Discovery and Self-Improvement

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Joanna C. Schwartz, *Introspection Through Litigation*, 90 **Notre Dame L. Rev**. 1055 (2015).

Opponents of civil litigation portray it as one massive resource suck, focusing on its transaction costs and ignoring its social benefits–not only fair and accurate resolution of disputes, but also the potential for improved compliance with the laws governing civil society. Thus the current round of discovery rule amendments recite the usual claims about the expense of discovery, despite empirical research showing that discovery costs are actually quite modest in most cases. A number of civil procedure academics question the need for those new limits, even considering only costs.

Discovery's benefits, while harder to measure, come in a number of forms. My last Jotwell essay highlighted the egalitarian information-sharing function of discovery. Steve Burbank's forthcoming article, *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?*, reminds us that lawsuits, including discovery, reflect the deliberate congressional policy choice of enforcing law through private litigation. And now Joanna Schwartz's excellent article, *Introspection Through Litigation*, adds to the "benefits" side of the analysis. While Burbank focuses on benefits external to the litigants themselves, Schwartz calls our attention to a litigant-centered phenomenon: self-study, based on information unearthed and marshaled in the process of being sued.

Schwartz's article locates introspection through litigation at the intersection of two concepts: "organizational introspection" and previously hidden information. The former recognizes that organizations must understand both their strengths and their weaknesses in order to improve their own performance. The latter recognizes that the dispersion of information within organizations means that critical knowledge about weaknesses may elude regulators and even the entity's own executives. Viewed in this way, litigation can act as a kind of unsolicited audit by a highly motivated researcher: the plaintiff's lawyer. As Schwartz explains:

> Complaints may describe allegations of wrongdoing that employees never reported to their supervisors. During discovery, lawyers may unearth details about the plaintiff's allegations that other investigators did not have the time or fortitude to seek out. And in complaints, summary judgment briefs, expert reports, pretrial orders, and trial itself, parties marshal the evidence – meaning they interpret, organize, and present information to support their claims – in ways that may prove illuminating. Each of these aspects of civil litigation can draw attention to previously unknown or underappreciated information and insights that organizations can use to identify and correct weaknesses in personnel, training, management, and policies (p. 1058)

Schwartz acknowledges that litigation-generated information can have flaws, and must be understood in light of the circumstances under which is was generated, but nevertheless argues that it is a powerful source of information that may otherwise fall between the cracks.

The most fascinating part of the article lies in Schwartz's studies of two distinct types of entities – hospitals and police departments – and their very different behavior when it comes to learning from what litigation reveals. Hospitals, it turns out, almost always make some effort to learn systemic lessons

from the lawsuits brought against them. Few police departments do so. In seeking to understand why some entities benefit from introspection while others do not, Schwartz posits three conditions needed for fruitful institutional self-analysis: 1) incentives to learn about errors and weaknesses in order to improve performance; 2) awareness that lawsuits can be a source of valuable information about organizational performance; and 3) infrastructure and personnel to gather and analyze lawsuit-generated information. The presence of the first two conditions gives an incentive to establish the third condition.

Applying these three variables, it is easy to see why hospitals and police departments differ so dramatically. Hospitals feel an immediate out-of-pocket cost from lawsuit judgments, while judgments against police more often are paid from general funds. The two types of institutions also tend to have quite different norms regarding the importance of detecting, understanding, and reducing the types of errors that lead to lawsuits. Influenced by a groundbreaking study published in 1999 titled *To Err is Human*, health care providers have been encouraged to think of systems and policies as both a source of medical risk and a way to increase patient safety. Unlike hospitals, police department are still more likely to see the problems identified by lawsuits as isolated incidents – "bad apples" rather than the results of systems or practices. Hospital risk managers and patient-safety advocates are tasked not only with handling individual cases but also with discerning patterns. Police departments, in contrast, rarely have personnel dedicated to collecting the kind of information that might detect and reduce systemic abuses.

How could we incentivize organizational defendants to act more like hospitals and less like police departments? The most direct tactic would be government regulation requiring the collection and analysis of closed claim (including lawsuit) information. But that would involve significant investment in the administrative state, something politically unlikely to happen in the United States. Perhaps ironically, it may be that private litigation is a motivational key. Substantive law provides a strong incentive for corporations to utilize litigation information introspectively, where it faces liability for *failure* to take steps to discover and deal with systemic risk. This norm is so well established in the hospital setting that it has created a standard of care. Current civil rights law, on the other hand, discourages police departments from identifying or correcting illegal behavior as part of a recurring practice that would subject them to municipal liability under Monell. There is actually a substantive law *disincentive* to an introspective search for patterns of individual misconduct.

Even with encouragement from substantive law, however, if procedural rules limit discovery, the material may not be unearthed or marshaled, even through the independence and energy of opposing counsel. Schwartz and others argue that introspection can improve future compliance and decrease future harm. And this is where the impact of discovery on individual litigants broadens to benefit society more generally, as Margo Schlanger has described.

The loss of that potential benefit takes us back to the pending discovery amendments. Two problems are evident. First, it appears that the Advisory Committee and the Supreme Court give little weight to the social value of discovery, particularly the benefit of introspection. Second, this is most prominent in the so-called "proportionality" element in the new definition of discoverability . In addition to being relevant, the new rule would only allow discovery that is:

> proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Unless “importance of the issues at stake in the action” is interpreted to include the information’s potential impact on the defendant’s future actions, discovery’s ability to promote introspection will be missing from the scale, and even logically relevant information may be left undiscovered.

I hope that Schwartz’s important article prompts judges doing this inevitably normative balancing to include a richer array of benefits.

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