DRAFT JULY 2008 NOT FOR CITATION

Democracy, Courts and the Information Order

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Last modified Friday, July 25, 2008

Introduction: What is the Role of Courts?

On August 3, 2001, 22 year-old Northwestern University football player Rashidi Wheeler died on the field during a practice drill as a result of an exercise-induced asthma attack. His mother, Linda Will, filed a wrongful death suit against the University, alleging that Northwestern was negligent in how it managed the team and responded to the medical emergency when it arose; Northwestern in turn filed third-party claims against the manufacturer of performance supplements provided to the football players, alleging that defects contributed to Wheeler's death. The litigation pursued a contentious and complex four-year path, which included allegations that the team doctor had burned Wheeler's medical files. During mediation in the spring of 2005, Northwestern offered to settle the case for $16 million, but Linda Will refused, insisting that she wanted a public jury trial to investigate her claims of negligence. She said she was unwilling to settle for any amount of money. Declaring that the settlement result would be a "superb result" for this litigation, the Cook County judge in the case, however, ordered the settlement to be executed over Will's objections. Will, she said, had a responsibility as administrator of her son's estate to manage the litigation in the best interest of all the heirs, including her other two minor children and that by refusing a reasonable amount of money, Will was failing to act in their best interests. "There is a point in every lawsuit where compromise and settlement is the best course of action," the judge declared. She accepted the findings of a Guardian Ad Litem appointed to assess the interests of Will's other children that

the amount of money offered would be a "record high" for a case of this type and that Will, "in her own mistaken misconstruction of her interest" was behaving "recklessly"[1]: "money for the Minors is more important than any form of vindication . . . non-financial vindication is a waste and mismanagement of the Estate of the Deceased." (*Will v Northwestern & Next Proteins Inc*).

The Northwestern case is unusual in the boldness of the result—parties ordinarily cannot be ordered outright to settle their cases—but it is commonplace in the sense that it reflects an increasingly widespread view in the judiciary and legal profession that litigation is wasteful and that the goal of litigation is to obtain money, money which can be just as effectively transferred by settlement as by trial. The maxim that "a bad settlement is better than a good trial" appears in the opinions of numerous American courts. In the recent high-profile effort to move lawsuits over the deaths caused in the September 11, 2001 terrorist attacks out of the courts (which we discuss in more detail below), at least one plaintiff who refused to accept payment from the Victim Compensation Fund says she heard the judge presiding over the consolidated case hearing wrongful death and business tort claims say that "he thinks that everyone should have opted for the VCF's money and that no one should be in his courtroom."

How important *is* the courtroom, apart from the role it plays in coaxing money out of those who have or are alleged to have caused harm to others? What in particular is the role of civil or private law courts, activated by a claim filed by and conducted by a private citizen against another private citizen or entity? How do we understand what happens in such a process as part of the institutional environment of a democratic society? Is it really just about the money?

Made particularly salient by the tort reform and alternative dispute resolution (ADR) movements that took shape in the mid-nineteen eighties in the U.S., these questions have engaged only indirect

[1] Similarly, Ken Feinberg characterized reluctance to sign on to the VCF as "irresponsible family behavior" (160)

attention in the literature to date. Law and society scholars writing in the legal needs (Mayhew & Reis 1969, Curran 1977, Baumgartner 1985, Genn 1995), dispute processing (Trubek et al 1983, Miller & Sarat 1980, Mather & Yngvesson 1980) and legal consciousness (Merry 1986; see Silbey 2005 for a review) have studied how people translate the difficulties they encounter in their everyday lives into legal categories and contacts and thus how they decide whether they wish to enter the courtroom, but have not looked at the social function performed by the availability of public courts. Legal scholars who see in tort reform and ADR a threat to the role of civil litigation in a democratic regime (Fiss (1984), Luban (1995), Resnik (2000)) have largely followed the stance of much of the constitutional literature, looking to the role of courts in enforcing the rights guaranteed by a democratic society; much of this concerns public law. Law and economics scholars have also taken a consequential approach, turning their attention primarily to the role of private law in achieving effective deterrence (Calabresi 1972). Legal theorists (Fletcher 1972, Epstein 1973, Perry 1992, Coleman 1992, Epstein 1998) see in private law the mechanism by which just compensation and redress is achieved. The frameworks brought to bear on these questions thus largely focus on the material functions performed by courts in generating compensation, deterring harms and protecting rights.

Moreover, in most of the existing literature, the distinctive procedural features of private law courts in democratic, particularly Anglo-American, societies are suppressed. The courtroom is a black box that transforms a complaint into a judgment. The fact that courts are activated by the filing of a claim by a private individual against another, that the person named as defendant is obligated to answer, produce documents and testify in response to a claim fully fashioned by the plaintiff, that the plaintiff must respond, produce documents and testify in response to any defense raised by the defendant, that third parties with information material to the claim or defense can be required to produce documents or testify, and that the conduct of all this litigation is largely managed by these

private actors, is elided. A handful of tort theorists (Weinrib 1995, Zipursky 2003, Goldberg 2005) have emphasized that the structure and procedure of a private civil action is essential to understanding the role of private law but even here the focus is on the moral relationship between a victim and a wrongdoer, as effectuated through the relationship of plaintiff and defendant. What these authors do not account for is the fact that private law courts effectuate the relationship of plaintiff and defendant at the sole discretion of the plaintiff and require the participation of the defendant regardless of whether the defendant is a wrongdoer or not. Indeed, there is no determination of whether the defendant is a wrongdoer until the conclusion of the process. Thus we are thrown back to the idea that the structure of courts and the relationship between plaintiff and defendant is immaterial except insofar as it leads ultimately to the material relationship between one entitled to compensation or rights protection and one who owes that compensation or right.

In this paper we apply a new, more sociological, framework to understand the meaning and function of civil litigation as a process in a democratic society. We do not mean to analyze the social significance of all of the procedural attributes of the litigation process; we are interested in particular in the democratic function of the striking informational characteristics of litigation, requiring substantial disclosure and engagement between plaintiff, defendant and certain third parties. We do not look to the instrumental function of information transfer—in effecting deterrence, assessing compensation or enforcing underlying rights. Instead we examine the role courts in the maintenance of a social information order (Ryan 2006)—norms and legal rules governing the sharing and withholding of information—that enacts the informational interactions among individuals in a democratic society.

Ryan (2006) introduced the concept of the information order as an important component of the constitution of relationships in everyday life. Intimate relationships, for example, are characterized by, and constituted by, the sharing of information that is kept from (or shared at a later time or in a

different manner with) more distance acquaintances: a pregnancy is disclosed first to one's partner, an embarrassing moment shared only with one's trusted close friends. We know the intimacy of our relationships in part by where we stand in relation to others in the information order: if others learn about your decision to leave your job before I do, I interpret that to mean that our relationship is not as close as I thought it was. We know what it means to be "out of the loop" or "in the know" in relational terms. We modulate the nature of relationships, in part, by the pattern of information shared and withheld.

In this paper we argue that democratic relationships—relationships that manifest the principle that on an abstract political level all citizens are equal—are constituted in part through an information order. We ask, how do the norms and rules governing when one citizen is obligated to account to another, to share information about what they know and what they did, constitute a relationship as 'equal' or 'democratic?' Here we explore the idea that hierarchical relationships are generally characterized by a non-reciprocal obligation for subordinates to disclose information to superiors: employees must account to employers, children must account to parents, but not vice versa. "I don't have to explain myself to you" is understood to mean that I reject an assertion that I stand in a subordinate relationship to you. In the context of democratic citizenship, we argue, the symmetric and abstract obligation to account—to provide information in the context of a legal claim filed in a public court—is an important means by which the principle of equality among citizens is made manifest. Courts provide an arena in which democratic citizens' relationships as civic equals are enacted, in part through its enforcement of the information norms that characterize a relationship of equality.

As we will make clear, the information norms that characterize equal relationships are not ones that require full disclosure of everything to the equal other. Equal relationships vary across a continuum of closeness: close relationships require more information to be shared than more distant

relationships and the symmetry we identify in equal relationships applies only to the obligation to symmetrically disclose what is appropriate to a given relationship. Moreover, the obligation to disclose even to an equal other is limited to information that is relevant to the other. Indeed, as we will argue, what is distinctive about the legal realm and the obligations of disclosure is the resort to an abstract legal rule to determine what is relevant and what is not. Finally, there are various limits that can come into play and override an obligation to disclose even relevant information. Privacy rights limit, to some extent, what can be demanded (although here what is interesting about ordinary civil litigation in the United States is the absence of a privacy objection in the majority of contexts.) Concerns that the disclosure of information may jeopardize security or safety are relevant to a determination of what must be disclosed in litigation. In commercial litigation, there are extensive efforts to protect trade secret information from disclosure except to the extent necessary to assess the plaintiff's claim. The contours of the obligation to disclose are thus highly tailored; what we emphasize is the central role that the notion of symmetric obligations plays and how these are manifest in the informational rules that structure much of what we mean by "courts" in democratic settings.

We present our analysis with a mixture of appeal to systematic empirical evidence, documentary accounts drawn from media accounts of current events, the generic reader's experience of everyday life[2] and theory. In Section 2 we bring together evidence of the idea that in legal settings people care about their entitlement to information and that this in part explains their actions in deciding whether to file a lawsuit, accept a settlement or require particular terms in a settlement. Linda Will, the mother of the Northwestern football player who died during a routine practice session, clearly saw the courtroom as a place where she could seek public disclosure of the information she felt she (and

[2] This "method" is reminiscent of the work of Erving Goffman in, for example, Frame Analysis. It has been called by Zerubavel, Purcell, and Brekhus "exampling."

the community at large) was entitled. Her motivations are also evident in the thinking of many of those who lost a family member in the September 11, 2001 terrorist attacks and who were faced with the choice between accepting a cash payment from the Victims Compensation Fund or pursuing a lawsuit against those they felt negligently contributed to their loss. We summarize here some of the findings from Hadfield (2008) in this regard. Other examples on which we draw include Dan Rather's lawsuit against CBS in response to his dismissal as anchorman of The CBS Evening News, the creation of a civil right of action for victims seeking to participate in the prosecution of members of the former Khmer Rouge regime in Cambodia for crimes against humanity, the terms of the settlement offered to families of those killed in the Virginia Tech massacre of 2007, and [Washington Post]. [Also Relis study of Ontario mediation, Gilbert's Wrongful Death book]. We use these examples to ask what we are to make of the evidence that those who have been harmed profess a deep interest in being able to ask and expect an answer to questions such as "what happened?" "why did it happen?" "who is responsible?" The interest in information has not been overlooked by observers of the legal system, but it is often dismissed as disingenuous, emotional or purely instrumental. We will argue that it may also be driven by the expectation that this is how one who is an equal is entitled to be treated.

In Section 3 we open our theoretical analysis first with a summary of Ryan's (2006) notion of the information order and how this relates to the literature on the sociology of information. We expand the analysis of how information norms and transfers characterize hierarchy and equality in relationships. [more, based on what's actually in there]. Section 4 introduces the concept of the information order in a legal setting and then section 5 presents the claim that courts operate as a democratic space, where the informational norms of an equal relationship are enforced and thus people's relationships as civic equals are enacted.

The Phenomenon: The Lived Experience of Entitlement to Information (in legal settings)

In the context of legal settings, a frequent description by participants of their motivations includes strong expressions along the lines of "I just want to find out what happened." Parallel to this are cultural images of the law that include the idea that things will "come out at trial" and that courts are an arena where "the truth will out." For all the cynicism present in contemporary society, people do seem to hold onto a belief that in certain circumstances individuals should be able to participate in a process that will allow them to obtain information to which they feel entitled.

Examples abound. In a recent relatively high profile case, journalist Dan Rather filed suit against CBS after he was demoted:

> Asked yesterday in his lawyer's office why he was [suing CBS over forcing him to step down as anchor in the wake of criticism of a 60 Minutes report on President Bush's National Guard service], [Dan] Rather said he had been unable to let go of numerous lingering questions about the Guard report and CBS's handling of its fallout. . . "I'd like to know what really happened," he said, his eyes red and watering. "Let's get under oath. Let's get e-mails. Let's get who said what to whom, when and for what purpose." New York Times September 20, 2007.

[Material to be inserted on Cambodian "Extraordinary Chambers": civil action design includes victims right to participate in investigation (asking questions Rule 23) as civil party in criminal case]

Evidence that these sentiments are more than moral window dressing is provided by the fact that settlements sometimes include agreements about information and investigation. A 9 March 2007 NYT article, for example, reported that the family of a murder victim reached a settlement in a lawsuit against the District of Columbia and that "the settlement calls for the district to investigate the response of fire and emergency medical services after the beating and report back in six months. The district must also report to the family of David E. Rosenbaum in nine months on progress by the Metropolitan Police Department in addressing questions raised by its actions, the mayor said" (New York Times, 2007).

The recent settlement following the Virginia Tech shootings included, in addition to cash payments to victims' families, provisions that certain kinds of information would be available in a public archive and that families would meet several times with the governor and state and university authorities and be able to ask questions of them (Washington Post 2008b). Public discussions about the proposed settlement frequently mentioned information:

> Another intriguing promise was made by Mr. Grenier and Mr. Fierberg, who said "previously undisclosed facts and information turned up by our firm's investigation that will enable the public to better understand the events which caused this senseless tragedy." (Nizza 2008)
>
> "After the judge approved the deal, some families said more needs to be done to determine the roles of the state and university in the April 16, 2007, shootings. The families called for further investigation.
>
> "This has nothing to do with money and everything to do with seeking the truth and complete accountability," said Joe Samaha of Centreville, whose daughter Reema was killed" (Washington Post 2008b).

Commentators noted the role that the families' questions had in the process.

> "I think there are really difficult questions about what a jury would find if you took the case to court," said Carl Tobias, a law professor at the University of Richmond.
>
> Tobias said families of the victims are probably conflicted over whether they prefer to have their concerns aired in court.
>
> "I think these people are litigating not about money, and if it is not about the money, then they are not going to settle it," Tobias said. "I think in some ways, the [families] maybe really want their day in court" (Washington Post 2008a).

And just last week the news was of continuing pressure on the university to live up to what victims' families say were there informational obligations in terms of putting information into the settlement archive.

> "Families of those who died in the shootings said they were upset by earlier statements that the university planned to keep documents about the tragedy out of a public archive it promised to set up" (Times Dispatch 2008).
>
> Virginia Tech promised yesterday to make public some, if not all, records of the April 16, 2007, massacre that it previously planned to keep private….

> "It is my understanding that much of the above will be in the settlement archive," Tech spokesman Larry Hincker said in an e-mail yesterday, referring to those records.
>
> Families of the victims feel they've yet to get the full story about what happened that day, despite a state investigation last year.
>
> "There are just too many open questions. They've not been fully open with us," said Michael Pohle of Flemington, N.J., whose son, Michael, was killed. "It is spin city."
>
> The families said Tech's apparent decision -- now partly reversed -- to withhold some documents particularly was upsetting.
>
> "It feels like that is not what we agreed to in the settlement. That was the whole purpose, to get to the truth," said Linda Gwaltney, … (Times Despatch 2008)

And finally, in Hadfield (2008) we see many examples like the following of 9/11 victims' family members who prioritize information:

> *I will do as much as I can to keep her alive," said Low, who represents one of six Sept. 11 victims' families refusing to settle lawsuits against the airlines and security industries and demanding instead a trial - and answers as to what went wrong and how it will be prevented from happening again. She says she doesn't want one cent. She wants something harder to win. ``It's not about the money," the sister said, ``it's about accountability."* (Boston Herald, January 1, 2008)

What is the analytical take-away from these "it's not about the money" quotes? Two common responses effectively dismiss such comments as not representing anything real.

Perhaps the most common response is to characterize these statements as disingenuous or at least unconsciously misleading. It really is about the money, this position would argue, but pecuniary concerns need to be dressed up in more morally appealing finery. Stark individualistic selfishness is universal but we remain collectively uncomfortable with that fact and so we tolerate (or even require) claims of selflessness and doing things for the general good. Alternatively, it really is about the money in the sense that the information can be priced as evidenced the frequency with which, for a given settlement, disputants agree to sealing records or allowing defendants to admit no wrong-doing. Finally, a third version of this is to see the alleged desire for information only in terms of the instrumental value of the end product – to get the information out there—and so, perhaps a

goal that's better served by investigative bodies outside the legal system. In summing up the VCF's "success story" Feinberg noted : And as for their other objective—to use the lawsuits as leverage to force disclosures about our nation's preparedness for the 9/11 attack—I explained to them that they would have greater success pursuing that goal through the 9/11 Commission and the Senate and House Intelligence Committees" (165)

A second common response is to psychologize the desire for information. Those who wish to "have their day in court" are seeking "closure" through the cathartic process of getting to "tell their story." At the conclusion of the VCF process Special Master Kenneth Feinberg could only understand the seven or so families that failed to participate in terms of being "paralyzed by grief, clinically depressed…" (161). The "need to know" (or be able to ask) is portrayed as a pathological state, an unwillingness to accept facts or let things go or master one's morbid curiosity.

In this paper we are arguing for a third alternative. It appears to us that in legal interactions, it is the relationship of entitlement to information per se that matters. Plaintiffs may indeed be highly focused on monetary recovery and the business plan of plaintiffs' lawyers may depend on this, but this is not the entire story. These anecdotes are linked by a phenomenon that is something more than a need to dress up instrumental motives in socially acceptable sentiments. Courts provide, we argue below, an arena in which members of a polity can make demands for disclosure that characterize the informational relationships that people experience as equal.

The Information Order

Notification Norms

Ryan (2006) describes a previously unexamined category of informal social regulation : notification norms are social rules that map social relationships onto obligations and expectations about passing along acquired information. His analysis begins with the simple observation that

people care about whom they acquire information from, and when and how they acquire it, even when these have no instrumental value. One does not want to hear about a spouse's affair on the morning news or learn of the closing of one's place of employment by finding a lock on the door. Apart from any material disadvantage such untoward notifications might impose, they are experienced as a slap in the face and demotion of status. The manner in which we are told information that we care about conveys the state of our relationships (as well, sometimes, as the social savvy of tellers). Notification rules are highly taken-for-granted and so mostly invisible, but we know a violation when we see one. When, for example, Al Gore publicly announced his endorsement of Howard Dean during the 2004 Democratic primary campaign prior to notifying former running mate Joseph Lieberman that he would do so, the notification lapse was in the news longer than the actual endorsement (Purdum 2003). As information flows around us we continuously pick up on ratifications of and challenges to the status orders in which we are embedded. An episode titled "17people," for example, of the American television series "The West Wing" centered on the drama surrounding how the main characters reconciled their professional identities with the order in which they had been told about the president's illness (Sorkin 2001). From personal relationships to organizational politics to affairs of state who tells what to whom and how and when they do so has a relational impact that can be quite independent of the instrumental value of the information involved. The symbolic cost of being the last to know can easily outstrip the practical cost of being out of the loop.

Ryan argues that patterns of tellings, reactions to perceived mis-notification, and a rich array of meta-messages ("I should have called you sooner." "Who else have you told?" "When did you find out?" "For your eyes only.") that accompany notifications are evidence broad system of informational norms. The content of these norms indicate the information obligations and

expectations associated with social relationships from the interpersonal and organizational right up to our experiences as members of a civic polity.

How we notify is both indicative and constitutive of social relationships. Consider the case of the boss who tells the secretary at the last minute and without explanation that she will be out this afternoon and that same secretary who requests, a week in advance, to have a morning off to take a child to the dentist. These informational expectations reflect the superordinate/subordinate relationship between the boss and the secretary at the same time that fulfilling these obligations enacts this relationship and ratifies the notification norms that go with it. The friend who learns second hand about a friend who is getting married learns too that she is not as good a friend as she may have thought. An acquaintance who wants to be more of a friend may offer to share the kind of information that only good friends share as a relational gambit.

From notification to information order

These various dyadic notificational responsibilities are linked together and networks of informationally competent individuals give rise to the Information Order which Ryan defines as the static and dynamic patterns of how information is distributed within a group or community along with the normative and institutional structures that create these patterns. At equilibrium, people know what they should know (based on the network of social relationships they are embedded in), are being told what they need to hear, expect to hear, and have a right to hear. There is, in other words, a harmony between the status order (understood relationally) and the information order.

The dynamics of the information order – how information flows – arise in part because as we find things out, our relational obligations are engaged – we know whom we ought to tell if our sense of the relationships we are in is to be maintained.

Different kinds of social organization are characterized by different sorts of local information orders depending, primarily on the kinds of social relationships of which they are composed. Hierarchical organizations are marked by particular patterns of bottom-up and top-down information flows and relatively clear ideas of the kinds of information obligations subordinates have to superiors, managers have to workers, and colleagues to one another. In families, certain kinds of very personal information flow freely. In a neighborhood norms govern what "good neighbors" owe one another and what is worthy of gossip. In a street scene, only warnings of impending danger might be expected by one pedestrian from another.

In any of these milieus, if we learn that we have been excluded from an information flow that fits the criteria describing things we ought to be told, we are, in effect, put in our place. If others find out about this, they see the place we are put into. We, or these third parties, must them re-assess our assumptions about our relationships.

In general, informationally competent individuals (1) know what kinds of notifications their relationships demand (2) know what relational work they do with various tellings and non-tellings (3) can locate themselves in terms of status on basis of information ecology – the pattern of who knows what, who found out from whom, etc. (4) keep appropriate track of the systems of relevance of others based on relationships (5) keep track of what others know already

The Theory of the Information Order

Our information sharing responsibilities (whom we tell, when and how) and our reciprocal expectations of the same are conditioned by social relationships and by the content of information (Ryan 2006). Different kinds of relationships require different kinds of informational responsibilities and different kinds of information behaviors can indicate and constitute different kinds of relationships.

In the simplest model of the information order "relationship" varies along a single dimension of intimacy. The more intimate the relationship, the more information disclosure is expected. I am expected, for example to tell a spouse "almost everything"[3] and a fellow pedestrian almost (but not) nothing. And what happens when I fail? Neglecting until several hours after getting home to mention to a spouse that one got fired that afternoon may have no material impact on one's employment prospects, but in most cases it will provoke from that spouse a lecture about what a relationship is and may cause her/him to wonder what kind of one they have. A pedestrian who fails to warn another of an oncoming car or falling piano risks condemnation by fellow pavement-pounders as inhuman and failing in the most basic responsibilities one has to a fellow human.

The acquisition of any piece of information, then, should evoke in us an assay of our social relationships (and identities) and direct us as to the acceptable (if we wish to maintain these relationships) disposition of this information. News of an engagement, for example, is conveyed first and immediately to one's mother and only later to coworkers. Out of order tellings come with warnings about who should not be told second-hand before they can be reached by the teller. Late tellings are accompanied by elaborate expressions of "I should have told you before." All of this meta-notification does the work of making the inapt telling less telling about the state of a relationship or the teller's social competence than it otherwise would.

One might read the above as suggesting that the "what" of informational obligations varies only quantitatively: the more intimate the relationship the more extensive the expectations. A moment's reflection reveals that this is captures only a part of the variation. Different relationships with similar levels of intimacy may involve informational expectations that vary more horizontally than

[3] And to do so more or less "right away" and preferably in-person or at least one-to-one. Sitting on even trivial information for too long or conveying information too casually or indirectly is a frequent source of relational strife. These dimensions are not critical for the present inquiry. They are treated at some length in Ryan (2006).

vertically. The lover, in fact does not wish to know all as s/he who talks too much of "things" or who insists on revealing a complete personal history soon finds out. We do not, in general, expect of others that they tell us everything they know, not even everything across the board at a particular level. What we expect is that they tell us things we would care about. And, in fact, this is what a further elaboration of our informational responsibilities in interaction suggests: the competent relationship partner passes on information at the level of appropriate for our relationship and appropriate for the interests of the relationship partner. Thus our interactional responsibilities include keeping track of what things are in that category for each of our relationship partners. To accomplish this requires us, as a part of our interactional responsibility, to maintain a more or less detailed record of what our partners, friends, colleagues, and even strangers are interested in as well as what they already know. It is a relational failure both to neglect to warn the fellow pedestrian about the falling piano as well as to tell him about a life changing event. And those who excitedly convey what is already known will appear to have dropped the relational ball.

We can use a concept borrowed from Alfred Schutz' phenomenological sociology to describe this: competent interaction partners maintain a sense of their partners' *system of relevance*. Friends know what one another are interested in and would want to know about. Colleagues keep track of one another's projects as much to know what information to pass on as to have something to talk about. Keeping abreast of the other's system of relevance (and demonstrating that one has done so by passing along relevant information) is, in fact, a part of how we maintain a relationship and validate one's status as a member in good standing of a relationship of a particular kind. The delivery of irrelevant information (and especially information that "should" be known to be irrelevant) undermines the sense we have of being a member in good standing of a particular kind of relationship.

Hierarchical Relationships

The boss/secretary example above suggests a factor not yet considered. Relationships are not only more or less intimate, they can also be more or less symmetrical or equal and the amount of hierarchy in a relationship can have a profound effect on the information order that characterizes it.

Hierarchical relationships are characterized by distinctive norms related to who must tell what to whom and in particular, by specifically asymmetric or non-reciprocal obligations of disclosure. The nature of access to information within an organization, for example, is often virtually definitive of a person's location in the hierarchy of that organization. To be "cut out of the loop" is a challenge to our status vis-à-vis those in the know. Subordinates, by and large, are obligated to share information with superiors that superiors are not reciprocally obligated to share with them. Children must account to parents for their whereabouts and activities, but parents can, if they choose, remain mum about what they are doing and when. Employees generally are obligated to tell employers what tasks they have worked on, to whom they have spoken and what they have learned, but employers can remain mysterious about their choices about how they spend their work hours, with whom they are meeting and information they have gleaned. A teacher can demand an explanation for a student's absence or inadequate preparation, but the student who asks the same of the teacher is impertinent and not likely to get an answer.[4] "I don't have to explain myself to you" or "it's none of your business" are virtually declarations of "I am not subordinate to you" or "you're not the boss of me." These informational norms are part of how we read the terrain of our status relationships, mapping where we stand in vertical relation to others.

[4] Consider, for example, the connection between hierarchical status and information in this definition of "impertinent:" "Impertinent, from its primary meaning of not pertinent and hence inappropriate or out of place, has come to imply often an unseemly *intrusion into what does not concern one*, or a presumptuous rudeness toward one entitled to deference or respect." Dictionary.com Unabridged, based on the Random House Unabridged Dictionary. (emphasis added.)

Not all information has to be shared, of course, even with superiors. There are bounds of privacy and autonomy even in the parent-child, employee-employer, teacher-student relationship. A parent can demand to know where her sixteen year old son is planning on driving the family car, but not what he is saying to his girlfriend in the front seat; a teacher is entitled to ask for an explanation for a late assignment, but not for how the student spent his Saturday night; an executive's assistant owes an account of why a phone message was not delivered in time, but not about a lunchtime visit to a doctor.

But these bounds of privacy and autonomy are not arbitrary, or reciprocal. The sixteen year old son *can* ask where the parent is taking the car, but the parent is not likely to feel an obligation to answer; the teacher may offer, but the student is not entitled to, an explanation for why graded assignments were not returned on time; the executive need not even acknowledge to the assistant a failure to return a phone call. Patterns of authority and hierarchy are in part identified, maintained and understood precisely through the asymmetric norms associated with the obligation to provide access to information and explanation. We know we are being put in our place when we are told "it's none of your business," "you owe me an explanation" and/or? "I should not be telling you this."

It is important to note that the symmetrical information obligations characteristic of a relationship experienced as "equal" or "symmetric" do not require that identical information be shared in both directions. All manner of reciprocity from "I'll show you mine if you show me yours" to "let's swap secrets" to "colleagues keep an eye out for stuff of interest to the other" involve expectations that different kinds of information that are in a culturally understood (or intra-relationship negotiated and defined) equivalence class are what is expected to be passed on. Thus one level of friend keeps track of one another's avocations even though these may not be shared and so one party remembers to tell a friend who knits of a sale of wool going on at the mall while the

knitter would be sure to pass along news of a shipment of wood having come in at the lumber yard to the friend who is a woodworker. We can imagine either saying "why didn't you tell me?" if s/he were to learn that the other had known of the particular information but not passed it along. By comparison, the knitter's failure to pass along information about a cousin who is going to Antarctica won't ruffle their relationship at all. And, in reverse of this, if the knitter does, it may either provoke a feeling of obligation for some personal information reciprocity or the feeling that a boundary has been overstepped.

Structure, Agency and the Construction of Relationships Experienced as Equal

From the above we arrive at this proposition: a characteristic of relationships experienced as formally equal and power symmetric is mutual obligation to disclose information relevant to the other in the context of a given situation. One experiences a relationship as equal if there is symmetry in the kinds of things that are or are not subject to "I don't have to tell you that" or, the other way round, in the kinds of things the members of the relationship have an obligation/expectation to disclose to one another. Intimate partners can be expected to reveal to one another information about their extra-relational intimacies. Real estate sellers disclose information about a property and buyers about their finances. What sorts of information count as reciprocity in a give relationship? Our sense that something is in the category of things that "friends like us" tell one another can derive from the culture in which the relation is embedded, local organizational rules and practices, and meanings negotiated intra-relationally.

Even if adherence to these rules is not strict (friends or neighbors or colleagues do not hew to a regime of symmetrical attention to relevance and the passing along of all that would be expected), in combination with meta-messages which honor the rules in the breech ("I should have told you this yesterday") or prod us toward compliance ("How long have you known?" they are a tool by which we can construct relationships that are experienced as equal.

Our argument below is that to create a space in which relationships among actors who may be empirically unequal are experienced as ones of equality requires the implementation of the kinds of information norms that characterize equal relationships just described. We are interested in the messages about the nature of social relationships that are sent by the institutional environment, specifically the legal environment, in which someone resides. What recourse to assert the nature of the relationship does a person have when they are stonewalled or when they are told "I don't have to explain myself to you"? Does the message from the legal environment mirror the assertion of privileged access that a superior can make? Or does it counter that assertion with one of its own: the plaintiff is entitled to be told? How do courts modulate the distribution of information that arises outside of the redistributions that courts that accomplish? These redistributions, we claim, also constitute the information order and thus the very nature of the relationship between those who meet in the courthouse.

Experiencing the Information Order in a Legal Setting

We emphasize here that the norms governing when an explanation and access to private information are owed are, first and foremost, social phenomena and not (necessarily) positive legal rights. They are attributes of the relational maps that people use to assess where they stand in relation to one another and, recursively, the informational behavior that is expected in those relationships. Moreover, explanations and accountings perform these relational tasks—establishing and maintaining particular patterns of relationship—quite apart from the consequential effect of information. An explanation or divulging of private information may form the basis for penalties or changes in future conduct; but being denied an explanation cuts off not only the functional value of the information but also its relational value.

The relational value of information and accounting is evident in how some 9/11 survey respondents in Hadfield (2008) articulated their interest in pursuing civil litigation against those they

felt bore some responsibility for the losses they suffered and their ambivalence about signing on to the VCF and waiving their rights to litigation. They did not just want the information to come to light so that changes could be made; they wanted to be able to ask the questions themselves and personally exercise their right to get answers.

> 70-80% of my decision was based on having the parties have to come to the table and [say] "we have to tell you what we did or didn't do." They're [airlines, security services] going to have to go to deposition—I get joy out of that.
>
> All I wanted was the opportunity to make people answer questions under oath.
>
> I wanted a day in court to face the people responsible.
>
> I would give all my money for the truth to get out…All we want is the opportunity to make people answer questions under oath.
>
> I want to hear, "You had information since 1974 that this was a problem." I want them to own that.

We read in these comments more than just a desire to ensure that information is obtained that can be used for consequential purposes, although that is clearly also a goal many held. We read in these comments an interest in the nature of the victim's own interaction and stance vis-a-vis the putative wrongdoers, and an interest in the relationship, one-on-one, between victim and perceived wrongdoer. Explanations—answers to questions—are owed not (just) to the public generally, but to those who suffered harm, personally.

Importance of Public Forum

This is not to say that the explanations that are owed can be entirely private ones. Indeed, the public nature of the explanation given to the private individual also appears important. The answers are sought in the public forum—under oath, before a judge and jury, on the record, in the open. Private answers undoubtedly would provide private solace and further other goals respondents may have had: personal closure, psychological relief, private acknowledgement, even apology. It is the publicness of the explanations that civil litigation can secure, however, that reinforces the political

dimension to this asking and answering. It is in the civic sense that the bereaved New Jersey housewife and the chief security officer for American Airlines are equals; and it is on public terrain dedicated precisely to the obligation of accounting and disclosure to mediate what they owe each other in the exercise of autonomy, a place of formal legal equality, that they meet as political equals. Instinctively some of the victims and family members who sought public adjudication of their claims of responsibility, understood the courtroom as the place where the otherwise substantial differences in status between the powerful and the injured are leveled; where they get to ask the questions and the powerful must answer. This is a place where this otherwise dormant or latent aspect of the relationship between fellow civic actors is made overt, for all to see.

The importance of the litigation process to the way in which citizens interpret their political relational status with others was illuminated by a particular issue brought up a number of times in interviews with 9/11 families. Respondents who participated in the VCF process noted the asymmetry in information obligations imposed on them and those imposed on political officials and public figures. People who entered claims with the VCF were required to produce extensive detailed documentation to support their claims, documentation that many found terribly painful to assemble. But, many noted, final payment amounts were not accompanied with any explanation from VCF officials for how contested issues were resolved or how numbers were computed; the detailed presentations were met with what seemed to be undifferentiated numbers that were inexplicable in light of the individualized detail they felt encouraged, even required, to disclose.

> What came after [the hearing] was abominable. After years of pulling paper together, economic scenarios….when I received the award I was shocked. It was well below even the published numbers…I was told [by my attorney], yes there was a mistake, but the Fund is closed, there's nothing we can do about it. .. .The Fund wouldn't talk to me. . .. We were dealt with absolutely horribly. . .we didn't get reasonable answers.
>
> [After spending months assembling information about the injury, my health insurance coverage, my economic circumstances and need,] when the amount came,

> I asked "What does this represent?" "Where is the pain and suffering?" No one could tell me. I'm entitled to know how they calculated that. When I called the attorney to ask, they told me no, the process is over. . . [The lack of explanation] was very odd. … My attorney said, there is no rhyme or reason to how they came up with this number."
>
> The amount of footwork, paperwork, proof—how [brother-in-law] spent his time, down to how many minutes he was in the shower. When she [sister] had no time to take a shower herself. . . [She] had to give line by line [accounts], but the government didn't, just "here's your number." There was no way to tell if there was a mistake, no door to knock on, the door was closed, done. They had to prove nothing.
>
> We were led to believe the process would respond to information. . . I got the information two weeks ago [responding to her appeal of the initial payment.] There was no letter or anything. . . We were led to believe by everyone that the effort would mean something. . . [The process] was a betrayal of civil rights.

Special Master Kenneth Feinberg argued specifically that these citizens' expectations of what courts might provide were misplaced:

> [on those who chose to sue rather than apply to the fund] "As a lawyer, I consider their chance of winning their lawsuits quite slim. And as for their other objective—to use the lawsuits as leverage to force disclosures about our nation's preparedness for the 9/11 attack—I explained to them that they would have greater success pursuing that goal through the 9/11 Commission and the Senate and House Intelligence Committees" (165)

But these investigations furthered their sense of a being a party to a fundamentally unequal relationship. Other respondents noted that the witnesses before the 9/11 Commission were not required to testify under oath, and many not in public, while they were required to swear an oath before 'testifying' in the hearings the VCF Commission conducted in determining their claims.

> At my hearing I had to swear that what I was saying was true. The swearing in was intimidating, bizarre. At the 9/11 Commission, no one was sworn in.

The VCF process thus put the victims and families of those killed—in their minds by the failure of fellow citizens to 'do their jobs'—in the position of subordinate: the one required to account, the one required to submit to public oath. But they had no reciprocal authority, as they would have as plaintiffs, to seek their own accounts—even an accounting of how their accounts were understood and processed. They had no reciprocal authority, even through their political representatives, to

demand that testimony be given under oath. Many responded to this as a challenge to their political status as equals: I must explain but they need not; I must swear to disclose to them the truth but they need not.

Courts as a Democratic Space

The concept of the information order, and in particular the symmetric nature of the information norms that enact equal relationships, gives us a new way of thinking about what happens during a civil action and provides a new articulation of the role of civil courts in a democratic regime. This provides a new perspective on why the process, and not only the outcome, matters in legal encounters. Our analysis is thus akin to Tom Tyler's work on procedural justice. Tyler (1990), Tyler & Lind (1992), Tyler & Huo (2002), Tyler (2005) present evidence that people's willingness to cooperate with police, to obey the law and to trust legal institutions is influenced by their perception of the fairness of the procedures used to reach legal judgments. Fairness concerns encompass the capacity to speak and be heard, the neutrality of decision-makers, the capacity to participate and the right to be treated with dignity and respect. Tyler & Lind (1992) call these "relational criteria" because they provide individuals with information about the nature of their relationship with authorities. Like Tyler and his co-authors we focus on the relational work done by the procedures that define legal process, but unlike them we are interested in the relationship between private citizens rather than the relationship between citizen and state. Moreover, we are interested not in fine-grained attention to how well a court system is operated—whether judges treat people with respect or the extent to which people are given a meaningful opportunity to present their case—but rather in the characteristics of a process that make it recognizable as a civil court in a democratic regime.

A civil action is a case between citizens, which can include entities or even governmental agencies acting in their capacity as citizens for purposes, for example, of tort law or employment

regulation. We are thus excluding actions between the state and a citizen that are grounded in the particular functions and obligations of the state such a criminal or constitutional case. In fact, in Anglo-American legal regimes, the most familiar courts are of general jurisdiction, which means that they hear civil, criminal and constitutional cases. We call the court a civil court when it acts in its capacity to hear a civil case between private citizens and we will focus on Anglo-American courts.[5]

The defining feature of a civil court is that it is activated only by the action of a private citizen, the plaintiff. The plaintiff chooses if and when to file an action and the court has no jurisdiction over any civil claim unless and until a plaintiff chooses to initiate one. The plaintiff defines the scope of the work the court must do through the drafting of the complaint, which must identify a particular defendant, allege a set of facts and provide the legal rule under which, if the facts are proven true, the defendant has violated an obligation to the plaintiff, caused the plaintiff harm and the plaintiff is entitled to a remedy the court can provide such as damages or an injunction. The plaintiff can drop the action, depriving the court of further jurisdiction and power to act, at any time. But the court cannot decline to hear a case that is properly plead; it is obligated to follow through to conduct the fact-finding process and reach a judgment on the claim raised by the plaintiff.

It is the responsibility of the plaintiff, and not the court, to inform the defendant of the case filed against it and to provide sufficient detail that the defendant is put on notice as to claim the plaintiff has made. Once service and notice is effective, however, the defendant is obligated to participate in the judicial procedures triggered by the complaint. Without any court order, the defendant is obligated to 'answer' the complaint, to concede or deny the claims made by the

[5] Court systems in (what are confusingly called) civil law regimes such as France and Germany have many of the features we describe for Anglo-American courts. The greater role for judges in conducting the process of a case (sometimes called the inquisitorial process, a bit of a misnomer) and the far less extensive pre-trial discovery processes, together with sometimes more restrictive evidentiary rules that prohibit self-serving testimony by a party, make the civil law system, clearly democratic, an appropriate focus for separate study in our framework. For a discussion of some of the key institutional differences see Hadfield (2008).

plaintiff. Failure to do so authorizes the court to enter a default judgment in favor of the plaintiff and to award the remedy sought by the plaintiff. The court can in its discretion require a hearing at which the plaintiff presents evidence of the facts alleged in the complaint and supportive of the remedy (e.g., amount of damages) sought. The court will assess whether the evidence is sufficient and capable of being true but will not assess the likelihood it is true or engage in any fact-finding of its own, that is, it will not do the work of the absent defendant.

The defendant is entitled to frame its defense as it chooses and to make any counter-claims against the plaintiff it chooses. Like the plaintiff, the defendant is required to articulate the legal rule and set out the facts that support its entitlement to the benefit of the rule as a defense. Once the complaint and the answer have been put in place (and they can be modified during the course of litigation with the permission of the court) the scope of the litigation is established. At that point, the plaintiff, the defendant and potentially third parties with material evidence come under obligations to disclose what they know. Both parties can require the other or material witnesses to appear and testify under oath, to produce documents and to allow a party to inspect their premises. Under the Federal Rules of Civil Procedure (FRCP 45) for example, the clerk of the court is required to issue a blank subpoena, signed by the court, to a party that requests one. The party fills in the subpoena with the name of the person or entity from whom information is sought and specifying the information demanded and serves it on the named person. Failure to comply with such a subpoena is grounds for being held in contempt of court. A party on whom a subpoena is served has the right to contest the subpoena on the grounds it is overly burdensome, for example, but "every citizen owes to his society the duty of giving testimony to aid in the enforcement of the law." (*Piemonte v U. S. 1961*).

In modern American practice, the obligation of a party to produce information goes even further than the obligation to respond to a demand for testimony or documents at trial. As part of

pre-trial preparation, parties can seek information from the other in discovery, requiring other parties or third parties to give evidence at a deposition in a private office with no judge in attendance, and with the scope of questions asked broadly drawn well beyond what would be admissible evidence and thus potentially compelled testimony during a trial. (The standard in federal practice, for example, is that information may be sought in discovery if it might lead to the discovery of relevant admissible evidence.) The standard for seeking documents in discovery is similarly broad. Moreover, in U.S. federal courts since reforms in the civil procedure rules in 1993, parties are under an affirmative obligation to disclose to each other substantial amounts of discoverable information without waiting for a formal discovery request.

The power that parties wield when they become Plaintiff and Defendant in civil court, then, is thus a rather extraordinary capacity to call on the power of the state to coerce the disclosure of information from each other and certain other citizens. They do this entirely at the initial behest of the plaintiff and with a scope that can then be expanded by the defendant to accommodate the right to present a defense. Outside of the courtroom and the relationship of plaintiff and defendant—and this is critical to our goal of illuminating what is at stake in the assessing the democratic impact of using non-litigation methods to achieve the goals of compensation for example—there is no such power. Outside of the courtroom, one who has a grievance against another has only the tools that fall to his or her individual status to obtain information. A powerful person may be able to threaten another to obtain information. One with the ear of the media may induce disclosures in response to a journalist's investigation. Any citizen can petition his or her representative and ask that an investigation be conducted. Letters can be written, phone calls made and emails sent requesting information. But there is no authority to compel a response outside of the courtroom. This, we think, is a critical attribute of the civil process in democratic regimes.

The capacity to compel disclosures clearly has instrumental value and we do not want to minimize that value. This, indeed, is the focus one generally finds in the literature on the democratic importance of a free press, the right to petition government and the right of free speech. Information is essential to the enforcement of the obligations of government and fellow citizens. Our claim is that there is another essential value in the informational obligations created by the relationship between plaintiff and defendant, a non-instrumental value, found in the creation of an arena in which any citizen can demand to meet another citizen under a set of information norms that characterize a relationship among equals. Given the importance of information norms to the general ecology of relationships—to our ability to map where we stand in relation to others—the arena provided by the court thus can play an important role in the constitution and maintenance of the experience of equality in a democratic society.

We have argued that the information norms that characterize a relationship of equality are symmetric, in that the parties to the relation are symmetrically obligated to disclose information of a particular type to the other subject only to the limit that there is no obligation to disclose information that is not made salient by the other's system of relevance.

[In the remainder of this section we defend the following claims:

- *Democratic society is composed of equal relationships among abstract persons*
- *The obligations of persons is governed by law and law is addressed to abstract persons*
- *Courts are an arena in which the empirically unequal meet as abstract equals*
- *All parties have to participate as abstract 'plaintiff' and 'defendant' with obligations defined by their abstract position and not their personal characteristics (there is not a tort obligation for the rich and a different one for the poor)*
- *In court, in their abstract relation as plaintiff and defendant, the obligations to disclose are symmetric: each is obligated to disclose to the other information that is made relevant (system of relevance) by the legal rules put in play by the plaintiff's complaint and the defendant's defense; these rules define the system of relevance for these abstract persons. This may not mean disclosing the same information: the plaintiff's earnings may be relevant, for example, because she is claiming lost wages as damages*

while the defendants earnings are not. But this is the only basis on which the defendant can avoid be required to produce the same information, that it is not relevant to the other.

- *Through the enforcement of these symmetric information norms, the court provides a space in which the relationship of political equality among abstract equals is enacted. If this arena is not available, where do citizens, who are generally empirically unequal, experience their political equality. [voting booth, etc.]*

Information Norms and Institutional Design

[In this section we approach the problem inductively, effectively engaging in a thought experiment: if one wished to create a new community, institution, or organization that was characterized by equality among members, what sort of informational norms would be compatible? How much asymmetry in information obligations would be tolerated before it felt like we had missed our goal of creating an entity in which membership would be experienced as equal? By iterating over several types of organized entity (ranging, perhaps, from couple to family to neighborhood to company to social movement to community) we arrive at a formulation of what information practices/norms would be compatible with goal of creating an "egalitarian" organization.]

Constraints on Equal Information Obligations

[In this section we offer several caveats and describe limitations of the present argument. We make the following points:

- This is this not an argument for universal informational symmetry or open-ness as a pre-condition for democracy
- Equal relationships do not require complete disclosure
- Even the informational equality that we describe as a feature of courts is expressly limited by certain considerations such as privacy, trade secrets, and security.]

It is important to note here that we are not pointing to an unfettered constitutional requirement for openness as a pre-condition for democracy. The enactable formal equality that courts can provide is not constrained only by the way that the legal rule at issue defines who and what is informationally relevant.

First of all, as described above, the type of relationship between actors overlays their respective systems of relevance to define some things as subject to the information obligations between them

and others out of play. Thus, anonymous pedestrians may be obligated to warn one another of falling pianos but not to say where they've been or where they are going; spouses may mutually expect to be told about their work days but not about their day dreams.

In equal relationships, as argued above, categorical symmetry is the rule. Those who expect to be told about another's children, can expect to be expected to tell about their own. A colleague who can ask you how long you'll be out at lunch, should expect to tell you the same information, absent a sense of hierarchy between you.

In the legal arena, as we have suggested, parties meet as equals and the legal rules Legal rules set boundaries around what information is relevant in a given case. Other rules, however, also come into play and interact with the symmetrical obligations at work. Thus, for example, it may be relevant to my claim to find out about the security measures taken at the WTC in the 1980s. At first, the democratic equality of the courtroom suggests that the state have an obligation to disclose, but considerations of national security may supersede these obligations and rule some information out of play. Similarly, the case at hand may make my income relevant to your claims and yours to mine, but we might decide that privacy considerations overrule the demands for equal disclosure. Finally, legal rules may make the formula for your soft drink relevant to my claim but you may be able to shield it from disclosure as a trade secret.

Conclusions

We have argued that access to courts and participation in civil litigation plays a role in constructing and maintaining political equality by mediating the information order within which individuals interpret and manage their relationships. In relationships that are experienced as equal there are reciprocal information obligations and expectations. Actors recognize where they stand vis a vis others partly on the basis of what one is expected to account for, explain, or pass along. By

becoming a plaintiff, a person who perceives themselves as having been harmed by the conduct of another assumes and makes manifest their status as one entitled to an explanation of this conduct. It is in thinking about what it means to be denied that status that we see most clearly how this supports the experiential aspects of political equality. For in being denied an explanation or the capacity to ask for one, the would-be plaintiff is forced to enact a relationship of subjugation vis-à-vis the perceived wrongdoer.

This role for courts in mediating the information order that supports politically equal relationships casts important new light on the increasingly widespread anti-litigation efforts of the tort reform and ADR movements. While we do not intend to understate the important consequential effects of litigation in achieving compensation, securing rights and deterring harmful behavior, nor even the instrumental value of the information produced through litigation for achieving effective compensation, deterrence and rights enforcement, without a relational account of the importance of what happens *during* litigation—not merely what results from it—it is difficult to fully grasp what may be lost in substituting non-litigation methods for achieving these material ends. It is difficult without a relational account, for example, to grasp what is at risk with efforts such as the 9/11 Victim Compensation Fund to channel would-be litigants out of the courts and into administrative and compensatory systems that lack the information redistribution attributes of the court system. And the claim that the "information function" can be fulfilled by investigations and panels may, in fact, be mis-specifying that function.

Our emphasis here has been on the relationship between the power that litigation confers on plaintiffs to obtain information from named defendants and the construction and maintenance of political equality. We believe, however, that the information order, particularly as it is mediated by law and judicial institutions, plays a more widespread and largely overlooked role in supporting democracy. Substantive rules governing privacy protection against intrusions by the state, for

example, or freedom of information laws that mandate disclosures by the state, also modulate the information order and hence play a role in structuring the lived experience of democracy. We anticipate turning to these other areas in future work.

[Still missing from the conclusion are further thoughts on

- Implications for tort reform discussion paragraph
- Balancing information considerations with acknowledged problems of litigation (cost, time, access)]
- A consideration of the macro implications of sanctioned silence that emerges from settlements that avoid disclosure or seal the results thereof.
- Implications for institutional design and the outputs of democracy
- Further suggestions for task of a phenomenology of equality/democracy beyond the hand-waving we do here with the concept of "relationships experienced as equal"]

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