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Obscured Visions: Policy, Power, and Discretion in Transnational Discovery

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ESSAY

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ABSTRACT

This Essay addresses issues involving the discovery of information located outside the United States. Specifically, it deals with some of the problems created by the lack of appropriate limits on United States discovery procedures. Professor Gerber first analyzes the extent of judicial discretion in the United States in matters concerning extraterritorial discovery. The analysis encompasses the underlying legal bases for the exercise of discretion as well as the political and institutional factors that influence the uses of discretion.

Next, the Essay focuses on the international consequences of the virtually unlimited discretion courts in the United States exercise in discovery matters. This analysis indicates that domestic justifications for unlimited discretion in discovery have little relevance in the extraterritorial discovery context. Further, unregulated transnational discovery can result in potentially serious and generally unrecognized harms.

The Author concludes that while a significant measure of judicial discretion is necessary in making discovery decisions, transnational discov-

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ery requires a framework of analysis that differs in important respects from the analysis applicable in domestic discovery. Professor Gerber views conceptual guidance in this area as a necessity, both to limit adverse international legal, economic, and political consequences and to provide fair and efficient discovery procedures.

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I. INTRODUCTION

When a United States court orders the discovery of information located in the United States, the consequences of that decision are evaluated according to domestic concepts of procedural justice. The court's role is to resolve conflicts among rights, claims, and duties recognized by United States law. When a United States court orders discovery of information located outside the United States, the decision often has conse-

quences far beyond the litigants and the United States legal system. These decisions affect United States and foreign state interests as well as the effectiveness of transnational economic, political, and legal relations. Thus, the foreign location of the information fundamentally alters the context and consequences of decisionmaking.

Despite the fundamental differences between decisions in these two contexts, United States law generally treats extraterritorial discovery decisions as if they were purely domestic decisions.[1] As a result, the conceptual and procedural frameworks of discovery virtually compel judges to make decisions that are "blind," because the judge cannot perceive the probable consequences of those decisions. Such decisions, in turn, tend to obscure the consequences of extraterritorial discovery decisions for United States lawyers and policymakers.

This situation is largely the result of the extraordinary discretion that United States judges exercise in making extraterritorial discovery decisions. United States law provides judges with little guidance for making domestic discovery decisions. Then, failing to recognize the crucial differences between domestic and extraterritorial discovery situations, it unwittingly expands this exceptionally discretionary regime to include extraterritorial discovery.

This Essay examines judicial discretion in the context of extraterritorial discovery. It first describes the extent of such discretion and then analyzes the underlying concepts on which this extensive discretion is based. This is followed by analysis of the justifications for the virtually unlimited discretion judges exert in the extraterritorial discovery context and the consequences of such discretion. The Essay concludes that: (1) the justifications for virtually unlimited discretion in the purely domestic discovery context have little relevance in the extraterritorial discovery context; and (2) discovery takes on entirely different dimensions in the transnational discovery context, creating potentially serious, but generally unrecognized harms.[2]

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1. The term "extraterritorial" refers to the location of the required conduct. References to "foreign" or "international" discovery are imprecise, because they do not specify the nature of the nondomestic element. "Foreign" discovery, for example, may refer to conduct on foreign territory or to some other foreign element such as the nationality of the witness.

2. This Essay is concerned solely with civil litigation. The related issues of criminal procedure are beyond its scope.

II. DISCRETION IN EXTRATERRITORIAL DISCOVERY

A. *General Principles*

Discretion, by definition, is the absence of constraint.[3] In the judicial context, the more rules there are requiring particular outcomes, the less freedom judges have in making choices. It is important, however, not to view legal constraints mechanistically. Rules can be manipulated, and the judge's perceptions of the "right" outcome often dictate judicial decisions, despite existing precedents or rules. The real issue is one of influence: to what extent do existing principles, cases, and institutional arrangements influence decisional outcomes by casting certain outcomes as more correct than others or providing institutional incentives or disincentives for particular choices.

Moreover, decisional discretion is always relative.[4] A judge has more or less discretion, depending on the extent of conceptual and institutional influences on decisionmaking. Consequently, the issue is not whether, but rather how much discretion judges should have in making extraterritorial discovery decisions.[5]

Although specific aspects of the concept of discretion are controversial, the concept generally includes two basic ideas.[6] Professor Maurice Rosenberg calls the first "primary discretion," and Ronald Dworkin refers to it as "discretion in the strong sense."[7] This notion refers to the lack of conceptual constraints on decisionmaking. The idea is that within a discretionary range there are no "wrong answers," and the judge is authorized to decide at will.

The second form of discretion Rosenberg calls "secondary discretion," and Dworkin labels "discretion in the weak sense."[8] Secondary discre-

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3. For an extensive discussion of the "senses of discretion," see D. GALLIGAN, DISCRETIONARY POWERS 1-55 (1986).

4. *See, e.g.*, A. BARAK, JUDICIAL DISCRETION 19-20 (1989).

5. For purposes of expositional clarity, attention will not be called repeatedly to this relativist aspect of discretion, but the term will be used consistently in that sense.

6. The literature on the general problem of judicial discretion is vast. *See* A. BARAK, *supra* note 4; D. GALLIGAN, *supra* note 3; R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978); Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975); Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747.

7. *See* Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 636-43 (1971); Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 33 (1967).

8. Rosenberg, *supra* note 7, at 638-43; Dworkin, *supra* note 7, at 31-32. Dworkin refers to two types of "discretion in the weak sense." The other "weak sense" of discre-

tion refers to the lack of institutional constraints on decisionmaking. The idea is that within the discretionary range, review by superior authority either is limited or non-existent. Appeals are not permitted or are limited in scope. In both cases, the issue involves the judge's freedom to choose, and discretion refers to the absence of constraints on such choices.

With few exceptions, the basic principles applicable to domestic discovery also are applicable to extraterritorial discovery.[9] Under these principles, there are virtually no institutional constraints on discovery, because discovery decisions generally are not appealable.[10] There are also relatively few conceptual constraints on discovery decisions. Consequently, the judge's discretion in discovery decisionmaking is almost unlimited, regardless of the location of the information being sought.

Under the Federal Rules of Civil Procedure (FRCP) and most state legislation, a party may request information from any person who is subject to the court's jurisdiction. Failure to comply with such a discovery request may result in court-imposed sanctions. There are, however, two potentially significant limits on the right to request information. The first limitation is that the information sought for discovery purposes cannot be privileged.[11] Privileges apply without regard to the location of the information sought, and, therefore, are not altered in the extraterritorial discovery context. The second limitation is that the information be reasonably likely to lead to admissible evidence.[12] The concept of relevance is exceptionally broad, and provides little guidance to the proper extent of discovery.[13]

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tion relates to the need for judgment in applying principles to cases. *Id.* at 32-33.

9. For detailed discussion of the extraterritorial discovery process, see G. BORN & D. WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 261-309 (1989).

10. *See* Cochran v. Birkel, 651 F.2d 1219 (6th Cir. 1981); Weis, *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U. PITT. L. REV. 903, 928 (1989).

11. *See, e.g.*, MCCORMICK ON EVIDENCE 170-87 (E. Cleary 3d ed. 1984).

12. FED. R. CIV. P. 26(b)(1). For discussion, see C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2035 (1990).

13. The concept of relevance has played a central role in the controversies over United States extraterritorial discovery practices. For discussion and comparison of concepts of relevance in the United States and in civil law jurisdictions, see Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745, 761-63 (1986) [hereinafter Gerber, *Extraterritorial Discovery*].

B. *International Law Constraints*

United States courts have recognized some limitations on discovery under public international law. These few constraints, however, have been largely ineffectual.[14] In recent years, United States courts have recognized that customary international law provides at least one potentially significant constraint on extraterritorial discovery: A United States court may not require a party to submit to discovery procedures on foreign territory.[15] A United States court, however, does not violate international law when it subjects parties located in foreign states to discovery requests in the United States.[16] The anomalous result is that United States courts do not have the right to order the production of information in a foreign state, but they do have the right to order removal of persons and documents to the United States for inspection.[17]

International treaties also provide minimal constraints on United States discovery. In *Société Nationale Industrielle Aérospatiale v. United States District Court*, the United States Supreme Court held that the only treaty which arguably might provide discovery constraints did not do so for purposes of United States law.[18] *Aérospatiale* involved the 1969 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention or Convention),[19] which was an attempt to bridge the procedural gap between United States discovery procedures and those of other states.[20] The central feature of the Convention was the creation of a procedural mechanism by which evidence could be taken within the state of one contracting party

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14. For analysis of the theories used by United States courts in applying international law to United States discovery decisions, see Gerber, *International Discovery After* Aérospatiale*: The Quest for an Analytical Framework*, 82 AM. J. INT'L L. 521, 534-39 (1988) [hereinafter Gerber, *International Discovery*].

15. *See* Compagnie Française d'Assurance pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 35 (S.D.N.Y. 1984); Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 60 (E.D. Pa. 1983); Volkswagenwerk A.G. v. Superior Court, 123 Cal. App. 3d 840, 856-57, 176 Cal. Rptr. 874, 884 (Cal. Ct. App. 1981).

16. *See In re* Anschuetz & Co., 754 F.2d 602, 615 (5th Cir. 1985), *vacated and remanded*, 483 U.S. 1002 (1987); International Soc'y for Krishna Consciousness v. Lee, 105 F.R.D. 435, 449 (S.D.N.Y. 1984).

17. For criticism, see Gerber, *International Discovery, supra* note 14, at 536-37.

18. Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522, 541 (1987).

19. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, codified at 28 U.S.C.A. § 1781 [hereinafter Convention or Hague Evidence Convention].

20. *See* Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 INT'L & COMP. L.Q. 646 (1969).

for use within another.[21] Many signatory states believed parties to the Convention had an obligation to use this procedure when seeking information within the territory of another contracting party, but the United States Supreme Court ruled in *Aérospatiale* that there was no general obligation to employ these Convention procedures.[22]

C. *Comity and Reasonableness*

Some courts have used concepts of comity and reasonableness to establish an obligation for United States courts to restrain extraterritorial discovery.[23] Here it is not international law that restrains discovery; rather, the United States legal system imposes an obligation on its courts to consider the interests of foreign states and the foreign location of information when exercising discovery jurisdiction.

In *Aérospatiale*, the Supreme Court endorsed this general principle and called on lower courts to consider the sovereign interests of foreign governments and the special situation of foreign litigants when ordering the production of information located abroad.[24] Thus, the Court recognized some of the problems of failing to distinguish between domestic and extraterritorial discovery, but failed to provide either insight or guidelines for courts to use in addressing these issues.

Consequently, despite the Supreme Court's urging, there is little evidence that lower courts currently attach significant weight to foreign interests in extraterritorial discovery decisions. Since *Aérospatiale*, few reported cases have held that foreign interests were sufficient to curtail United States discovery prerogatives.[25] Courts typically do not address

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21. *See, e.g.*, B. RISTAU, 1 INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL) 192-256 (1986).

22. *Aérospatiale*, 482 U.S. at 533-40. For commentary, see Bermann, *The Hague Evidence Convention in the Supreme Court: A Critique of the* Aérospatiale *Decision*, 63 TUL. L. REV. 525 (1989).

23. The concept of comity has long been used by United States courts in requiring consideration of foreign interests. For discussion of the use of the comity concept in the discovery context, see Maier, *Extraterritorial Discovery: Cooperation, Coercion and the Hague Evidence Convention*, 19 VAND. J. TRANSNAT'L L. 239, 252-55 (1986).

The *Restatement (Third) of Foreign Relations Law* includes such obligations under a broader requirement of "reasonableness." *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1988) [hereinafter THIRD RESTATEMENT OF FOREIGN RELATIONS LAW].

24. *Aérospatiale*, 482 U.S. at 546.

25. In Hudson v. Hermann Pfauter GmbH & Co., 117 F.R.D. 33 (N.D.N.Y. 1987), the court applied a comity analysis based largely on the principles outlined in Justice Blackmun's concurring opinion in *Aérospatiale*.

these issues[26] or suggest that it is highly unlikely the existence of foreign interests would justify any curtailment of rights to discovery provided under United States legislation.[27]

Moreover, United States judges frequently indicate that they see little, if any, value in considering foreign interests, believing that all requests for discovery should be handled in the same manner. Some judges claim that they have neither the time nor the knowledge to engage in such an analysis, often adding that since such decisions are not subject to review, this enables them to concentrate on more important issues.

D. *Procedural Posture of Discovery*

These judicial reactions are a predictable consequence of the procedural posture in which discovery decisions are made. Subject to the broad principles of relevance and privilege, attorneys demand information from persons subject to the court's jurisdiction, and discovery normally proceeds with minimal involvement of the court.[28] In general, the judge becomes involved in the process only when a party seeks to enforce or resist a request for discovery.[29] Consequently, judicial involvement is often seen as an impediment to the normal process of discovery.

The net result is that judges have little incentive to limit extraterritorial discovery absent clear abuses of procedure.[30] This accords with the basic assumption of United States procedural law that attorneys should have extensive freedom in gathering information. Moreover, the judge typically has insufficient knowledge to intervene effectively in the process, because the judge has little information on the issues being developed by the attorneys and, in the extraterritorial discovery context,

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26. *See* Rich v. Kis Cal., Inc., 121 F.R.D. 254 (M.D.N.C. 1988); Roberts v. Heim, 130 F.R.D. 430 (N.D. Cal. 1990). For a review of recent cases, see Born & Hoing, *Comity and the Lower Courts: Post-*Aérospatiale *Applications of the Hague Evidence Convention*, 24 INT'L LAW. 393 (1990).

27. *See, e.g.*, Sandsend Fin. Consultants v. Wood, 743 S.W.2d 364 (Tex. Ct. App. 1988) (statement of defendant judge).

28. *See, e.g.*, J. FREIDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 379-423 (1985).

29. Amendments made in 1983 to Rule 16 of the Federal Rules of Civil Procedure encourage and facilitate the involvement of judges in regulating discovery, but this has not changed the basic procedural posture of discovery in most cases. For discussion of this form of "managerial judging," see Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

30. FED. R. CIV. P. 30(d). For discussion of discovery abuse, see Rosenberg & King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579.

knows little about the international legal issues that might be involved.

The *Restatement (Third) of Foreign Relations Law* (the *Restatement*) proposes a procedural modification for extraterritorial discovery decisions that may help to improve this situation. The *Restatement* requires that requests for information located outside the United States cannot be made, as in domestic discovery, directly by the attorneys, but must be made through a judge.[31] It is unclear, however, whether courts will widely accept this requirement.

III. Conceptions of Discovery

The lack of conceptual and institutional constraints relating to extraterritorial discovery is a consequence of the way discovery is addressed by the United States legal system. Most lawyers and judges in the United States view discovery exclusively from a private litigation perspective in which discovery is a quintessential component of the private struggle of litigant against litigant. This perspective shapes perceptions of the litigation process and filters information for use in assessing that process. The only issues relevant to discovery decisions are the issues endemic to private litigation, such as fairness to individual litigants and the integrity of the procedural system. Extraterritorial discovery should be treated as much like domestic discovery as possible, and there is no need to alter procedural or decisional principles to address issues that do not arise in the domestic private litigation context.

Viewing extraterritorial discovery exclusively from this perspective, however, ignores fundamentally important consequences of discovery decisions that result from the location of information outside the United States. This view fails to perceive that extraterritorial discovery decisions represent the exercise of United States power outside the United States and that such exercises of power significantly may affect political, economic, and legal relationships with other states. For these factors to play a role in discovery decisions, the discovery process must be viewed from two additional perspectives.

The first perspective relates to judicial power. When a United States court orders the discovery of information located within the territory of a foreign state, the court is employing the power of the United States. The judge's act is an exercise of power just as an executive or legislative act is an exercise of power.[32] Moreover, the coercive effect of the judge's order

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31. *See* Restatement (Third) of Foreign Relations Law, *supra* note 23, § 442 comment a.

32. The term "power" includes any use of coercion by a state to obtain compliance with its demands. For more elaborate discussion of the concept of power, see D. Wrong,

depends on the same factors that affect other governmental acts, such as the relative political and economic positions of the states involved, the extent to which the relevant interests of the United States and of the effected state are perceived by other states as affecting their own interests, and the relationship of those interests to considerations of strategy and foreign policy. In general, the greater the power of the United States vis-à-vis other states and institutions, the greater the coercive effect of orders by its courts.

This perspective reveals important consequences that are obscured when the process is viewed solely from the perspective of private litigation. It directs attention to issues such as the consequences that flow from the use of United States power to achieve discovery goals, the opportunities and procedures for influencing the use of such power, and the interests affected by its use. This reveals, for example, the potential consequences of allowing private attorneys to direct the application of United States power.[33]

A second perspective necessary to provide adequate information about the consequences of discovery is the systemic perspective. This perspective views discovery decisions in relation to current and prospective transnational legal systems or arrangements. United States discovery practices are imbedded in arrangements and patterns of cooperation between the United States and other states, and thus United States discovery decisions should be evaluated in relation to their potential impact on these arrangements. For example, most states generally recognize and enforce valid judgments of foreign states. Without this arrangement, transnational litigation is of little value.[34] The systemic perspective requires that discovery decisions be assessed in light of the enforceability of resulting judgments and the potential for interference with intergovernmental cooperation in this area.

Each of these conceptions of discovery provides structures and excludes information concerning the consequences of extraterritorial discovery decisions. Each concept is critical to the analysis of judicial discretion, because the extent, form, and content of the information utilized by the judge is a major factor influencing decisional outcomes. An effective legal framework for discovery decisions requires recognition and appreciation

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POWER, ITS FORMS, BASES, AND USES (1979).

33. The attorney, of course, does not have authority to order discovery, but directs its application by making decisions to request information in a context in which such requests generally must be accommodated.

34. This is true, for example, when a judgment is entered in one state, but the defendant has no assets in that state which can be attached to satisfy the judgment.

of all significant consequences of such decisions. Thus, the framework must integrate the information produced by each of these conceptions of discovery. There can be no justification for allowing or compelling a judge to make decisions without appreciation of the potential consequences.

IV. Primary Discretion: The Importance of Conceptual Guidance

Little attention has been paid in the United States to the issue of judicial discretion in the international discovery context, largely because the dominance of the private litigation perspective has made the issue undiscernible. Correspondingly, there have been virtually no attempts to justify current levels of discretion in the extraterritorial context. This section addresses whether general justifications for discretion and for supporting discovery in the domestic context support discretion in the extraterritorial discovery context.

A. *Justifications for Discretion*

Three interrelated arguments support discretion in domestic discovery: flexibility, individuation, and substantive justice. Legal rules reduce a judge's flexibility in decisionmaking and thus prevent individuation of specific fact situations.[35] This, in turn, limits the judge's ability to effectuate substantive justice.[36] However one assesses these justifications for primary discretion in the domestic discovery context, the justifications have less force in the extraterritorial discovery context.

1. Flexibility and Individuation

Flexibility and individuation arguments are irrelevant to extraterritorial discovery. A judge ruling on discovery issues must, of course, have sufficient discretion to consider the particularities of a specific fact situation. This especially is true in the extraterritorial discovery context in which the variety of potentially relevant factors is increased by the for-

35. *See, e.g.*, Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. Rev. 925 (1960).

36. For a general discussion of the Legal Realist movement from which these ideas are derived, see White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 Va. L. Rev. 999 (1972). For analysis of how these jurisprudential ideas have affected the development of procedural rules, see Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 Colum. L. Rev. 1 (1989).

eign location of the information. Consequently, detailed extraterritorial discovery rules that attach specific consequences to particular patterns of conduct likely will not be workable.[37] The issue, however, is not whether there should be flexibility, but rather how much flexibility there should be. Establishing decisional principles does not deny the judge flexibility, but merely provides information and guidelines that structure and inform the decisionmaking process.[38] The judge always has the obligation to apply the general principles to the specific factual situation.

2. Substantive Justice

The most important claim for discretion in domestic matters is that it correlates positively with substantive justice, because decisional principles may obscure justice or impede the judge's ability to achieve it.[39] The substantive justice claim is alluded to often, but seldomly is developed carefully. It rests on assumptions relating to the judge's knowledge as well as sense of justice and each of these assumptions is less likely to be valid in extraterritorial discovery situations than in domestic discovery.

a. Factual Expertise

The factual expertise argument is that a judge, because he previously has handled similar cases, is likely to know much that might be relevant to the facts of an individual case.[40] This familiarity may provide the judge with insight into the problems involved in such cases that are not readily available from other sources. Rules assigning consequences to specific facts, therefore, may impede substantive justice by limiting the ability of the judge to use experience from other cases in determining the relevance and importance of facts.

This argument clearly has less force in the extraterritorial discovery context than in domestic discovery. Although on a national scale the

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37. The Essay utilizes the types of general principles referred to here in developing a framework for analysis of extraterritorial discovery decisions. *See* Gerber, *International Discovery, supra* note 14, at 527-48.

38. Legal principles contribute to a "system of meaning" that can be used to interpret and order complex factual and normative situations. For discussion, see J. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 192-214 (1985).

39. For discussion of the concept of "substantive justice" in a comparative law context, see M. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 27-28, 64-69 (1986).

40. For the classic treatment of this issue, see Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930).

number of cases in which extraterritorial discovery is an issue is significant, most judges, whether state or federal, are unlikely to face many such cases. Indeed, some judges claim they are likely to see so few extraterritorial discovery cases that learning the relevant issues would not be cost-effective. Moreover, issues relating specifically to extraterritorial discovery typically have no close analogues in domestic litigation, and thus there is little opportunity to use factual expertise developed in other areas. Therefore, the factual expertise claim carries little weight in the extraterritorial discovery context.

b. Normative Expertise

Presumed knowledge of another type also is used to justify discretion. The judge is presumed to "know the law" in a more profound and differentiated way than can be represented in prescriptive norms, and thus limits on discretion are likely to impede rather than advance just outcomes. The two sources of normative expertise most frequently cited in this context are community norms and systemic knowledge. Under the community norms theory, the judges are thought to know the law in a more profound way because they know the community better.[41] Under the systemic knowledge theory, the judges' expertise derives from knowledge of the legal system as an organic whole.[42]

These arguments are unpersuasive in the extraterritorial discovery context. Judges may have extensive knowledge of the norms applicable in the United States, but the relevant community for extraterritorial discovery purposes is not United States society. When the relevant information is located on foreign territory, foreign concepts of justice affect the impact of the discovery decision and international rights and obligations may be involved. The relevant community, therefore, must be defined to include these relationships, and since United States judges typically have little knowledge of the transnational aspects of the community, they have no claim to superior access to this source of law.

Similarly, the notion that the judge's broad knowledge of the relevant legal system generates normative expertise is inapposite in extraterritorial discovery, because the relevant norms are not limited to those of the domestic legal system. Norms of foreign legal systems and of the international legal system also may be involved. United States judges, however, typically have no particular expertise in regard to those systems.

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41. *See, e.g.*, Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

42. *See, e.g.*, Kaufman, *The Anatomy of Decisionmaking*, 53 FORDHAM L. REV. 1-22 (1984); A. BARAK, *supra* note 4, at 64-72, 152-67.

c. Sense of Justice

Related to the knowledge arguments is the claim that justice is a matter of the judge's subjective "sense of justice" or moral sensitivity.[43] Consequently, conceptual or institutional restraints on discretion interfere with just outcomes by restricting the development and application of the judge's sense of justice. Again, the problem is that this sensitivity normally relates only to the domestic system. Presumably, few would argue that a sense of justice developed in the United States legal system has any necessary relationship to litigation involving international interests or to concepts of justice in other legal systems.[44] This sense of justice is culture-bound and thus does not support discretion that involves foreign concepts of justice or international rights and obligations.

Thus, the arguments made to support judicial discretion in the domestic context use much, if not all, of their force when applied to extraterritorial discovery. The assumptions on which these arguments are based lose much of their validity, and the potential benefits associated with discretion are reduced correspondingly.

B. *Harms Caused by Excessive Discretion*

1. Policy and Discretion

Not only are justifications for primary discretion weaker in the extraterritorial discovery context, but such discretion represents increased risks of harm to the litigants, the states involved, and transnational legal relationships. A decision of a United States judge ordering conduct within a foreign territory is no longer merely part of the litigation process of the United States. The decision becomes an act of the United States government and is so perceived by those whom the decision affects. Foreign states consider the United States government responsible for these acts and often consider them to be expressions of United States policy.

This creates a fundamental issue concerning responsibility for such decisions within the United States political system. If these acts are understood by others to represent the policy of the United States government, governmental officials should be at least in a position to influence

43. *See* Brennan, *Reason, Passion, and "the Progress of the Law,"* 10 CARDOZO L. REV. 3 (1988); Hirshman, *Bronte, Bloom, and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177 (1988); E. CAHN, THE SENSE OF INJUSTICE (1949).

44. For analysis of some fundamental differences in concepts of procedural justice between the United States and Germany, see Gerber, *Extraterritorial Discovery*, *supra* note 13, at 767-69.

them. This can be achieved through participation in establishing the legal principles to be applied in the extraterritorial discovery context.[45] If, however, the government does not provide guidelines for judicial decisions, there are no realistic opportunities for asserting such influence.[46] In effect, discretion shifts the available use of United States power from the executive and legislative branches to the judiciary.

The United States governmental scheme charges the executive branch, and sometimes Congress, with responsibility for the external relations of the United States.[47] Yet the lack of conceptual guidance for discovery decisions reduces the ability of government officials to influence decisions affecting interests of the United States for which they are supposed to be responsible. Thus, failure to perceive discovery decisions as exercises of governmental power conceals a fundamental issue of responsibility for the use of such power.

The failure to recognize discovery as a governmental issue also impacts the development of policy responses to the problems of extraterritorial discovery. When government officials responsible for United States foreign relations have no significant influence on decisionmaking, they have little incentive to develop and improve policy in the area. These officials have little incentive, for example, to engage in constructive negotiations with foreign governments concerning extraterritorial discovery when their efforts are unlikely to influence the judges who will decide how United States power is used in specific situations.[48] This signifi-

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45. In this context, the process of prescription, whether through legislation or through a revision of federal or state rules, provides a mechanism for conveying generalized information to the ultimate decisionmaker, the judge. Policy organs of the government would, of course, have to convince the appropriate prescriptive body of the importance and appropriateness of conveying such information.

46. The State Department can, and sometimes does, appear as amicus curiae, but its resources would not allow it to appear in more than a small fraction of the many extraterritorial discovery situations. Even if it could, this would be an extraordinarily inefficient means of conveying information and insights to lower court judges. For discussion of the role of the State Department in such cases, see Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again,"* 25 VA. J. INT'L L. 7, 25-33 (1984).

47. *See* United States v. Belmont, 301 U.S. 324, 330 (1937). "[C]ourts must take care not to impinge upon the prerogatives and responsibilities of the political branches of the government in the extremely sensitive and delicate area of foreign affairs." United States v. First Nat'l City Bank, 396 F.2d 897, 901 (2d Cir. 1968) (citation omitted); *see also* Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972).

48. It is perhaps for this reason that the United States government has paid little attention to these issues. The executive branch has neither introduced legislation nor developed policy with regard to the problem, and Congress has demonstrated little interest in it.

cantly impairs international efforts to resolve extraterritorial discovery problems and also impairs the ability of the United States government to achieve its policy objectives in this area.[49]

2. Knowledge of Decisional Consequences

The tacit shift of power within the United States government that results from the lack of an effective means of influencing judicial decisions acquires additional significance as a result of the knowledge differential between the judiciary and the policy organs of the government. Policy officials such as those of the Department of State presumably are better informed than most judges about the likely consequences of decisions concerning the use of United States power. The State Department, for example, typically receives complaints from foreign governments and from United States nationals, and its officials frequently engage in factual investigations of problem areas.[50] Judges, on the other hand, usually have a far more restricted base of knowledge relating to such consequences.

Decisional principles provide a means of reducing this differential by transmitting some of the information and expertise developed within the executive branch to the judicial branch, thereby "educating" judges on such issues. In particular, decisional principles can encourage the judge—who is likely to be familiar only with the private litigation perspective—to consider information provided by the power and systemic perspectives. The use of decisional principles can thus provide the judge with a means of obtaining an integrated perspective on the consequences of judicial decisions. At issue is the role of legal principles in providing and structuring information for the decisionmaker and thus increasing the judge's capacity for making informed decisions.

This process is exemplified in blocking legislation. When a judge orders conduct within the territory of a foreign state that has enacted blocking legislation,[51] a set of factors is introduced that is not present in

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49. The need for international cooperation to resolve the problems in this area has been cited frequently. *See* Maier, *supra* note 23, at 262-63; Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. MIAMI L. REV. 733, 793-94 (1983).

50. *See, e.g.*, Robinson, *Compelling Discovery and Evidence in International Litigation*, 18 INT'L LAW. 533 (1984).

51. Blocking legislation attempts to prevent compliance with certain foreign discovery procedures. *See, e.g.*, British Protection of Trading Interests Act of 1980. For discussion, see Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act*, 1980, 75 AM. J. INT'L L. 257 (1981); *see also* Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L.

domestic discovery, because obeying the order may violate the law of another jurisdiction. Yet the actual impact of such an order often is difficult to assess and may depend on issues such as whether the legislation actually is enforced, whether the relevant provisions are common in such legislation, and what sanctions exist for violation of the legislation.[52] Moreover, this type of order, by itself or in conjunction with other orders, may induce a foreign state to enact blocking legislation or increase the severity of existing legislation, thereby harming the system of transnational legal relations.[53] A judge who is forced to rely on personal experiential and conceptual bases may neither recognize such issues nor be in a position to assess the consequences of particular responses to the situation. Normative principles can induce the judge to ask the questions that tend to elicit necessary information and can assist in structuring that information so that the judge can use it more effectively.

The potential complexity of issues in extraterritorial discovery cases can have a serious impact on judicial incentives. The presence of foreign and international interests that a judge is poorly prepared to evaluate creates an incentive for the judge merely to avoid considering such interests at all. Without conceptual guidance, the judge must create standards for evaluating a complex set of issues with which the judge has had little experience and about which he has little knowledge. Few judges are prepared to undertake such a demanding task in dealing with a single discovery request. If the judge can rely on a conceptual framework in approaching such cases, this disincentive is largely eliminated.

C. *The Problem of Bias*

The potential for bias further increases the need for decisional principles. Intentional bias is the conscious decision to favor one side in litigation for reasons unrelated to the merits of the controversy. This generally is not viewed as a significant component of the extraterritorial discovery

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185, 219-20 (1985).

52. These were among the factors that influenced the Supreme Court's unwillingness to respect such legislation. Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522, 544 n.29 (1987). The point here is not that rules and principles could answer such questions, but that they could encourage the judge to ask them and to understand their potential relevance and importance.

53. Foreign governments have enacted blocking legislation in response to concerns that United States discovery procedures often violate the rights and the interests of foreign governments or foreign persons. *See* Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 INT'L LAW. 487, 491-92 (1985); Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 FORDHAM L. REV. 877, 879 (1982).

problem, because it is assumed to be rare. Nevertheless, the temptation for such bias may increase when the party requesting discovery is a domestic individual alleging harm and the resisting party is a foreign person.

Decisional principles only marginally affect this form of bias, because a corrupt judge generally can manipulate the relevant principles to achieve the desired outcome. Such principles, however, do reduce the temptation for bias by providing a standard against which decisions can be evaluated. Moreover, they reduce the perception of intentional bias by demonstrating that the judge is at least supposed to apply certain principles.

A second relevant form of bias is perceptual and is in the form of distortion of the decisional process as a result of the judge's greater knowledge of and sympathy for certain types of interests.[54] Here the notion is that the judge unconsciously may favor United States interests merely because the judge understands and appreciates them better than the competing foreign values and interests. Although some perceptual bias is inevitable whenever a judge must weigh domestic values against foreign values, this form of bias is particularly troublesome in the United States where the level of knowledge concerning foreign legal systems is decidedly low.

Principled guidance also can help prevent unintentional bias by providing the judge with information. For example, guidance can direct the judge to identify particular interests and types of problems, which, absent such principles, the judge may find neither relevant nor important. Guidelines increase the ability of the judge to understand the foreign interests involved in discovery decisions and, correspondingly, decrease the likelihood of this form of bias.

Decisional principles also may reduce the perception of unintentional bias. Foreign observers often are inclined to believe that a United States judge unintentionally may favor a domestic litigant over a foreign litigant because of the latter's "foreignness." Their concern is sharpened when the judge has virtually unlimited discretion in discovery decisions.[55] The existence of a conceptual framework for decisionmaking at

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54. In *Aérospatiale*, Justice Blackmun referred to the likelihood of this form of pro-forum bias. 482 U.S. at 553 (Blackmun, J., concurring in part and dissenting in part). For discussion of perceptual influences on judicial behavior, see J. CORSI, JUDICIAL POLITICS 263-70 (1984).

55. von Hülsen, *Gebrauch und Mißbrauch US-amerikanischer "pre-trial discovery" und die internationale Rechtshilfe*, 28 RECHT DER INTERNATIONALEN WIRTSCHAFT 225, 228 (1982); *see also* Born & Hoing, *supra* note 26, at 403 ("The almost inevitable predisposition of trial judges to ignore the Convention suggests that doubts

least assures foreign litigants and states that a significant effort has been made to counteract distortion of the decisional process.

D. *Discretion and Decisional Objectives*

Excessive primary discretion, therefore, may impede attainment of the goals that the United States procedural system is designed to serve. It creates incentives to avoid consideration of issues necessarily relevant to the judge's decision, limits access to information essential for the adequate evaluation of the consequences of these decisions, and creates obstacles to the development and implementation of effective policy.

V. Secondary Discretion: The Need for Decisional Review

Extensive secondary discretion further compounds the harms and risks created by extensive primary discretion. The basic idea that discovery orders are not subject to review except for abuse of discretion has been applied to extraterritorial discovery with little recognition that this practice may have very different ramifications in the extraterritorial context. The lack of appellate review further reduces the already minimal incentives for judges to engage in the often demanding and unfamiliar task of assessing foreign interests and analyzing international law issues. The law's message to the judge is that such issues are relatively unimportant and there is little reason to spend time on them.

Virtually unlimited secondary discretion also increases the likelihood of bias in extraterritorial discovery decisions. Intentional bias is reduced because a judge who might knowingly allow personal proclivities to affect a decision presumably would be less likely to do so if the decision were subject to review. Increased appellate review also reduces the likelihood of perceptual bias by increasing the judge's incentives to obtain deeper knowledge and understanding of such claims, thereby reducing the knowledge differential that induces bias. Increased appellate review also would reduce the perception of bias. Foreign observers are less likely to suspect bias when initial decisions are subject to review and when litigants and states at least have the opportunity to appeal the initial use of power by the trial judge.

Secondary discretion also raises the issue of judicial accountability. A judge in the domestic context is accountable to the community and subject to the pressures of neighbors, peers, and colleagues to perform judicial tasks fairly and efficiently. Foreign litigants and states are not part of the community in which the judge operates and thus have little oppor-

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about parochial bias may well have some substance.").

tunity to participate in this process.[56] They have no effective means of ensuring that due regard is paid to their interests.

The lack of appellate review further intensifies this effect by atomizing participation in the relevant legal community. Because trial court discovery opinions are published seldomly and appellate decisions in this area are rare, there is little exchange of information or development of insights relating to these issues. Judges have little information about what other judges are doing and thus have little capacity or obligation to relate their own decisions to the decisions of others. Further, without appellate review, they are not even accountable to a reviewing court.

The issues of conceptual structure and decisional review—primary and secondary discretion—are closely interwoven. Appellate review has value only to the extent that there are standards and criteria for evaluating the decisions of the trial court. A judge who has unlimited primary discretion necessarily also has virtually unlimited secondary discretion, because a reviewing court would have no basis for review. Similarly, increased appellate review of discovery decisions tends to strengthen the influence of normative principles on the trial judge's decisions. Therefore, achieving an effective legal framework for extraterritorial discovery requires increasing both conceptual guidance and decisional review.

VI. Discovery Discretion and International Conflicts

The lack of conceptual and institutional constraints on United States extraterritorial discovery also plays an important role in the international conflicts that have raged during recent years over discovery procedures.[57] At issue is the claim that United States extraterritorial discovery orders violate the rights of foreign states to regulate conduct within their own territories. This dispute also reflects a fundamental conflict in perceptions of the discovery process. From the perspective of a foreign state affected by United States discovery orders, such orders represent an exercise of power, whereas discovery orders in the United States tend to be viewed solely from the perspective of private litigation.

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56. States can attempt to achieve influence indirectly by exerting pressure on the United States government or by taking action against United States interests. *See, e.g.*, Comment, *The Sovereign Compulsion Defense in Antitrust Actions and the Role of Statements by Foreign Governments*, 62 WASH. L. REV. 129, 146-49. Such efforts not only are unlikely to be effective, but also entail potential harms to the foreign relations of the United States as well as additional costs to the government.

57. For discussion, see *Hague Conference on Private International Law: Special Commission Report on the Operation of the Hague Service Convention and the Hague Evidence Convention*, 28 INT'L LEGAL MATERIALS 1556, 1563-69 (1989).

The problem of judicial discretion is at the core of this conflict. Claims that United States discovery practices violate the rights of foreign states rest primarily on the argument that United States procedures fail adequately to control the use of power to coerce the production of information, thus exposing individuals, institutions, and states to unjustified intrusions. Foreign states object both to the freedom of attorneys to direct United States power and to the limited role of judges in controlling the exercise of this power. Additionally, foreign states object to the low relevancy standards under United States law that allow discovery to extend to a far greater range of information than is permissible under foreign laws.[58]

These objections have led many states to resist the application of United States discovery practices to information located within their territory. Such states refuse any discovery within their territory, pass blocking legislation, and threaten not to enforce United States judgments obtained through procedures they consider to violate their rights.[59]

This international conflict has significant consequences for individual litigants, the states involved, and transnational cooperative relationships. For individual litigants, it creates additional costs, delays, and uncertainties. In particular, blocking legislation subjects litigants to conflicting orders from two or even more governments with the power to impose sanctions for failing to obey such orders, thus further increasing the costs and uncertainties of litigation. For the states involved, including the United States, the conflict often disrupts the litigation process and interferes with the capacity of those states effectively to pursue their own policies and procedures. Finally, the conflict interferes with cooperative relationships between states relating to private litigation—such as the willingness of states to enforce foreign judgments and to cooperate in transmitting information for use in litigation.

VII. FAIRNESS AND INTERNAL PROCEDURAL CONSISTENCY

Many United States attorneys and judges ignore arguments for the special treatment of extraterritorial discovery decisions. They assume that discovery decisions should be made uniformly, regardless of where

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58. *See* Gerber, *Extraterritorial Discovery, supra* note 13, at 767-69.

59. *See* Lowenfeld, *Introduction: Discovering Discovery, International Style*, 16 N.Y.U. J. INT'L L. & POL. 957 (1984); Rosdeitcher, *Foreign Blocking Statutes and U.S. Discovery: A Conflict of National Policies*, 16 N.Y.U. J. INT'L L. & POL. 1061 (1984); Note, *Court Ordered Violations of Foreign Bank Secrecy and Blocking Laws: Solving the Extraterritorial Dilemma*, 1988 U. ILL. L. REV. 563.

the information is located.[60] If a foreign defendant is subject to the jurisdiction of United States courts, this defendant should be subject to the same obligations to produce information as any other litigants, and the foreign location of the information should have no bearing on the relevant procedural rights. Therefore, the judge should have the same degree of discretion in both domestic and international cases.

Although the postulate of internal procedural consistency seldomly is examined carefully, it rests on notions of fairness to litigants and on notions of the efficiency and integrity of the litigation process. Fairness requires that all litigants be subject to the same procedures. To reduce the discovery rights of a litigant because of the location of information appears to be an unfair disadvantage to that litigant.

The integrity and efficiency of the procedural system also seem to call for internal procedural consistency. Consistency allows the law to remain simple and uniform. If a special status were established for transnational discovery, it would lead to fragmentation and unnecessary complexity in discovery. Moreover, it might impose significant additional costs on the system, not only because of the additional complexity involved in applying more complex rules, but also because much of the information necessary for making discovery decisions would be located outside the United States and may be more costly to acquire.

Procedural consistency arguments appeal both to judges and lawyers. Discovery procedures are widely thought to take too much time, use too many resources, and provide too many opportunities for dilatory tactics.[61] Thus, judges oppose changes that might further increase costs and delays, particularly when the main benefit would appear to accrue to foreign interests. Moreover, both lawyers and judges generally are disinclined to introduce new issues whose resolution requires knowledge that they cannot readily acquire through accustomed methods. They have little incentive, therefore, to welcome issues that relate to foreign law, foreign concepts of procedure, and international law, because few judges and lawyers have significant levels of expertise in these areas.[62]

While the procedural consistency argument appears attractive from

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60. *See, e.g., In re* Anschuetz & Co., 754 F.2d 602, 611 (5th Cir. 1985), *vacated and remanded*, 483 U.S. 1002 (1987).

61. *See, e.g.*, Note, *Discovery Abuse under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352 (1982).

62. It also should be noted that discovery is an important source of income for many lawyers. As a consequence, there is an incentive for them to resist measures that might reduce the scope of discovery, and increased concern for foreign interests may tend to have that effect. *See, e.g.*, Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 635 (1985).

the private litigation perspective, a broader perspective quickly reveals its weaknesses. Fairness can be assessed, for example, only by reference to the consequences of the procedures for specific litigants. When the foreign location of information makes compliance with procedures impossible, hazardous, or excessively costly, those procedures have a far different effect on the litigants than when these obstacles do not exist. Thus, procedural consistency is more likely to lead to unfairness than to fairness.

Similarly, when the fundamental objective of the procedural system—fair and effective resolution of disputes—can be achieved only with the cooperation of other states, the impact of specific procedural arrangements on the cooperative system may affect significantly the fairness and integrity of the entire litigation process. If a judgment rendered in a United States court cannot be enforced against assets in a foreign state because that state considers the procedures used in obtaining evidence for that judgment to violate its public policy, the United States proceedings are a source of injustice to the litigants and a waste to both the litigants and the government.[63] If United States procedures induce foreign states to make it more difficult to acquire information for use in United States litigation or to establish a cause of action within the foreign state to recover losses sustained in United States litigation, these procedures will undermine the effectiveness and integrity of the United States procedural system.[64] Considerations of fairness and procedural integrity, therefore, actually may require adaptations of the procedural system that reflect the cooperative and interdependent nature of transnational litigation.

VIII. CONCLUSION

In purely domestic litigation, the private litigation perspective provides the appropriate framework for evaluating and structuring the extent of the discretion to be accorded the judge. In this context, the judge's function relates solely to assessing domestic facts and applying domestic concepts of procedural justice to resolve conflicts between interests located within the United States. The judge is given broad discretion, because it

63. Foreign courts often refuse to recognize or enforce judgments of United States courts under such circumstances. *See* Stiefel, *"Discovery"-Probleme und Erfahrungen im Deutsch-Amerikanischen Rechtshilfeverkehr*, 25 RECHT DER INTERNATIONALEN WIRTSCHAFT 509, 514-20 (1979); Gerber, *Extraterritorial Discovery*, *supra* note 13, at 775.

64. The United Kingdom blocking legislation contains, for example, a so-called "clawback" provision, which provides a cause of action in the United Kingdom to compensate for the treble damage component of an award in the United States courts. *See, e.g.*, British Protection of Trading Interests Act of 1980, ch. 11.

is assumed that the judge has the requisite knowledge and judgment for making these decisions in a manner considered appropriate by both the legal community and society in general.

When information is located outside the United States, the private litigation framework no longer is adequate. In addition to resolving domestic conflicts, extraterritorial discovery decisions also involve using United States power in relation to other states and to systems of international cooperation. The conceptual framework that the judge applies to such decisions, therefore, must take these additional dimensions into account.

This fundamental change in the potential consequences of discovery decisions transforms and contorts the role of judicial discretion. Whereas extensive discretion in the domestic context liberates the judge from rules that may be expected to interfere with the judicial task, such discretion in the extraterritorial context may limit the judge's capacity to accomplish justice. In contrast to the domestic context, extraterritorial discovery places the judge in a position that requires information which the judge cannot be expected to have, but fails to provide any assistance in acquiring that information. When the judge wields the external power of the state, the state has an obligation to provide the guidance necessary to perform this function effectively. The critical, and typically overlooked, insight is that legal principles can perform an important informational function for the judge.

Unfortunately, the conceptual and experiential frameworks of United States lawyers and judges have obscured the consequences of discovery discretion in transnational litigation. As a result, these frameworks represent a major obstacle to the search for fair and effective procedures for litigants in United States courts and to responsible participation by the United States in the system of transnational legal relations.