.* at 541.

10. *See e.g.*, Seth Katsuya Endo, *Discovery Hydraulics*, 52 U.C. DAVIS L. REV. 1317, 1343 (2019) (reviewing proposals to limit discovery costs); FED. R. CIV. P. 26 (amended Dec. 1, 2015).

dinosaur has played a major role in debates over electronic discovery. As Associate Reporter to the Advisory Committee on Civil Rules, he was an important voice in the 2006 e-discovery amendments.[11] Rick has shaped how federal courts handle electronically stored information. His byword has been: caution. No need to overreact or pretend that e-discovery changes everything (although it does change a lot).

Perhaps Rick's personal resistance to technological change actually enhances his institutional perspective on e-discovery. While others get caught up in the latest digital innovations, Rick maintains focus on the underlying legal and procedural challenges that persist regardless of which technology is causing problems this year. His e-discovery views demonstrate his core methodology: he watches how legal institutions actually adapt to technological change, then helps craft rules that reflect practical realities rather than theoretical ideals. The man who can't figure out modern fonts has figured out how to make modern litigation work.

4. Areas of Discussion.

Despite our shared obsession with discovery, Rick and I don't always agree. Our philosophical divide is the most glaring one: Rick doesn't like grand structural explanations. He is skeptical of sweeping explanations that try to make legal evolution seem purposeful, preferring instead the pragmatic solutions that actual rule-makers pursue. I, on the other hand, seek structural explanations for why American procedure developed as it did. Where I see discovery as evolving to take its place in a regulatory ecosystem (not a deliberate one!), Rick sees historical accident and reactive adaptation. Perhaps we both agree that it was not intentionally designed, but we might disagree as to whether legal tools can take on a different role than intended.

A few years ago, I asked Rick for comments on one of my papers about discovery. When I argued that discovery serves as a substitute for trials, Rick pushed back: "I really have difficulty with the idea that discovery is a replacement for trial." When I argued that discovery was *the* central procedure, Rick retorted that our litigation system depends on "much more" than just broad discovery—jury trials, lax pleading standards, punitive damages, and the absence of loser-pays rules all matter equally. He thinks other features of America's litigation package matter just as much, from jury trials to elastic liability standards. Rick also rejects what he calls the "generate information for the public" justification for discovery that I've focused on. In his view, discovery exists to litigate cases, not to inform the public or serve broader regulatory purposes. Rick sees discovery as a practical mechanism for case resolution that works best when properly contained.

11. *See generally* Richard Marcus, *Brave New World: Technology and Tort Practice*, 49 SW. L. REV. 455, 455 (2021) (surveying how technological and other changes are reshaping tort litigation, including discovery).

Another theme in our discussions is how legal scholarship and rule-making practice can best inform each other. Rick's insider perspective—he once parsed thousands of public comments on a single Rule 30(b)(6) amendment—has made him skeptical of theory-centric law review articles divorced from practical constraints. Rick sees discovery rules as hammered out through experience, not law-review clouds. His approach is iterative and incremental: pilot programs, granular experience, and micro-revisions rather than blockbuster overhauls. I also appreciate this perspective, even if I sometimes write about those broader theoretical frameworks. We need both Rick's rigor alongside theoretical frameworks that can guide us toward the right questions to ask.

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