Discovery and Democracy

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Gillian K. Hadfield & Dan Ryan, *Democracy, Courts and the Information Order*, 54 **European J. of Sociology** 67 (2013), available at SSRN.

Discovery has a bad name, and the reason for that is something of a mystery. It certainly isn't careful empirical evidence. Decades of research have consistently demonstrated that discovery is used appropriately and that in the vast majority of cases its costs are proportionate to the stakes in the lawsuit. Most recently, the Federal Judicial Center's 2009 study of thousands of closed cases (chosen to maximize the likelihood of discovery) found that at the median, the reported costs of discovery, including attorney's fees, was just 1.6% of stakes of the case for plaintiffs and only 3.3% for defendants. Discovery's benefits are harder to quantify, but mutual access to relevant information surely leads to case outcomes that more accurately reflect legal norms. Yet the Advisory Committee on the Civil Rules is once again proposing rule amendments that would limit discovery.

The public discovery debate focuses almost entirely on the instrumental value of discovery to litigants. There are, however, other significant reasons for using the power of courts to compel information exchange. Judicial process *as process* is crucial to the legitimacy of the legal system because citizens must perceive it to be trustworthy and fair. Hadfield and Ryan's *Democracy, Courts, and the Information Order* articulates how the discovery process is fundamental to American democracy: civil courts serve as a place where litigants are formally treated as equals in their ability to demand the sharing of relevant information, even from entities with far more political or economic power in society. The experience of participating in the discovery process is thus part of the "phenomenology of democracy"– the lived experience of being treated as an equal among equals. (P. 88-89.)

Hadfield and Ryan begin with vignettes reminding us that those who file lawsuits are not always or only interested in money; a thorough and public assessment of responsibility, including disclosure of underlying facts, is an essential part of the process. They then couple this reality with Ryan's concept of a *social information order*, a system of notification norms that prescribe who is expected to share information with whom. Part of what an information order reflects is hierarchy, because some may be privileged to receive information without giving it, and in some settings the failure to provide expected information can have serious consequences.

While lawyers may not have thought about this bit of sociology, the explanation and examples ring true. Here are some examples of asymmetry: 1) Children must account to parents for their whereabouts and activities, while parents need not share similar information with their children; 2) Employees are obligated to tell those above them in the pecking order what work they have done, to whom they have spoken, and what they have learned, but bosses share information as they wish; 3) Teachers can demand information from students but are not obligated to make reciprocal disclosures.

Equal relationships, on the other hand, come with reciprocal expectations for information sharing. Those expectations are reinforced both with actual disclosures and with meta-messages ("I should have called you sooner.") Close friends share information that is not shared with strangers, and the failure to share is an indicator of lack of closeness or equality. (P. 72-73.)

Interesting, but how does any of this apply to litigation? To embody the expectations of equality before the law, Hadfield and Ryan argue, courts must implement the kind of information norms that are found in equal relationships.

The paper then demonstrates the effects of a system with an asymmetric disclosure regime – the 9/11 Victim Compensation Fund – using interviews conducted by Hadfield. Those who gave up the right to sue and accepted the settlement – which is almost everyone – expressed regret that by doing so they gave up the opportunity to learn more about what happened and to obtain answers from those they felt were responsible. Moreover, the claimants themselves had to provide significant amounts of personal and financial information. While litigation would have posed enormous obstacles, it would have come closer to information equality: "the bereaved New Jersey housewife and the chief security officer for American Airlines [would be] equals." (P. 77.)

What is it about courts, and about discovery, that makes a more democratic space possible? In their roles as "plaintiffs" and "defendants," litigants have broad authority to use discovery devices to compel the disclosure of information in a way that would be impossible outside the courtroom. This authority exists even where, absent litigation, there is enormous inequality of resources and information. In discovery, the "empirically unequal meet as abstract equals." (P. 83.) And while the information revealed does have instrumental value, Hadfield and Ryan argue that it also has enormous political significance.

Calling on the work of various political theorists, the article contends that equal rights and duties to share information in dispute resolution are necessary to our ongoing experience of citizenship. "[W]e suspect that a political community that denied those lacking the good fortune, material resources, or political influence to obtain the kind of information from another that one expects to obtain from an equal – and allowed those with the good fortune, material resources or political influence to withhold the information one is ordinarily expected to share with an equal – would be one in which it would become increasingly untenable for individuals to conceive of themselves as being even formally equal to one another." (P. 91.) Conversely, that equality may explain some of the resistance to discovery on the part of those who otherwise are *not* required to treat others as equals.

The most direct implications of this article are for discovery itself and the rules of discovery. But the authors' arguments are also relevant to any number of current procedural debates: when should complaints be dismissed for failure to plead sufficient "facts" without an opportunity for discovery; when should courts consign disputes to arbitration systems with extremely truncated or one-sided information exchange; and when does our zeal for efficiency and case management get in the way of the equalizing effect of the judicial process? This intriguing article can help procedure reformers remember the world beyond case-specific costs and benefits and focus on the special role of courts and dispute resolution in a democracy.

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