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## *Democracy, Courts and the Information Order*

### **Abstract**

Conventional wisdom about civil litigation, both among scholars and political actors, holds that abuse of the legal process is common, that there is too much litigation, that it is “all about the money”, and that “a bad settlement is better than a good trial”. This constellation of attitudes that emphasize the economic function of law suggests that courts are an expensive conflict resolution mechanism of last resort and that their use would be minimized in a healthy market-based democracy. In this paper we apply a new sociological framework to understand the meaning and function of civil litigation in a democratic society. We focus in particular on the democratic function of the informational characteristics of litigation that require substantial disclosure and engagement between plaintiff, defendant and third parties. Instead we examine the role courts play in the maintenance and attainment of a social information order – norms and legal rules governing the sharing and withholding of information that depend on and constitute particular status relationships between actors (Ryan 2006). Using interviews and surveys of family members of victims of 9/11 we develop a theory of the lived experience of entitlement to information in Anglo-American legal settings with suggestions of how these ideas might translate to civil law systems.

*Keywords:* Democracy; Information order; Equality; Civil litigation; Alternative dispute resolution; Legal consciousness.

### *What is the role of Courts?*

ON AUGUST 3, 2001, 22 YEAR-OLD Northwestern University football player Rashidi Wheeler died on the field during practice after an exercise-induced asthma attack. His mother, Linda Will, filed a wrongful death suit against Northwestern, alleging that the University was negligent in its management of the team and its response to the medical emergency; 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 followed a contentious and complex

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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. The Cook County judge, however, declaring that the settlement would be a "superb result," ordered the settlement to be executed over Will's objections. "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": "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".<sup>1</sup>

Is the function of civil litigation in modern democratic societies simply to transfer money between those who suffer harm and those responsible for causing harm? Is "non-financial vindication" a "waste"? The Northwestern case is unusual in the starkness 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 in the legal profession that litigation is wasteful, that the goal of litigation is to obtain money, and that money can be as effectively transferred by settlement as by trial (Hadfield 2005, 2008a; Relis 2007). And yet it is also commonplace to hear those engaged in disputes, particularly disputes of high personal significance, say that they do not want (only) compensation; they also want to know what happened and, especially, to make those they feel to be responsible for their harms show up and answer questions. Examples like the Northwestern case abound and cut across countries, classes and cultures:

- In Brazil, victims of torture seek the right to sue their torturers from the previous regime in civil court, even though amnesty ensures they will never collect compensation (Püschel 2012).
- A settlement agreement reached in the wake of a mass shooting at an American University (Virginia Tech) includes, in addition to cash payments to victims' families, provisions that certain kinds of information will be available in a public archive and that

<sup>1</sup> *Will v Northwestern & Next Proteins Inc.* (Nos. 05-L-1563, 01-L-10149, Cook County Circuit Court, August 15, 2005).

- families will meet several times with, and be able to ask questions of, the governor and state and university officials (Kumar 2008).
- Cambodian victims of the Khmer Rouge regime seek rights to participate as civil parties in criminal proceedings against former officials; the court decision grants these rights over the objection of defendants who say that the only purpose of a civil action is to obtain damages and cites, among other international standards, the transitional criminal code for Kosovo which grants victims of criminal acts “the right to propose evidence [and] to put questions to the defendant, witnesses and expert witnesses”.<sup>2</sup>
  - A settlement, in a lawsuit over emergency medical service delays and the death of a mugging victim calls for Washington DC “to investigate [...] and report back in six months [...] on progress by the Metropolitan Police Department in addressing questions” (*New York Times*, 2007).
  - A class-action settlement with an Italian insurance company in a dispute over life insurance policies held by Holocaust victims is criticized because the insurer “avoided opening up their archives and historical records to reveal what happened, how and why” (Treater, 2007).
  - In one of several 2011 cases alleging that a leading art broker in Paris was in possession of numerous works of art that had been looted from Jewish families by the Nazis, a litigant who had been searching for years for works stolen from a great-great aunt says the motivation for his lawsuit was basic: “People are lying, and we want to find the truth” (Carvajal and Vogel, 2011).
  - A prominent American journalist, explains his lawsuit against the television network that demoted him after a scandal involving the reporting of falsified documents criticizing the sitting President, saying: “I’d like to know what really happened, [...] Let’s get under oath. Let’s get e-mails. Let’s get who said what to whom” (Steinberg, 2007).

Although these newsworthy examples involve high-profile individuals or events, the sentiments attend the mundane as well. Relis (2007), in a study of sixty-four Canadian medical malpractice cases of varying severity, found that “obtaining answers/explanations” was the second-most frequently cited reason for filing a legal claim.

<sup>2</sup> Decision on Civil Party Participation in Provisional Detention Appeals, Extraordinary Chambers in the Courts of Cambodia (Pre-Trial Chambers), March 24, 2008

(available at [http://www.eccc.gov.kh/english/cabinet/courtDoc/53/PTC\\_decision\\_civil\\_party\\_nuon\\_chea\\_C11\\_53\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/53/PTC_decision_civil_party_nuon_chea_C11_53_EN.pdf)).

How important *is* the courtroom, apart from the role it plays in coaxing money out of those who are alleged to have caused harm to others? What, in particular, is the role of civil or private law courts, activated by a private citizen's claim 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?

These questions have engaged only indirect attention in the literature to date. Law and society scholars writing in the legal needs (Mayhew and Reiss 1969, Curran 1977, Baumgartner 1985, Genn 1995), dispute processing (Trubek *et al.* 1983, Miller and Sarat 1980, Mather and Yngvesson 1980) and legal consciousness (Merry 1986; see Silbey 2005 for a review) traditions have studied how people translate the difficulties they encounter in their everyday lives into legal categories and how they decide whether to enter the courtroom, but have not looked at the social or political functions performed by the availability of public courts. Legal scholars who see in tort reform and the rise of alternative dispute resolution systems such as mediation and private arbitration 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 and focuses not on the process *per se* but rather on the concrete consequences of litigation.

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 examine the role courts play in the maintenance of a social information order (Ryan 2006) – patterns of who knows what and who is obligated to disclose or permitted to withhold what from whom and the norms and legal rules governing the sharing and withholding of information – that is characteristic of the informational interactions between individuals who perceive themselves to be equals. Our focus is thus on the striking informational characteristics of litigation that require substantial disclosure and engagement between plaintiff, defendant and certain third parties.

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 abstract 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 equal relationships.

A handful of American tort theorists (Zipursky 1998, 2003; Goldberg 2005; Solomon 2011) have also emphasized that the structure and procedure of a private civil action is essential to understanding the role of private law (and especially tort law). Solomon (2011) has specifically related the civil recourse aspects of tort law to concepts of democratic equality.<sup>3</sup> The focus of the civil recourse literature, however, is on the moral relationship between victim and wrongdoer, as effectuated through the relationship of plaintiff and defendant. While recognizing the significance of process independent of remedy, this literature still does not account for 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 section 2 we open our theoretical analysis 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. Section 3 introduces the concept of the information order in a legal setting, using Hadfield's (2005, 2008a) study of how the families of victims of the September 11, 2001 attacks, who were forced to choose between receiving compensation from the government and filing a civil lawsuit against those they felt responsible, perceived the function of civil litigation. Section 4 presents the claim, focusing on the Anglo-American setting, that courts operate as a democratic space, where the informational norms of an equal relationship are enforced, and people's relationships as civic equals are enacted. Section 5 then considers how our analysis might apply outside of the Anglo-American legal context, specifically in civil law regimes where judges play a more active role in the evidentiary process, duties to provide information to the court are more circumscribed, and courts do not routinely publish publicly available judgments that detail their findings. Section 6 concludes by exploring links between our analysis and phenomenological and relational accounts of democracy.

<sup>3</sup> SOLOMON (2011) builds in part on an early version of our thesis in this paper, about the democratic function of access to courts, presented in HADFIELD (2005).

*The information order*

Ryan (2006) describes a previously unexamined category of informal social regulation: notification norms. These norms are social rules that map social relationships onto obligations and expectations about sharing acquired information. His analysis begins with the simple observation that people care about from whom they acquire information, and when and how they acquire it, even when these transmission attributes 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 and sequence of information acquisition conveys much about the state of our relationships.

Notification rules are taken-for-granted and so mostly invisible, but we know a violation when we see one. As information flows around us we continuously pick up on ratifications of, and challenges to, the status orders in which we are embedded. Who tells what to whom and how and when they do so has a relational impact that is often independent of the instrumental value of the information. The symbolic cost of being the last to know can outstrip the practical cost of being out of the loop.

Ryan argues that patterns of tellings, reactions to perceived misnotification, 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 evidence a broad system of informational norms. The content of these norms link information obligations and expectations with social relationships ranging from the personal and organizational to, as we shall argue, our experiences of co-membership in a civic polity.

How we notify is both indicative and constitutive of social relationships. 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 involve different kinds of informational responsibilities and different kinds of information behaviors can indicate and constitute different kinds of relationships. Close friends share information that is not shared with strangers or more casual acquaintances; intimate partners share even more. The friend who learns second hand about a friend who is getting married learns too that she is not as close

a friend as she may have thought. The spouse who learns last that her partner has quit his job is likely to worry about the stability of her marriage. 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. And upon receipt of information that ups the relational ante, one may feel compelled to respond in kind if one is to mirror the same understanding of the status of the relationship. If your dinner partner on a first date shares a story of a childhood embarrassment, you are likely to quickly make some decisions about whether you want to follow him or her down this more intimate path by reciprocating with your own experiences of childhood woes. Ryan (2006) developed the concept of the information order primarily in the context of the horizontal dimension of relationships. But 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 governing 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 organizational hierarchy. To be "cut out of the loop" is a challenge to one's status vis-à-vis those in the know. To be excluded from, or included in, an information flow is to be, in effect, put in our place. 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 where they are going and what they are doing. 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 how they spend their work hours, with whom they are meeting and what 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. "I don't have to explain myself to you" or "it's none of your business" are partly declarations of "I am not subordinate to you" or "you're not the boss of me."

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 her Saturday night; an executive's assistant owes an account of why a phone message was not delivered in time, but not about the details of a lunchtime visit to a doctor. But even subject to these constraints, 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.

Conversely, relationships of equality are constituted and maintained by the absence of asymmetry in information sharing norms. A husband in an egalitarian marriage who expects to be told about his wife's infidelities feels an obligation likewise to disclose; and if the obligation is not honored it will be difficult for either to think of the relationship as truly egalitarian. An employer who seeks to establish non-hierarchical workplace relationships is likely to promote expectations reflecting equal access to information by encouraging norms that allow anyone to sit in on a meeting or by adopting an open office plan that does away with individual offices, even for the boss. Parents seeking to reduce the level of hierarchy in their relationships with their children may accord their children greater discretion over what to tell and what to keep private, closer to the privacy they themselves expect to enjoy.

Reciprocal obligations to disclose in a relationship of equals do not, in general, require the sharing of identical data; rather, notification norms mandate the sharing of "equally relevant" information and members of a relationship are expected to track one another's systems of relevance in this regard. If colleague A has an interest in agent modeling and colleague B has an interest in critical race studies, B would expect A to mention an upcoming lecture by a race theorist but not one by a scholar of mathematical models and vice versa *mutatis mutandis*. "I thought you'd want to know" captures the affirmative responsibility to pay heed to relevance while "I can't believe you didn't think I'd want to know that" captures the inverse.

From the above we arrive at this proposition: a characteristic of relationships experienced as 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. What sorts of information count as reciprocity



in a given 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. Adherence to these rules is not strict (friends or neighbors or colleagues do not hew to a rigid regime of symmetrical sharing) but, in combination with meta-messages that honor the rules in the breach (“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 formal equality requires the implementation of the kinds of information norms that characterize equal relationships. 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 prevails outside their confines? The redistributions that courts can accomplish, we claim, also constitute an information order and thus enact the very nature of the relationship between those who meet in the courthouse.

*Experiencing the information order in a legal setting:  
lessons from September 11, 2001*

The relational value of information and accounting is evident in how survey respondents in Hadfield (2005, 2008a) articulated their interest in pursuing civil litigation. Hadfield surveyed people who lost a family member in the attacks of September 11, 2001 and were, as a consequence, entitled to apply for compensation from the federally-funded Victim Compensation Fund. Accepting compensation required a waiver of any rights to file a civil lawsuit against private individuals and entities the claimants thought might be responsible for the death of their family member: the airlines and airports responsible for security screening and on-board safety; the owners of the World Trade Center responsible for

fire safety and procedures; the manufacturers of malfunctioning communications equipment used by fire-fighters and police. Her study asked respondents – almost all of whom ultimately agreed to settle with the Fund and forego litigation – what they felt they were giving up with their choice.

Access to information about what happened and the opportunity to obtain answers from those they believed responsible were central to respondents' sense of loss in giving up their right to litigate:

I felt that I had to find the facts. Seventy to 80 % of my decision [not to settle] 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. I want to hear, “You had information since 1974 that this was a problem.” I want them to own that.

It's not just about money to me. All I want is discovery. I don't care if the jury award is \$1... It will be very upsetting to me if this turns out not to produce information. If I can't get information, why not take the money?

I wanted a day in court to face the people responsible – the people who allowed the planes to take off (Hadfield 2008a, p. 662; p. 670).

These statements reflect 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: to help ensure that failures were recognized and fixed. Respondents wanted to be able to ask the questions themselves (or have them asked by their lawyers) and personally exercise their right to obtain answers. They demonstrated a keen interest in the nature of the victim's own interaction and stance *vis-à-vis* the putative wrongdoers, and an interest in the relationship, one-on-one, between victim and perceived wrongdoer. Explanations, they felt, were owed to those who suffered harm, personally.

This is not to say that respondents sought entirely private explanations. Private answers undoubtedly would have provided private solace and furthered other goals respondents may have had: personal closure, psychological relief, private acknowledgement, even apology. But respondents expressed more than this. The answers they wanted were ones that would be given in a public forum – under oath, as part of the proceedings in a public court, on the record, in the open:

I am worried that the facts will never be made public and nothing will change.

Outsiders just don't see the justice denied, the accountability and responsibility denied; the cover-up by the city and the fire department [...] I want the public to know what is going on (HADFIELD 2008a, p. 672).

The publicness of the explanations that these respondents sought speaks, we believe, to the political dimension of their understanding of what civil litigation offered them. Instinctively some who sought public adjudication of their claims understood the courtroom as the place where the otherwise substantial differences in status between the powerful and the injured are leveled, at least in the information order, where they get to ask the questions and the powerful must answer. This is a place where this otherwise latent aspect of the relationship between fellow civic actors is made overt for all to see. 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.

Several respondents, for example, characterized the “choice” they were forced to make between obtaining much-needed income to substitute for the loss of family earnings and filing a civil lawsuit expressly in terms of their understanding of their political status as citizens in a democracy.

It was wrong for the government to dictate who you can sue and who you can't sue. “If you want this money, you can't sue the airline.” That is not American to me. America is based on certain rights and we have the right to bring a lawsuit against anyone.

The last blow was that you had to give up the right the Constitution provides for all citizens. We had to go into the Fund blind, poor and with no recourse (Hadfield 2008a, p. 672).

The importance of symmetric information obligations to our understanding of our political relationships was evident in several interviews with 9/11 families.<sup>4</sup> Multiple respondents expressly 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, the obligation to provide information was not reciprocal. Final payment amounts were not accompanied by any explanation from VCF officials as to how contested issues were resolved or how numbers were computed; the detailed presentations were met with what seemed to be undifferentiated numbers

<sup>4</sup> The following is based on interview material not previously published in HADFIELD (2008a).

that were inexplicable in light of the individualized detail they felt encouraged, even required, to disclose.

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."

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."

Other respondents noted that the witnesses before the 9/11 Commission, established by Congress to conduct a public investigation into the attacks, 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.

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 a 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.

The disavowal or discounting of monetary goals in civil litigation and the articulation of grand interests in public information disclosure is often read as disingenuous or at least unconsciously misleading. The desire to file a lawsuit is really about the money, many believe, but pecuniary concerns need to be dressed up in moral finery; individualistic selfishness may be universal, but we remain collectively uncomfortable with that fact and so we tolerate (or even require) claims of selflessness and the general good. Others 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, for example, the Special Master in charge of allocating the fund, Kenneth Feinberg, could only understand the seven or so families that failed to participate in terms of being “paralyzed by grief, clinically depressed” (Feinberg 2005, p. 161). The “need to know” (or to be able to ask) is portrayed as a pathological state, an unwillingness to accept, or let things go or master one’s morbid curiosity.

No doubt these motives may, at times, be in play for civil litigants. But the importance of the information order to our way of finding our place in the relational world leads us to posit that, in legal interactions, it is also 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 that is not the entire story.

#### *Courts as a democratic space: the Anglo-American setting*

The symmetric nature of the information norms typical of equal relationships, gives us a new way of thinking about what happens during a civil action and provides a new articulation of a 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 and Lind (1992), Tyler and Huo (2002), and Tyler (2006) show that people’s willingness to cooperate with police, obey the law, and trust legal institutions is influenced by their perception of the fairness of procedures. 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 and Lind (1992) call these “relational criteria” because they provide individuals with information about the nature of their relationships with authorities.

Like Tyler and his co-authors, we focus on the relational work accomplished by the procedures that define legal process but, unlike them, we are interested in the relationship between private citizens rather than that 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 the process that make it recognizable as a civil court in a democratic regime. In this section we consider the structure of an Anglo-American civil action to develop our analysis. In section 5, we consider the applicability of our analysis to civil law regimes such as those found in many European countries.

A civil action is a case between citizens, which can include entities such as corporations or even governmental agencies acting in their capacity as citizens for the purposes of, for example, 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 as criminal or constitutional cases. We call the court a “civil court” when it acts in its capacity to hear a civil case between private citizens.

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 whether and when to file an action and the court has no jurisdiction unless and until a plaintiff chooses to initiate and maintain one. The plaintiff defines the scope of the court’s work through the drafting of the complaint, which must identify the 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 or caused the plaintiff harm, and the plaintiff is entitled to a remedy the court can provide. The plaintiff may drop the action, depriving the court of further jurisdiction at any time. But the court cannot decline to hear a properly pleaded case; it is obligated to follow through, conduct the fact-finding process, and reach a judgment.

It is the responsibility of the plaintiff, and not the court, to inform the defendant of the case and to provide sufficient detail to allow the defendant to be put on notice as to the plaintiff’s claim. Once served and given notice, 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. 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 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 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.<sup>5</sup> A party on whom a subpoena is served has the right to contest the subpoena on the grounds that 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”.<sup>6</sup>

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 the pre-trial preparation, parties can seek information from the other in discovery, requiring the other 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.<sup>7</sup> The standard for seeking documents in discovery is similarly broad. Moreover, in US 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 the abstract persons “Plaintiff” and “Defendant” in civil court, then, is a rather extraordinary capacity to call on the power of the state to enforce obligations to disclose information. Outside of the courtroom and the relationship of Plaintiff and Defendant there is no such power: a person who has a grievance against another has only the tools that fall to his or her individual status to obtain information. A powerful person might 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 the government to request an official investigation. Letters can be written, phone calls made and emails sent requesting information. But outside of the courtroom there is no

<sup>5</sup> Under the US 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, specifies 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.

<sup>6</sup> *Piemonte v US* 367 US 556 (1961).

<sup>7</sup> The standard in US federal practice, for example, is that information may be sought in discovery if it *might* lead to the discovery of relevant admissible evidence.

authority to compel a response. This, we think, is a critical attribute of the civil process in democratic regimes.

The capacity to compel compliance with disclosure obligations clearly has instrumental value and we do not 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, rooted in the existence of an arena in which any citizen can demand to meet another under a set of information norms that characterize a relationship of 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 plays 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. This qualified symmetry is played out precisely in the Anglo-American courtroom. Plaintiff is obligated to disclose information that is relevant to Defendant's system of relevance and vice versa. These systems of relevance are derived from the legal rules implicated in the cause of action that transformed real human beings into the abstract legal persons Plaintiff and Defendant. If the plaintiff has alleged that the defendant has knowingly sold a dangerous product that has caused the plaintiff harm, for example, then the defendant's product design practices and its internal communications about the product's safety are relevant to the plaintiff by virtue of the tort law that says that manufacturers must ensure that their products are reasonably safe. Symmetrically, the plaintiff's use of the product and other possible reasons for the harm she suffered are relevant to the defendant's defense – that the plaintiff misused the product or that the harm was caused by something other than the defendant's product, for example – and so must be disclosed by the plaintiff.

Even if, empirically, the parties are highly unequal – if one party is an ordinary middle-class citizen, for example, and the other party is a large corporate entity – once they step into the abstract roles of



Plaintiff and Defendant for purposes of resolving the plaintiff's claims, they are on equal terms in the information order. The powerful defendant who can stonewall or hide behind corporate gatekeepers outside the courthouse cannot refuse, once sued, to provide the information that is relevant to the plaintiff. The diffident or angry plaintiff cannot simply refuse to show up or explain her role in the injury she suffered. The same symmetry applies if their positions are reversed: if a powerful plaintiff, such as a corporate landlord or bank, sues a relatively powerless defendant such as a tenant or small business borrower, the defendant can demand that the plaintiff disclose information that is relevant to proving its claim – even the powerful plaintiff cannot simply rest on an assertion as it sometimes can outside of court. Nor can the defendant appeal to extraneous norms such as social justice or privacy in attempting to withhold information that is relevant to the proof that the plaintiff is entitled to an order of eviction or payment. Courts are thus, we argue, an arena in which the empirically unequal meet as abstract equals. Through the enforcement of symmetric information norms, the court provides a space in which the relationship of political equality between abstract persons – citizens – is enacted.

Critically, we argue, the availability of a civil court grants to each individual in the court's jurisdiction the capacity to trigger an enactment of at least some dimensions of the formal political equality that exists in most democratic regimes between that individual and everyone else within that jurisdiction. Anyone can file or be named in the complaint – even those who, it turns out, have done no wrong or who have no right. The essential relationship is between individuals merely by virtue of their membership in a community subject to the jurisdiction of the court. The individual frustrated by the empirical inequality she experiences *vis-à-vis* a community member outside the courtroom has available an arena where she can insist on and experience at least some measure of equality with that other.

We do not claim that the equality experienced in this arena is complete. For a plaintiff with few material resources or who is poorly understood by a dominant judicial culture or whose harms are not recognized by legal rules, for example, the capacity to require another to provide information explaining why he should not be held accountable for an alleged harm may be cold comfort indeed. The plaintiff who abandons her case as futile or has it quickly dismissed for failing to state a valid legal claim must process this as a part of her understanding of where she stands in relation to her fellows. But it is, nonetheless, no small thing to be recognized by the community as holding an entitlement – as

an equal – to demand at least an initial accounting and to have available a public institution that is required to recognize and enforce this entitlement. Even the dismissal of a complaint that fails to state a claim requires the defendant to respond, if only to explain why the complaint fails. The court is not empowered as an authority to screen complaints on its own say-so.<sup>8</sup> If the complaint is legally sufficient – it states a valid claim that a legal rule has been violated on the assumption that the alleged facts can be proved – then the defendant must continue to comply with rules that play out the information norms of a relationship of equality. The responsiveness that the civil court requires from any other member of the community is also available as raw material for the construction of the individual’s sense of where she stands in the community.

*Democracy, equality and courts in the civil law tradition*

Our analysis above focuses on procedures that are characteristic of the Anglo-American, and especially American, tradition in civil litigation. Procedures in European courts operating in what Merryman and Perez-Perdomo (2007) call the civil law tradition – generally derived from the French and German legislative and judicial practices – differ on a number of dimensions. In this section we explore how our analysis might carry over to the civil law context.<sup>9</sup>

In civilian courts, as in Anglo-American courts, civil actions are initiated at the behest of individuals or entities who perceive themselves to have been harmed by another. Once initiated, however, the civilian court provides for a much more active role for the judge in managing disclosures of information from the parties. In Anglo-American

<sup>8</sup> There are some exceptions, even in robust systems such as in the United States. For example, prisoners may have their federal civil complaints alleging unlawful prison conditions administratively dismissed, without requiring the government to answer; this is at least in part a response to what is perceived to be a high volume of meritless complaints filed by prisoners without legal counsel. For a discussion, see SCHLANGER (2003).

<sup>9</sup> The term “civil law” here is admittedly confusing, given our use of the term “civil action” to mean a lawsuit in which both litigants are private citizens. A civil action, recall, is distinguished from a criminal, administrative or constitutional action in which a private

citizen is in litigation with the state, either as a plaintiff (challenging the action of government officials) or as a defendant (in a criminal or regulatory action, for example.) “Civil law” is a term of art used to refer to legal regimes that are based on a civil code – although for our purposes what is important is not the source of law but rather the constellation of procedures that distinguish courts in the Anglo-American (“common law”) tradition from those in the German or French tradition. For a discussion of some of these differences, in the context of the robust literature analyzing the differences between common law and civil code legal systems, see HADFIELD (2008b).

procedure, the parties decide what documents to demand and what questions to ask of the other side; but in the civil law tradition, these matters are ultimately in the hands of the judge. The parties in a German lawsuit, for example, will make proposals about what documents to request and what questions to ask, but whether such documents and questions are pursued is a matter of discretion resting with the judge (Kötz 2003). The civil law judge, of course, is obligated to exercise this discretion in light of the legal rules in play and will make a legal error if clearly relevant evidence necessary to an appropriate disposition of the case, if available, is not obtained. But the authority to obtain information rests, formally, with the court and not the parties. This is in sharp contrast with American procedure, for example, where the parties themselves are entitled to issue subpoenas – effectively to exercise the authority of the court – to obtain documents and testimony. Indeed, although in both systems a party's unwillingness to cooperate with information requests can be penalized by the court drawing negative inferences about facts or indeed by entering a default judgment against a party, only in Anglo-American systems can parties failing to comply with a demand for information be found in contempt of court and punished with fines or even imprisonment.<sup>10</sup> As American procedure expert Hazard (1998, 1024) observes,

the civil law concept is that production of evidence [...] is carried out through the authority and the responsibility of the court and not through authorization of the advocates for the parties. The notion that a *party* has a right to *compel* production of evidence violates this fundamental principle of civil law [...] On the other hand, the concept that a party has such a right – a right not dependent on judicial discretion – has become fundamental, and perhaps nearly constitutional, in the modern American scheme of civil litigation.

In instrumental terms, the information disclosure obligations under these systems could be said not to differ very much, in the sense that the parties in both systems are obliged, if they are to avoid penalty, symmetrically to disclose information that legal rules deem relevant to the claims or defenses articulated by the other party.<sup>11</sup> But do these different approaches result in differential experiences for the parties? Do they have differential significance for the individual's construction of her sense of where she stands vis-à-vis the abstract other with whom she is engaged in court?

<sup>10</sup> The contempt sanction is rare in the English system but used with some frequency in the US (STÜRNER 2001).

<sup>11</sup> In practice, they may matter a lot: American discovery procedures can lead

to much greater information disclosures because of the absence of direct judicial oversight and the availability of more substantial penalties.

The American system – with obvious and robust party authorship of information demands, backed by contempt sanctions that equate private demands with public law – appears to be one that makes the experience of being entitled to information from an equal other readily available. This is what we hear in the observations made by the families of 9/11, who express a clear identification with their power to use the courts to seek information. The threat to that experience in the Anglo-American context, if any, comes from the dominance of lawyers in the system and the possibility that litigants feel themselves to be simply passive participants in the process. Class action plaintiffs, for example, may feel themselves (quite rightly, in some cases) to be playing merely a formal role in what is ultimately a drama played out between lawyers.

In the civil law process, however, the fact that a party's role in obtaining information disclosures must be filtered through judicial discretion, and that information is ultimately demanded not by the party but by the judge, makes it much more difficult to predict what the phenomenological experience of a civil action will be. A litigant in a civilian court faces a much greater challenge interpreting the information order of the civil process as an enactment of the fundamental equality between the abstract persons, Plaintiff and Defendant. It seems highly possible to construct the experience as based in the fundamental subjugation of both Plaintiff and Defendant to the authority of the State. A request that the judge obtain evidence can be seen as a petition to the powerful to exercise power on one's behalf; but that is distinct from a right to control the exercise of power. The fact that even a judge's request for information may be ignored – punishable only by a disadvantage in the litigation at hand but not by the kind of sanctions granted for violation of public law – only further challenges the interpretation that the court in a civil law regime is a place governed by the information norms of equality.

Other features of civil law process also may challenge the potential for the civilian courtroom to play a robust role in the experience of democratic equality. Litigation in the civil law system is not, as a matter of practice, as robustly public as it is in the Anglo-American system. Anglo-American procedure begins with extensive discovery and settlement procedures conducted in private offices, but it culminates, in the imagination always if not often in fact, in the spectacle of an extended, oral and public trial. Anglo-American judgments are routinely published and contain extensive discussion of evidentiary findings and legal reasoning. Litigation in civilian systems, in contrast, is conducted in low-drama sequential fashion, with a series of hearings and decisions on aspects of the case accumulating to produce an overall

result. Even if hearings are open to the public, their sequential nature and the fact that much of the civil law process is conducted in writing, rather than orally, may raise the cost of public coverage of litigation and may also make litigation less salient as an event to the public. Judgments issued by civil law courts are often not published and, if they are, they generally contain little detailed discussion of the facts and findings of the case.

These less-public civilian procedures may lend themselves to a litigant's experience of litigation as a personal event, not an instantiation of formal political relationships. As we saw in the responses of the 9/11 families interviewed by Hadfield (2008a), the desire for access to American civil courts was for access to a fundamentally public forum. Only in a public forum can one not only see oneself, but also be seen by others, as a person to whom even the powerful must respond. The nature of an abstract relationship of political equality is in some sense fundamentally public: it is not a social, everyday relationship. It is constituted by the political community, and that community is what defines the concept of "the public."

That the civil law system is inherently less capable of providing an arena in which democratic equality is played out in the information order is not a necessary conclusion, however. It seems also entirely possible that, in a given context in practice, the meaning of the information order in civilian courts could serve to support a litigant's experience of fundamental political equality. If judges in civil law systems exercise their discretion with high fidelity to the legal rules in play and if there is little doubt or disagreement about what constitutes relevant evidence, then a right to request that the court exercise its authority to obtain evidence may be experienced as a direct right to obtain evidence. Indeed, the fact that judges in the civil law system are career civil servants<sup>12</sup> – most of whom are not identified by name in judicial rulings, many of whom work in panels even at the trial level and so exercise less personal control over proceedings, and some of whom fulfill the role of an assistant or investigating judge who does not ultimately render a decision – may allow the litigants to perceive the judge as a mere instrumentality of a private actor.

<sup>12</sup> We do not mean to imply that civil law judges lack judicial independence; they are not ordinary civil servants in the sense of being removable from office. We mean here to emphasize instead that in civil law systems, unlike Anglo-American systems, there is an elaborate judicial bureaucracy for which judges specifically train, which they enter often soon

after graduation from law school, and through which they are promoted throughout their careers. Anglo-American judges, in contrast, are generally appointed to the bench only after lengthy careers as lawyers and they routinely remain in the position to which they were initially appointed. For more discussion, see HADFIELD (2008b).

This is a conclusion that is potentially made even more available by another distinctive feature of the civil law system, namely that private individuals may initiate not only civil law suits seeking private remedies but also criminal law suits carrying public penalties.<sup>13</sup>

Similarly, if the threat of punishment through disadvantage in the litigation at hand is, in practice, routinely effective in producing information or – more profoundly – if a judicial request for information is routinely experienced by the target of the request as obligatory and so routinely complied with without regard to punishment, then a potential litigant in the civil law setting may well perceive the availability of a civil action as a manifestation of his or her equal formal status *vis-à-vis* a fellow citizen. And the mere fact that a sequence of proceedings takes place in public buildings, is recorded by public officials, and creates a public record may be sufficient stuff from which to weave an experience of public participation in the abstract relationships of formal political equality.

### *Discussion*

Our emphasis 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.

The arena provided by a civil court, we suggest, is a democratic space and civil courts can function to support democratic relationships. There are, of course, many competing visions of democracy. Most focus on the availability of political institutions that provide for self-governance.<sup>14</sup> Most require some degree of formal political equality, whether conceived narrowly as a right to vote for officials who make decisions or more deeply as equal practical access to deliberative decision-making processes, which may require substantial material equality.<sup>15</sup> Our focus here is on what we might call the phenomenology of democracy, the lived experience of being

<sup>13</sup> The power to initiate a public criminal proceeding, however, does not imply the power to control the proceeding once initiated. Thus the opportunity for agency offered by this procedure may have little impact in fact on the experience of democratic equality.

<sup>14</sup> See, for example, DAHL (2005), who identifies the following as the necessary political institutions for modern large-scale representative democracy: elected officials; free, fair and frequent elections; freedom of expression; access to alternative sources of information; associational autonomy; and inclusive citizenship.

<sup>15</sup> For a discussion, see BEITZ (1989).

treated as an equal among equals by the institutions of self-government, of the capacity to see oneself as a civic participant on equal footing with other citizens.<sup>16</sup>

Our claim is rooted in the tradition of Alexis de Tocqueville, who emphasized the role of the personal experience of participation in democratic institutions as an important way in which 19th century American democracy, in particular, was sustained. The uniquely successful form of democracy that took root in America, Tocqueville argued, was due primarily to the “manners” of the American people, by which he meant “their proper sense of what constitutes the character of social intercourse [as well as] the various notions and opinions current among men, and to the mass of those ideas which constitute their character of mind [...] the whole moral and intellectual condition of a people” (1875, pp. 303-304). Democracy in America, Tocqueville believed, rested on how each individual citizen experienced his relation to others in his community and the institutions of self-government. One factor in this, Tocqueville believed, was the very localized system of highly participatory governance in towns and villages in the US, a system that generated not particularly good administrative but nonetheless highly desirable political effects (p. 91). As a consequence, “democracy has gradually penetrated into [Americans’] customs, their opinions, and the forms of social intercourse; it is to be found in all the details of daily life equally as in the laws” (p. 327).

Tocqueville focused in particular on the “extremely numerous and minutely divided” (59) public duties of New England townships – duties such as town-clerk, tax assessor and fence-viewer – which all competent adult men of the town were expected, in their turn, to undertake. Every townsman, thus, had the experience of self-government at his disposal for constructing his sense of self and developing his “habits” and “proper sense of what constitutes the character of social intercourse.” Tocqueville chose the civil jury as an exemplar of how the *experience* of participating in the institutions of self-government could have a deep effect on an individual’s subjective conception of himself in relation to his political community, on the development of the “manners” of democracy:

When [...] the influence of the jury is extended to civil causes, its application is constantly palpable; it affects all the interests of the community; everyone cooperates in its works: it thus penetrates into all the usages of life. [...] *It teaches men to practise equity* [...] By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society (p. 289, emphasis added).

<sup>16</sup> SOLOMON (2011) also considers this line of analysis.

Our focus is similarly on the impact of the experience of civil litigation on the individual's subjective conception of him or herself as a member of a democratic community. We focus, however, not (only) on the experience of the decision-maker – the civil juror – but on that of the litigant, a role that Tocqueville perceived as one that all can equally imagine themselves taking on, “for [...] every one is liable to have a civil action brought against him” (p. 289). Even in our modern setting – where the material and other social inequalities among litigants are likely to be much greater than they were when Tocqueville made his tour of American townships – participation in court as a litigant requires one to “practice equity”: the information order of this institution is one that requires each to treat the other as an equal when it comes to the obligations to share information about matters of importance to them.<sup>17</sup> At least in this one dimension, the obligation of even the powerful corporate officer to account to anyone who perceives him or herself to have been harmed by that entity or against anyone whom the corporation seeks to enforce its claims, no matter how poor or powerless, in some measure “rubs off that individual egotism which is the rust of society”.

This is why we find compelling the scenarios discussed earlier in which individuals place great significance on their capacity to bring powerful others to account – even if there is no money or other material benefit in it. The families of those killed on 9/11; the Cambodian villagers who survived massacre; the mother of the Northwestern University football player who died on the field; the victims of torture under Brazil's dictatorships; the Jewish families in France who believe that the artworks in the collection of a Parisian dealer include pieces plundered from their ancestors by the Nazis: we suspect that access to an arena in which those that these plaintiffs perceive as responsible for their harms are required to treat them as an equal other, entitled to disclosure of information that is relevant to their legal claim, plays a powerful role in supporting the durability of the view that they are, indeed, on an equal footing with their fellow citizens. Even for those who are not involved in these rare episodes of actual information demands and disclosures – for in the modern world, involvement in a civil action is indeed a rare event – each of us is aware that if we were

<sup>17</sup> Tocqueville himself notes the way in which the individual internalization of democratic norms plays out in America in the information order sustained by courts. Speaking of criminal actions, Tocqueville notes that the enforcement of criminal laws is robust in the United States despite the fact that “in America

the means which the authorities have at their disposal for the discovery of crimes and the arrest of criminals are few [...] The reason is that *everyone conceives himself to be interested in furnishing evidence* of the act committed, and in stopping the delinquent” (Tocqueville 1875, p. 91, emphasis added).



to find ourselves in conflict with another, we too would be entitled to treatment as an abstract equal by the information order in court.

How central is this institution to the maintenance of a robust democracy? Particularly in a world in which material inequalities heavily tilt the prospects of success in civil litigation in practice, how important is it to the maintenance of a robust and authentic democracy to make available a stage on which, at least within the information order, anyone can experience what it means to stand on an equal footing with everyone else? The questions raise deep theoretical and ultimately empirical puzzles that we do not propose to resolve here. But we do confess we would find it difficult to label as “democratic” a world in which those harmed at the hands of others were effectively told by the constellation of publicly-constructed institutions that they were not entitled to an answer. This seems to be particularly so if the world in fact is characterized by high degrees of inequality in terms of information, material resources, media access and political influence. Those with these resources have non-judicial means available to them to seek an accounting; those without do not. Our claim is that our experience of the information order of a relationship is a critical way by which we, in fact, assess our place in the landscape of relations; and that one who has no entitlement to an account is one who has no choice but to experience him or herself as subordinate to the other.

Rachels’ (1975) analysis of the constitutive role of privacy in maintaining specific types of relationship makes this point nicely in a different context. Rachels frames “privacy” in terms of what we have called the information order: intimate relationships are characterized by a sharing of information that is not shared with more distant acquaintances and strangers. In a world in which close friends could never be alone, in which there was always a stranger present, such friends

“could no longer behave with one another in the way that friends do and further [...] eventually, *they would no longer be close friends*” (pp. 329-330, emphasis added).

Similarly, we 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. True, a robust sense of equality is likely to require more – even in the context of civil litigation – than an entitlement to information disclosure. But whereas

material inequality is something that we are well-practiced at absorbing into our sense of what it means to be equal in a modern liberal democracy, a denial of the right even to *know* if others have violated their legal duties to us seems to unwind a basic thread of what it means to be equal.

We end with Elizabeth Anderson's (1999) defense of the idea that democratic equality is, fundamentally, a function of how one sees oneself in relation to others in a political community. "Democratic equality", writes Anderson, is "a relational theory of equality: it views equality as a social relationship" (Anderson 1999, p. 313). It seeks "the construction of a community of equals" and "integrates the principles of distribution with the expressive demands of equal respect" (p. 289). Anderson focuses directly on the nature of the social order that expresses egalitarian relations – a social order that we have argued is manifested in an important part by the information order characteristic of equal relations. She notes in particular the role of discussion and account in such relationships:

Egalitarians seek a social order in which persons stand in relations of equality. They seek to live together in a democratic community, as opposed to a hierarchical one. Democracy is here understood as collective self-determination by means of open discussion among equals, in accordance with rules acceptable to all. To stand as an equal before others in discussion means that one is entitled to participate, that others recognize an obligation to listen respectfully and respond to one's arguments (Anderson 1999, p. 313).<sup>18</sup>

Our contribution here is to add to the phenomenological elements of what it means to "stand as an equal before others in discussion" not only the obligation to listen and respond to arguments, but also the felt obligation to listen and respond to requests for information.

Our claim is that civil courts provide an arena in which the experience of democratic equality is made available. They can thus contribute to the sense of equal agency and value that undergirds the ultimately self-constructed understanding of one's relationship to others in a democratic community. It is not enough to be defined in theory as an equal agent; equality must be lived in some measure. If, at signal moments in one's life – the suffering of harm at the hands of another or the accusation

<sup>18</sup> Robert Post's (2005) claim that the experience of equal democratic agency is essential to democracy is illuminating here: "The practice of self-government requires that a people have the *warranted conviction* that they are engaged in the process of governing themselves. The distinction is crucial, for it emphasizes the difference between making particular decisions and recognizing particular decisions as one's

own. Self-government is about the authorship of decisions, not about the making of decisions" (p. 26, emphasis added). A world in which decisions were reached in an exquisite voting procedure but in which no-one experienced what it means to interact with others as an equal agent of collective decision-making is one, he says, that we could not describe as democratic.

that one has caused another loss – the norms of the institution to which resolution of dispute is committed fail to track the interactional norms of equality, how does one then maintain a “warranted conviction” (Post 2005) that one is a member of equal standing in the community? In our everyday social relationships, Ryan (2006) argues, we must be led to question the nature of our relationship with another if the information norms of the relationship we thought we enjoyed are breached. If our fellow citizens are under no normative pressure to account to us – if our institutions are indifferent to their withholding of information relevant to our legal claims – can we continue to conceive of them truly as fellow citizens? If the information order is an important way in which our relationships with one another are, as a matter of sociological experience, constituted, then we believe that the constitution of the types of equality associated with democratic self-governance is at least supported by, and may require, an actual setting in which the information order appropriate to formal equality is played out in fact.

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## Résumé

La sagesse commune, partagée par les intellectuels comme les politiques croit à l'abus de procédures judiciaires en matière civile, pense qu'il s'agit toujours d'argent et qu'un mauvais arrangement vaut mieux qu'un bon jugement. Cet ensemble d'attitudes avec accent mis sur la fonction économique de la loi pousse à dire que le recours à la justice est une façon coûteuse de régler les conflits dont une saine démocratie libérale devrait minorer l'usage. L'article propose une lecture sociologique nouvelle de la signification et de la fonction d'un procès civil. Attention est attirée notamment sur l'apport démocratique de l'information dévoilée qui impose un engagement substantiel du plaignant du défendeur et des parties tierces au procès. Examen est fait du rôle des tribunaux dans l'entretien et la production d'un ordre social de l'information – normes et règles légales aidant. La base empirique vient d'interviews et enquêtes auprès de victimes du 11 septembre 2001. Une théorisation de l'expérience vivante des tribunaux anglo-saxons invite à suggérer que certaines idées pourraient être adoptées dans d'autres systèmes judiciaires.

*Mots clés* : Démocratie ; Ordre de l'information ; Égalité ; Contentieux civil ; Règlement extrajudiciaire des différends ; Conscience juridique.

## Zusammenfassung

Zivile Rechtsstreitigkeiten werden vom Volksmund, und hier sowohl bei Intellektuellen als auch bei Politikern, wie folgt eingestuft: der Mißbrauch des legalen Prozesses ist die Regel, es gibt zu viele Rechtsstreitigkeiten, es „dreht sich alles nur um das Geld“ und ein „schlechter Ausgleich ist besser als eine gute Verhandlung“. Diese Einstellungen, die die wirtschaftliche Aufgabe des Rechts betonen, wecken den Eindruck, dass eine gerichtliche Konfliktlösung nur im Notfall angestrebt, da kostenaufwendig, und in einer gesunden, marktwirtschaftlichen Demokratie auf ein Minimum reduziert werden sollte. Der neue soziologische Interpretationsansatz dieses Beitrags rückt Bedeutung und Aufgabe des Zivilprozesses in ein anderes Licht. Besondere Aufmerksamkeit wird hierbei der demokratischen Aufgabe des informativen Charakters von Rechtsstreitigkeiten geschenkt, die alle Beteiligten – Kläger, Verteidiger und Dritte – herausfordert. Desweiteren wird untersucht, welche Rolle Gerichte bei der Auf- und Erarbeitung von sozialen Informationen spielen – Normen und gesetzliche Regeln bestimmen den Informationsaustausch oder -vorenthalt, der wiederum von den Beziehungen unter den Beteiligten abhängt bzw. von ihnen beeinflusst wird (Ryan 2006). Aufbauend auf Interviews und Studien von Familien, die Opfer des 11. September geworden sind, wird eine Theorie erlebter Erfahrungen von Rechtsanspruch an Informationen im anglo-amerikanischen System entwickelt, gekoppelt mit Vorschlägen für eine Übernahme in das zivile Rechtssystem.

*Schlagwörter*: Demokratie; Informationen um; Gleichheit; Bürgerliche Rechtsstreitigkeiten; Alternative Streitbeilegung; Legal Bewusstsein.