

**The Functions of Publicity and of Privatization
in Courts and their Replacements
(from Jeremy Bentham to #MeToo and *Google Spain*)**

Judith Resnik, March, 2018,¹

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Asked to think about the concept of “open justice” to launch a discussion on “Privatization of Justice and Transparency: Arbitration and ADR,”² I found myself continually stumbling over the terms of discussion and the need for some kind of taxonomy. One could posit that the “alternatives” to court include arbitration, other forms of alternative dispute resolution (ADR), and online dispute resolution (ODR). This simplified view does not capture the vastly different kinds of processes within these groupings. That range runs from formal live-person in-court proceedings³ and large-scale international investment arbitrations⁴ to the “paths to justice”⁵ for small-scale claimants, often cited as the reasons for the growing reliance on internet-based interactions in courts and tribunals in the U.K.⁶ and in British Columbia.⁷ A thicker description would also entail specifying the range of technologies relied upon, from the buildings (and sometimes the grand architecture) of courthouses to virtual exchanges through the internet.

Many of the new processes relocate the places of decision away from courtrooms, reconfigure the modes of making

decisions, and authorize actors who are not state-appointed judges to render decisions that, in some jurisdictions, are binding and legally enforceable. Whether preclusive or not, the hope is that the outcomes will suffice for the disputants and that they will not press for more in courts. In short, we could conceptualize the ADR/ODR array as *diffusing disputes*⁸ by undoing the unity of time, place, and process long associated with adjudication.⁹

But I paused before providing this account because that map locates courts as one set of processes in contrast to the others. As I will detail, what is “court” is now in question. In some jurisdictions, these “other” processes are part - or all - of what judges/courts actually do. Rather than *alternatives*, they are *replacements* for adjudication, and their proponents hope that they will change professional and public understandings of the practices of dispute resolution. The dichotomies that once seemed plausible between “judicial” and “extra-judicial activities” (to borrow terminology from a 1983 version of a federal procedural rule¹⁰) are diminishing.

As a consequence, an integrated analysis is needed of the roles played by “transparency” and “openness” in this spectrum of dispute resolution processes, and those terms also bear interrogation. In some contexts, those words are equated.¹¹ But *transparency* is dispatched specifically to describe the ways of seeing *into* organizations or activities.¹² Claims are made about whether dispute resolution systems are “transparent” in terms of the ease of learning about how to obtain relief; about how individuals or entities are selected

to resolve disputes; about the mechanisms by which rules of resolution are made; about the processes for decision-making; and about the clarity about outcomes, either individually or in the aggregate.¹³ In the context of courts, transparency is often argued to be an end unto itself, as contrasted with a method of regulation aiming to achieve goals such as fair distribution of access to information or, in conjunction with other rules, molding behavioral expectations of the actors involved.

Openness in the context of dispute resolution systems is deployed more often to refer to the capacity of individuals either to enter or to observe dispute resolution systems. One focus is on the *accessibility* of procedures for seeking relief. Indeed, many innovations across generations are advocated as improving this form of openness; today's proponents of court-based ODR provide a contemporary example.¹⁴ Openness-as-accessibility could also reference third parties, entitled (or not) to observe the interactions. The mechanisms for bringing non-parties in could be the physical spaces made familiar through courthouses and the media or by televised proceedings and other forms of virtual exchanges.

Above, I flagged that what "is" a court requires interrogation, and that challenge is reflected when discussing open access to "court proceedings." The doctrine reflects the variations within that category. For some, the open access means attending hearings, while in other jurisdictions, the presumption is third parties can obtain written materials

filed with courts, and in a few places, access to watching deliberations is an option. An essentialist posture, assuming that institutions called “courts” provide openness to the same aspects of their proceedings, is undercut by the different responses coming from “courts” around the world.

In the European context, openness is generally focused on rights to a “hearing,” and that phrase is typically used to refer to live, interpersonal exchanges among disputants and decision-makers.¹⁵ In contrast, permitting the public to watch deliberations among the judges is counter-intuitive in many legal cultures. Yet, in Brazil, plenary sessions of the the Supreme Court’s deliberations are in public.¹⁶ Access to the outcomes of such deliberations – the judgments rendered by courts – is often assumed in diverse legal systems, even though not all courts have institutionalized the publication of decisions or made a comprehensive set accessible through print or online reports.¹⁷ And of course, publishing decisions may not entail publishing reasons; in the United States, appellate courts may have tables listing their affirmations, “on the decision below.” Moreover, in some jurisdictions, “depublication” entails taking a published decision offline to end its authority.¹⁸

Access to documents that parties give to courts is a distinct question that has produced a variety of responses. Public access to docket sheets, pleadings, and briefs as well as to most materials filed with courts is familiar in U.S. law, predicated on a mix of common law and constitutional traditions.¹⁹ In several more recent court systems, including

the European Court for Human Rights (ECtHR) in Strasbourg and some of the ad hoc international criminal tribunals, that pattern has been followed. Rules permit access to documents when cases are pending as well as when they are closed.²⁰

But many Member States of the EU had traditions that parties' filings are not accessible. The Court of Justice for the European Union (CJEU) has adopted the practice that the written submissions of parties (including submissions from Member States and the Commission²¹) are not routinely available online.²² While a case is pending, we can know the questions sent to the court in the reference, but not what the parties wrote to the court about the law as applied to the facts of their cases. (At argument at "public" hearings, each party summarizes briefly the arguments made.)

In jurisdictions permitting access to documents, the reasons for doing so are more taken for granted than theorized. But challenges to the CJEU's practices have prompted it to justify its rules limiting access to documents. When doing so, the CJEU has conceptualized parties' filings as part of the court's own processes that need to be sheltered from view; "the pleadings constitute the basis on which the Court carries out its judicial activities."²³ More by way of explanation comes from a 2010 decision in which the CJEU concluded that access to materials in pending cases would risk subjecting both the participants and the court to "external pressures" and "disturb the serenity of the proceedings."²⁴

A brief account of the CJEU's decisions on this issue reflect that openness could be understood as in service of

supporting democratic institutions but may also be used to undermine efforts to bring institutional authority into being. Thus, rather than see openness and transparency as end-states unto themselves, the drive to make decision-making accessible requires analysis of the goals that are to be served. The CJEU has explained its reluctance to embrace easy access to documents in part on the argument that doing so would subject the litigants to pressure about their positions and would undermine the “equality of arms,” in that non-EU litigants had no such obligations of disclosure.²⁵ The Court has thus shaped a presumption of closure in pending cases, subject to an individual assessment about whether that presumption should not preclude access to particular documents.²⁶ As for closed cases, the CJEU concluded that a case-by-case determination was again required, to consider whether disclosure would affect other pending cases.²⁷

That approach could be seen as in tension with foundational EU documents committed to openness and to transparency, which are expressly linked to democratic legitimacy. Indeed, as the CJEU explained, “the right of public access to documents of the institutions is related to the democratic nature of those institutions.”²⁸ In 2016, the issue of third-party access to documents returned to the CJEU through an individual’s request that the EU Commission give it submissions in its possession that were written by another party and presented to the CJEU.²⁹ Thus more of the puzzle of the relationship of “courts” to “openness” had to be excavated

against the backdrop of the affirmative commitments to open processes while also protecting “court proceedings.”³⁰

A 2001 regulation mandated “public access to all the documents drawn or received and held” by the European Parliament, Commission, and Council “in all areas of activity of the European Union.”³¹ But that regulation also provided that institutions “shall refuse access to a document” that would undermine “the protection of . . . court proceedings and legal advice . . . unless there is an overriding public interest in disclosure.”³² The EU Commission took the position that because it had no disclosure obligation under the regulation, it had no obligation to respond. The Commission lost in the General Court, before the Advocate General, and in the Grand Chamber.³³ Thus the current CJEU doctrine requires the Commission to respond to requests and potentially provide documents, but disclosure would not necessarily result, given mandates to decline to disclose based on weighing public and private interests.

The word *privatization* has yet more to untangle. One aspect is closing processes to make them private, and one justification is to protect disputants’ privacy. Privacy could be voluntary and ad hoc, or regularized and imposed. Such privacy could be part of a framework of rules or individualized, such as through nondisclosure agreements (“NDAs”) that include mandates for confidentiality in specific instances. In the United States, such NDAs may be focused on outcomes but can also apply pretrial, to documents exchanged through procedural rights to discovery. In addition, privacy

can entail insistence on secrecy, through sealing information or shredding records.

The term privatization also refers to a global phenomenon about allocation of power between governments and the private sector, which can take place under conditions of regulation or can be a part of deregulatory efforts to limit the authority of governments in general.³⁴ In terms of courts, privatization denotes a shift away from the sovereign monopoly over dispute resolution to permit non-public actors to have that power.

Less often discussed is what is taken for granted as the baseline, which is the accrual of sovereign power. I use the word "statization" to denote the numbers of activities that governments took on during the twentieth century.³⁵ Pressed by democratic egalitarian social movements, many countries committed themselves to be welfarist. Social, economic, and civil rights expanded and positive obligations followed.³⁶ Yet, much of the action is moving away from building state capacity and towards efforts to limit the use of government institutions – often in the name of efficiency.

Courts are one example of the services which came, during the last century, to be understood as entitlements for all.³⁷ As Lord Ryder put it, "open justice" encompasses "the principle of equal access to court," which is a "common law constitutional right in the United Kingdom."³⁸ A failure to provide genuine access to individuals and businesses results in a "democratic deficit."³⁹ Lord Ryder, the Senior President of Tribunals in England and Wales, was focused on how courts

could meet that challenge, and his answer was to rely heavily on digitalization.⁴⁰

Reflection is also needed about why questions of “open justice” – the title of this symposium – are on the agenda. Forty years ago, a segment on the privatization of courts and their replacements would have been unlikely.⁴¹ Indeed, even today, we remain awash with the *doctrinal openness* of courts, familiar because of layers of custom, practice, rules, and law.⁴² But as I will detail, despite the many textual commitments to open courts and public hearings, there is a pervasive *functional privatization* of court-based activities and of some forms of ADR/ODR, which undercuts openness and transparency in their many senses.

Courts, arbitration, and other forms of ADR are creatures of our own making, refashioned regularly as politics produces legal change. These processes are always interactive; practices, regulations, and constitutional doctrine shape – and reshape – the normative expectations of each. We are today in a struggle over norms about the power to bring claims, the rules to determine their merits, and the role not only of the public but also of courts. Those conflicts in turn are embedded in debates about the role of governments themselves and about whether goals of “open justice” remain central to political ordering.

To reflect on where we are now as well as on what may unfold requires understanding the pressures that have produced these new processes and the stakes in the changes underway. Analyzing the dynamics brings me to what Marc Galanter long

ago described as the ability of “repeat players” to use their resources and knowledge to structure procedures benefitting their interests rather than those of “one-shot” players.⁴³

Repeat players include lawyers and judges, governments and other entities that regularly use courts, and the media that reports on dispute resolution. The impact that law has on our lives makes me pause when using game metaphors. Yet Galanter’s terms identify how reiterative involvement provides insights *into*, and the potential for authority *over*, the procedures that have substantive impacts on rights and remedies. As his terms also reflect, resource asymmetries abound. Rather than (to borrow the English phrase) an “equality of arms,” profound disparities haunt today’s dispute resolution systems.⁴⁴

We are, of course, not the first generation to face these problems. An early proponent of what today we call ADR was Jeremy Bentham, who shared Galanter’s insight about the power of repeat players. Bentham famously railed against “Judge[s] & Co.” (lawyers), whom he believed developed common law practices that promoted their own self-interest.⁴⁵ Bentham argued that their legal system created “so thick a mist” that one could not, if “not in the trade,” get anywhere.⁴⁶ The “artificial rules” of the common law produced a “factitious” practice full of procedural obfuscation that cost clients and the public.⁴⁷ Civil courts were thus “shops” at which “delay [was] sold by the yard as broadcloth [was] sold by the piece.”⁴⁸

This symposium opened with an image of a king “giving justice under a tree.”⁴⁹ Bentham argued that once dispute resolution moved from the open fields of the Medieval era to the indoors, there was nothing *natural* about it. Bentham understood then what is clear today: social and political movements, interacting with technologies (his focus was on the architecture of buildings), shape what we expect courts to look like and what they do. Choices are always being made, and Bentham’s utilitarianism prompted him to call for radical reforms of the justice system in England.

Bentham famously opined: “Publicity is the very soul of justice. . . . It keeps the judge himself, while trying, under trial.”⁵⁰ Bentham spent the first decades of the nineteenth century advocating for “codification” (another word he coined) of law as one method of achieving publicity. Bentham thought written laws in an organized code, rather than promulgated in fragments through common law opinions, would make accessible what law demanded. Bentham also wanted to require judges to preside over a whole case so as to dispense justice swiftly,⁵¹ as he hoped that “oral interrogation before the judge in public”⁵² would avoid lengthy, slow, and costly written exchanges.

Why the insistence on openness and revisions of procedures to achieve it? What are the utilities and the politics of this form of knowledge production and its relationship to justice? Reiterating Bentham’s claims helps to understand their relationship to present issues. Bentham argued that publicity made several contributions. A first was

truth; he thought that public access to witness testimony would serve as “a check upon mendacity and incorrectness” – that public disclosures would make it easier to identify false statements.⁵³

Another was education, in that judges would want to explain their actions to those watching them. Courts were therefore both “schools” and “theatres of justice.”⁵⁴ And famously, Bentham lauded publicity’s disciplinary powers: “the more strictly we are watched, the better we behave.”⁵⁵ Bentham wanted the public to function as a “half real and half imaginary” Tribunal of Public Opinion, able to know the process of decision-making and the bases for the outcomes and therefore to assess whether the rules comported with its interests. That competency would enable the public to assess the decision-makers and hence to sit in judgment of judges and of the state that empowered them.⁵⁶

In addition, Bentham worried about state control of information. Bentham proposed that ordinary spectators (“auditors”) be permitted to make notes that could be distributed widely. (Today we might call such persons “bloggers.”) Those “minutes” would, Bentham argued, serve as insurance for the good judge and as a corrective against “misrepresentations” made by “an unrighteous judge.”⁵⁷ Bentham was not confident that courts would attract enough interest to have sufficient auditors; he proposed the incentive of paying them to observe and distribute information.⁵⁸

Bentham’s advocacy for simplified and public proceedings (brought about in part through legislative control) aimed to

enable public opinion to function as a “direct check” on judicial authority – to underscore or criticize courts’ legitimacy.⁵⁹ “Notification” of the public imposed oversight and a launch pad for reform. Publicity, “underwritten by simplicity,” would be the “main security against mis-decision and non-decision.”⁶⁰ At the center was publicity; “[w]ithout publicity all other checks are insufficient: in comparison with publicity, all other checks are of small account.”⁶¹

I should underscore that Bentham drew an important distinction between institutional publicity and personal privacy. Bentham’s enthusiasm for openness was focused on legitimating and on disciplining the power of judges and lawyers. He understood well that public processes could burden individuals. Bentham therefore argued for limiting openness if observers were unruly, so as to preserve “peace and good order.”⁶² Bentham also thought closure proper to “protect the judge, the parties, and all other persons present, against annoyance.”⁶³ Bentham therefore supported closure to “preserve the tranquility and reputation of individuals and families from unnecessary vexation by disclosure of facts prejudicial to their honour, or liable to be productive of uneasiness or disagreements among themselves,” or make public their “pecuniary circumstances.”⁶⁴ In short, Bentham limited his publicity principle for reasons ranging from “public decency” to state secrets.⁶⁵ Not surprisingly, Bentham’s list of circumstances for closure, like his arguments for openness, parallel those made in contemporary courts.⁶⁶

Bentham's concerns made him a proponent of reforms for another reason; he was an early advocate of what we now call "access to justice" (A2J). Although Bentham disdained natural rights, which he called "nonsense on stilts,"⁶⁷ Bentham's utilitarianism made him somewhat of an egalitarian.⁶⁸ Bentham described filing fees as "a tax on distress,"⁶⁹ and he argued for subsidies for those too poor to participate. He proposed that an "Equal Justice Fund" be established, supported by "fines imposed on wrongdoers," by the government, and by charitable donations.⁷⁰ Bentham wanted not only to subsidize the "costs of legal assistance but also the costs of transporting witnesses" and the production of other evidence.⁷¹ Bentham called on judges to be available "every hour on every day of the year," and he suggested that courts be on a "budget" for evidence to produce one-day trials and immediate decisions.⁷²

While Bentham was innovative, his insistence on publicity was built on practices familiar in the system that he criticized – the common law presumption (in part built on jury trials) that courthouses were open venues. Long before Bentham, one can find commitments to that precept. One example comes from the seventeenth-century founding documents for the English Colony of West New Jersey.

In all publick courts of justice for tryals of causes, civil or criminal, any person or persons . . . may freely come into, and attend⁷³

After the U.S. revolution, that proposition was embedded in state constitutions. The rituals from Renaissance times of the

public spectacles of adjudication became obligations of republican and democratic governments to welcome observers. “R-i-t-e-s” turned into “r-i-g-h-t-s,” as can be seen from excerpts of the Connecticut Constitution of 1818 and from Alabama’s 1819 Constitution.

“All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”⁷⁴

“All courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered, without sale, denial, or delay.”⁷⁵

Those propositions took material shape through the development of a special type of building that departed from the multi-function town halls of earlier eras. These segregated spaces – “courthouses” – came to dot the landscape, as you can see from this 1784 courthouse in Connecticut.⁷⁶

Figure 1



New London County Courthouse, New London, Connecticut, 1784.
 Architect: Isaac Fitch. Relocated to present-day location in 1839.
 Additions added in 1909 by Dudley St. Clair Donnelly, and in 1982
 by Hirsch and Persch.
 Source: <http://historicbuildingsct.com/?p=1574>

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On both sides of the Atlantic Ocean, “open justice” was an artifact of political agendas of the Enlightenment. Governments committed to building nation-state power had the economic resources to spend on public buildings and apportioned funds dedicated to building courthouses to serve as icons of law, justice, and their own authority. Persons walking into courtrooms not only had rights to observe what transpired therein, but also governments hoped that what they saw would prompt or renew commitments to the rule of their law. The professionalization of judges, lawyers, and architects, interacting with political commitments, forged a system in which courthouses became a signature of governments. The commitments to *doctrinal openness* and to *functional openness* were in service of the need to build state power.

I have used this image of an eighteenth century Connecticut courthouse because, even as the quaint building is still in use, it underscores the disjuncture between Bentham's era and ours. The numbers of people using courts, the buildings that house judges, and the practices of courts are very different. So too are the modes of communication. While Bentham could be styled a proponent of ADR, he did not live in a world in which his auditors had become not only our bloggers but also hackers. We have come to understand that they too may be a source of "mendacity," as well as a buffer against it.

The world that we inhabit, therefore, raises a question about whether claims for open courts are passé, in that many other institutions and technologies disseminate information about conflicts. A vivid example comes from what in the United States is called "*#MeToo*" (and in Europe, *BalanceTonPorc*, or other such phrases).⁷⁷ The web gives individuals the ability to tell their own stories of sexually predatory misbehavior and to hear others. Videos have been key to other popular outcries, such as when we watched airline employees drag a seated, ticketed passenger from an airplane and when we saw deadly encounters with police. Bentham's Tribunal of Public Opinion has indeed been empowered through publicity. In some instances, these exchanges have produced structural changes about how institutions respond to complaints, how people treat each other, and what law requires. A version of Bentham's "Tribunal of Public Opinion" has been put to work.

One of the terms in English for spreading this information is that these tapes and web posts have gone

"viral."⁷⁸ The word aptly captures the speed of transmission. And the word also points to the specter of contamination, which brings me to another aspect of the disjuncture between Bentham's era and ours. Bentham assumed that publicity would produce both oversight and then discipline that would produce a constructive link between the public and the institutions subjected to scrutiny. Twenty-first century theorists, however, see at least some forms of publicity as generating distrust and suspicion about the institutions subjected to mandates for public processes.⁷⁹

Moreover, Bentham's imagined public, reflected in his metaphor of a "Tribunal of Public Opinion," was predicated on the plausibility of constituting a singular public, understanding its own self-interests, aggregating preferences, and therefore enhancing the general welfare. But that postulate is belied by our experiences of the many competing and deeply divided public(s), with different understandings of their own self-interests than what others ascribe to them.⁸⁰ Today, political and critical theorists insist on the construction of preferences and multiplicity of points of views,⁸¹ just as art historians remind us that cubism broke the linear plane and refuted the singular perspective valorized in Renaissance art.⁸²

Further, we know well about another kind of public – what I would term a "predatory public," "trolling" on the internet, which can entail personal aggression against individuals and impose significant harms.⁸³ The injuries come from a too-easy

dissemination of information (true and false) about individuals.

Thus, Jeremy Bentham is not only invoked as the central theorist for our much-admired publicity of justice's "soul," Bentham is also the touchstone for modern public relations, advertising, and propaganda. Misinformation, disinformation, manipulated information, and too much information are all also aspects of our experiences of "publicity." Methods of manipulation have expanded through technologies, exemplified by a "social media black market" in which some individuals, in quest of celebrity, buy fake "followers" to claim larger market shares of public attention than they actually have.⁸⁴

If one concern is about accuracy and manipulation, another is about personhood and privacy. Tensions between free expression and privacy have preoccupied law for a long time, and the development of virtual exchanges has underscored the complexity of the impact of information flows. A leading contemporary example of efforts to address trade-offs comes from *Google Spain Sl. v. Agencia Española de Protección de Datos*, decided in 2014 by the Court of Justice of the European Union (CJEU) and shaping what has come to be referred to as a "right to be forgotten."⁸⁵ The Court concluded that webmasters had an obligation to take information off the web because of EU directives obliging deletion of "personal data . . . no longer necessary . . . to the purpose for which they were collected;" that mandate, however, had to be balanced with rights of "freedom of expression and of information."⁸⁶

I raise this case to make four points. First, it illustrates that individuals experience harm because new technologies make possible effortless dissemination across all boundaries. The ease of obtaining and exchanging information contrasts to what some refer to as the “practical obscurity” of the “public” records of courts.⁸⁷ While documents can be “public” in the sense that third parties may read them, if contained in physical form inside file drawers in courthouses, individuals have to know where to look for materials and have the resources to make labor-intensive site visits. Dissemination entails yet other costs.

Thus, and second, *Google Spain* reminds us that search engines create new opportunities and provide, as Robert Post put it, a “virtual communicative space in which democratic public opinion is now partially formed.”⁸⁸ Google does not just stockpile information; it organizes it for us to access. In these respects, search engines provide some of the functions Bentham ascribed to courts, which also compile and disseminate information. Google has its methods of deciding what materials to put up and the order of retrieval,⁸⁹ just as courts have rules on what documents are made public, the decorum required in in-person hearings, and the evidentiary boundaries.

Third, Google and other search engines are not only potential stand-ins *for* courts as “communicative spaces” but in practice, they *are* also courts, deciding on how to balance data protection rights and public access to the information in question. After the decision in *Google Spain*, the company

created an ad hoc Advisory Council that proposed guidelines.⁹⁰ Requests to take down information come from individuals, as well as governments arguing security needs.⁹¹ Refusals to delist are appealable to data protection agencies at the national level, and that access to appeals may prompt Google, as a repeat player, to develop presumptions of taking down information.⁹² Failures to delist can, under the General Data Protection Regulation coming into effect in the spring of 2018, also result in fines of not more than four percent of global revenues, which creates yet other incentives for data controllers to delist.⁹³

Google indicates that it makes decisions on a “case-by-case basis,” that it sometimes asks for more information, and that no requests are “automatically rejected by humans or by machines.”⁹⁴ Further, Google described the process as “complex,” requiring evaluation of factors such as the “requester’s professional life, a past crime, political office, position in public life,” and the authorship of the materials.⁹⁵ Examples provided included the delisting, at the behest of the wife of a deceased individual, of information on alleged sex offenses and decisions that delisted some URLs but not others related to individuals who were in political life.⁹⁶ As of the winter of 2018, Google reported that it had received, from 2014 through the winter of 2018, some 665,000 requests for delisting almost two and a half million URLs; Google reports it responded by removing more than forty percent (about 900,000 URLs).⁹⁷

Google is not the only company running its own in-house dispute resolution system. Another is Ebay, which reports it has a high volume system. Ebay describes dealing with sixty million disputes annually and records a high satisfaction by its users.⁹⁸ Companies may, like Google, employ the decision-makers or hire third-party firms (such as Modria) to provide services. Other companies require using their selected mechanisms for dispute resolution but many outsource to third-parties, such as the American Arbitration Association.

In addition to this proliferation of privately based court-like systems, accounts of what takes place come from the companies sponsoring them. Google puts on the web its "Transparency Report," which illustrates that the primary source of information about private courts such as that run by Google is what it and other providers tell us. The "corporation as courthouse" is not an open space in which third parties can freely enter.⁹⁹

Thus, and fourth, *Google Spain* also serves to represent the privatization of adjudicatory procedures. Google and other corporate dispute resolution systems have concluded that some forms of transparency are requisite but have not embraced the principles that "all courts shall be open" and that every "person can freely come and attend." Rather, we have Google's self-reports,¹⁰⁰ augmented by what it must tell webmasters,¹⁰¹ and what can be gleaned from reports posted about outcomes of these adjudicatory-like decisions and by way of the press, scholars' analyses, and litigation.¹⁰² For example, if Google or other web platforms decline to delist,¹⁰³ individuals can

appeal to national data regulatory bodies, and those cases may make their way to the CJEU.¹⁰⁴ Further, webmasters who receive Google's notice of delisting may also request that Google review a decision; those efforts can open windows to third-parties to learn about disputes.¹⁰⁵ And in principle, the many resulting issues are questions of EU law, and some reach Member State courts and the CJEU.¹⁰⁶ But absent the web engines offering full disclosures or legal mandates for third-party access, we have no way to assess the tens of thousands of decisions in which the EU requirement to balance personal privacy and public rights to information is being implemented.

Return then to Bentham's enthusiasm for "publicity" and realize that he is far from the only great analyst who now seems endearingly "innocent." So too were most commentators, entrepreneurs, and inventors of the web, talking just a decade ago about its great egalitarian force. Few foresaw how hackers could invade the systems – grabbing information about individuals' finances and health records, terrorizing specific people, altering market information, controlling streams of knowledge, and influencing and undermining elections. Nor were the myriad of questions in view about how to manage the information, whether to provide free access, the propriety of content control, and the authority of webmasters to render court-like decisions.

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In addition to being too optimistic about the complexity of “the public” and the uses to which openness and transparency could be put, my initial discussion did not engage an important facet of courts in Bentham’s era and in the century thereafter. Courts were then exclusionary institutions. The excerpts from the 1818 and 1819 state constitutions promised “every person” a right to a remedy in “open courts.” But, whether in Connecticut or in Alabama then, women and men of all colors were not treated equally in courts. “Every person” was not all of us.

To underscore this point, look at this mural, installed in 1938 in a courthouse in Aiken, South Carolina.



Figure 2

Justice as Protector and Avenger, Stefan Hirsch, 1938.
 Charles E. Simons, Jr. Federal Courthouse, Aiken, South Carolina.
 Image reproduced courtesy of the Fine Arts Collection, United States General Services Administration.

The artist saw himself as offering up a modern version of the Virtue, Justice. He wrote he had decided not to use the scales and sword or law book but rather to show her strength as "protector" and "avenger" and to use the red, white, and blue of the American flag in his palette.¹⁰⁷

But those who were in the court saw something else. A local reporter described the figure as a "barefooted mulatto woman wearing bright-hued clothing,"¹⁰⁸ and the federal judge who was to sit in front of the mural described it as "monstrosity," resulting in a "profanation of the otherwise perfection" of the courthouse.¹⁰⁹ The judge wanted the mural removed; the artist argued he had not intended to make any political statements and offered to lighten the skin tones. Federal and state officials were interested, but after a national public controversy, the denouement was that, as can be seen in Figure 2, brown drapes were placed on each side, and the mural was covered so it could not be seen.¹¹⁰ Despite the words – "equal justice under law" – inscribed on the U.S. Supreme Court's façade when the building opened in 1935, the U.S. was far from providing equal justice.¹¹¹ The unwelcomed image of a "mulatto justice" in the 1930s reflected how unwelcome people of color were in U.S. courts.

The substantive law and the rules of procedure changed in the wake of political and social movements of the second half of the twentieth century, to which we here are, of course, the heirs. To denote the impact of the "rights revolution," I have borrowed a snippet from Delaware's 1999 Constitution.

All courts shall be open; and every person for an injury done him or her in his or her reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense. . . .¹¹²

The amendments augment the familiar phrases (echoing the Magna Carta) of rights to remedies and open courts by adding a “him or her” so as to encode women’s authority into the text. (That decision was very much of its time, as contrasted with current concerns that gendered pronouns suggest dichotomies that do not take into account the range of sexual identities.)

The Delaware text reflects that, since Bentham wrote, courts have opened their doors in a deeper sense of accessibility. Employees can now call for legal accountings by their employers, just as prisoners can now challenge their custodians. Individuals (“vulnerable persons,” as some of the European case law puts it¹¹³) can seek protection from abusive family members, and women are no longer supposed to be “chastised” (beaten) by their husbands. Twentieth-century egalitarian movements produced a mix of constitutional and statutory law that not only recognized all persons as entitled to equal treatment, but also understood the terms of equality in different ways and welcomed an array of new participants into courts.

These new rights and these new participants turn courts, in my terms, into one of several *democratic venues*, obliged to treat all persons with respect and requiring state agents –

judges – to do so as well. In using the word “democracy,” I am not focused (as many others are) on the role played by lay jurors, temporarily holding the state’s power to render judgment.¹¹⁴ The aspect of “the democratic” of interest here is how courts can provide opportunities for the public to watch state actors in action, as they accord (or fail to provide) litigants, lawyers, and witnesses dignified treatment. The public also can see that disputants (be they employee or employer, prisoner or prison official) are required to treat each other civilly as they argue in public about their disagreements, misbehavior, wrongdoing, and obligations. Litigation is a social practice that forces dialogue upon the unwilling (including the government) and momentarily alters configurations of authority.

A body of law (what I described as doctrinal openness) reinforces this proposition.¹¹⁵ The “right to a public hearing” for criminal and civil proceedings is a familiar refrain in European law. The U.S. Supreme Court has many times insisted that criminal trials and related proceedings be open to the media and the public in general, and that lower courts recognize a right to civil trials and the hearings related to those processes.¹¹⁶ Thus, the right of access to courts has come to reference both the right of individuals to bring cases to courts and the right of third parties to watch. While litigation is often styled as a triangle, with the judge at the apex dealing with opposing plaintiffs and defendants, the depiction of a map of adjudication ought to be a square, with a fourth line required to denote the audience.

My focus on courts' function as venues of democracy makes another argument for why publicity is important today and requires a revision of the list of utilities that Bentham argued that publicity provided. Bentham saw courts as "schools for justice" because he thought judges would naturally want to explain their decisions to their audience. For me, the state is not only a teacher but also a *student*, reminded that all of us have entitlements in democracies to watch power operate and to receive explanations for the decisions entailed. The observers are, in this account, a necessary *part* of the practice of adjudication, anchored in democratic political norms that the state cannot impose its authority through unseen and unaccountable acts. Therefore courts are, like legislatures, a place in which *democratic practices* occur in real-time.

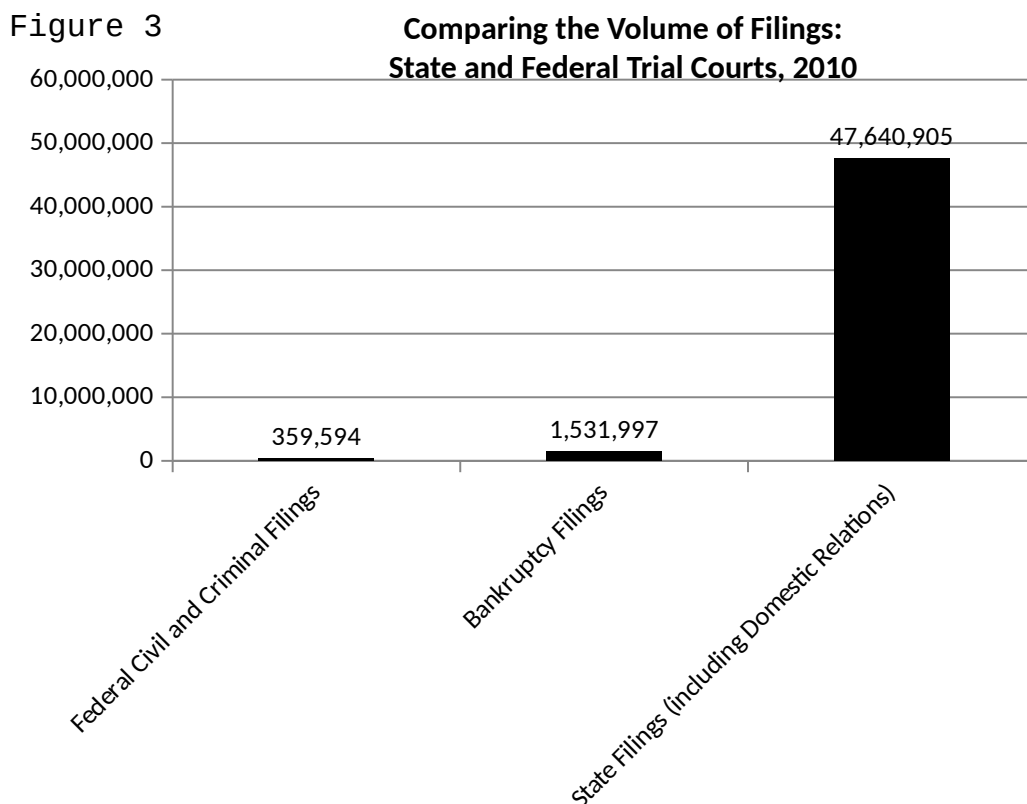
My account also assumes that law and norms – substantive and procedural – are not fixed but are constantly dynamic and debated and that court-based processes are one venue for that debate. This proposition is an element of my concerns about the functional privatization of dispute resolution and the use of online forms. Underlying the use of some fast-track techniques is the assumption that the job of law is to take the law "as is" and apply it to individual problems. But how do we know what the law is? Or how can we push for changes? Google's closed courts do not let us understand how to develop the balance between personal privacy and access to information, and neither do closed ODR or ADR processes in "public" courts.

Before examining more about privatization, I want to underscore another aspect of publicity that does work *for* courts. Statutes and regulations direct judiciaries to publish a wealth of data about themselves. In the United States, public records name every judge appointed in the federal and state systems. Statistics on case filings are likewise available, and such data collection began more than a century ago.¹¹⁷ The National Center for State Courts regularly offers comparative analyses of state court workloads.¹¹⁸ European data on costs per case and justice investment appears more extensive, as it provides measures across the Member States on a host of metrics in terms of investments in and outputs of the justice systems.¹¹⁹

This documentation is not only predicated on ideologies promoting open courts; the documentation is embedded in the political economy *of* courts. Judges need to convince their coordinate branches to provide funding, and the statistics on demand for services are regularly submitted as evidence of the need for support. In the U.S., this public data production has worked well for the federal courts, with its tiny sliver of adjudication. The federal judiciary continues to be successful in maintaining their budget allocations even as other segments of the government have suffered cuts.¹²⁰ State courts, where the bulk of litigation – more than 95 percent – takes place are less well-funded; about three percent of state budgets go

to courts, and many states have closed facilities and limited services.¹²¹

The issue of financing brings me from the discussion of the ways in which democratic egalitarianism *changed* courts to the ways in which democratic egalitarianism has *challenged* courts. One of the questions I posed at the outset was about why the topic of privatization and ADR are on the agenda now. The rights revolution of the twentieth century is part of the explanation for the focus on ADR/ODR and privatization. Legislatures provided a panoply of new rights and courts were required to welcome all comers.



Sources: Administrative Office of the U.S. Courts, Caseload Statistics, 2010, tbls C-1, D-1 and F, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx>. Data on state filings come from the National Center for State Courts, Court Statistics Project, National Civil and Criminal Caseloads (2010), <http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx>. The number of state filings is an estimate, as states do not uniformly report data on all categories; further, this number does not include juvenile or traffic cases.

This graph, *Comparing the Volume of Filings: State and Federal Trial Courts, 2010*, shows the volume of filings in the United States as of 2010. The high bar, denoting about 48 million cases, represents filings related to contract, tort, and family cases in state courts. In contrast, despite the visibility of the U.S. federal court system, it has a small set of cases. About 360,000 cases are filed a year, and bankruptcy filings in 2010 were about 1.5 million and have since declined considerably.¹²²

Figure 4

State Trial Court Filings, 1976-2008

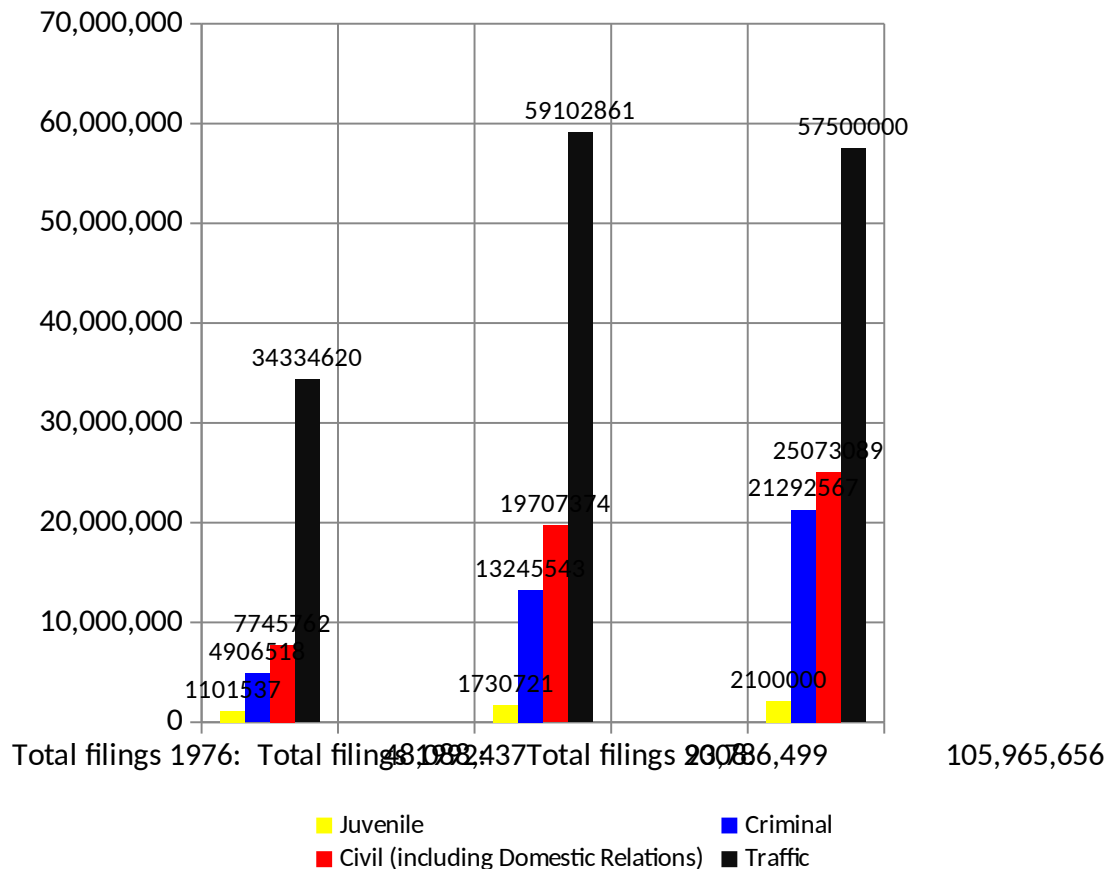


Figure 4, *State Trial Court Filings, 1976-2008*, maps the growth in state court litigation and disaggregates traffic, juvenile, civil, and criminal filings. As of 2008, more than one hundred million cases were filed in state courts.

In the United States (as in many other jurisdictions), not only have the numbers risen in terms of rights and the persons seeking them, but so have the fees charged to individuals using the system. The government, as a repeat player, turns both to legislatures and to users for support. Proponents of reforms (such as diversions from the criminal justice system, family waiting rooms, and ADR/ODR programs)

have relied on new fees to expand programs. Illustrative is a 2017 European volume on ODR, commenting that, while waivers or subsidies may be required in some instances, “charging users seems to be the only known way forward towards 100% access to justice.”¹²³ Deciding to add these charges reflects another impact of Galanter’s repeat player analysis. The individuals in need of such services are often one-shot players, unable to avoid the new fees. While individual sums may be relatively small “surcharges,” the cumulative impact can result in thousands of dollars of expenses. Absent systems in which fees are pegged to income, in practice courts have come to rely on regressive taxes to provide their services.

Lawsuits on both sides of the Atlantic have been filed in response; they argue that various fee systems are unlawful in light of commitments to open courts and equal justice. In 2014, the Canadian Supreme Court found impermissible an escalating set of fees charged by British Columbia when litigants’ trials lasted for more than three days.¹²⁴ Relying on Section 96 of its Constitution Act of 1867 (providing that the “Governor General shall appoint the Judges” of provincial courts),¹²⁵ the Court concluded that litigants had a right to “‘Section 96 courts.’”¹²⁶ As a consequence, British Columbia could not charge hundreds of dollars if doing so imposed an “undue hardship,” even for persons who were not “indigent” and therefore not exempt under the statute.¹²⁷

In 2017, the U.K. Supreme Court took a similar approach when it invalidated the high fees imposed by the government on claimants in its Employment Tribunals.¹²⁸ While the schedule

varied with the kind of claims brought by employees, fees ran from £1200 to £7200 at the first instance level, to be paid in different stages for filing, hearings, and the like. In contrast, fees in small claims courts were pegged to the value of the claim and ranged from £50 to £745.¹²⁹

Remissions (fee waivers) were available in the Employment Tribunals. But the U.K. Supreme Court found the increased fees unlawful, given that a “right of access to the courts is inherent in the rule of law” and that the administration of justice was not “merely a public service like any other.”¹³⁰ The U.K. Supreme Court spoke not only of the value of producing precedent, but also emphasized that businesses

need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations.¹³¹

Like the Canadian Supreme Court, the U.K. Court reasoned that obligations to pay fees ought not to be waived based only on indigency. Rather, the question was the impact of fees “in the real world”; when low- or middle-income households had to forego “the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees cannot be regarded as affordable.”¹³²

Challenges to court fees in the United States stem from the 1970s, as part of efforts (which were not successful) to

define poverty as a "suspect classification" under the Equal Protection Clause. The federal system and state courts generally had waiver provisions for persons seeking to proceed "in forma pauperis," but Connecticut did not provide those waivers for individuals seeking divorces. A class of "welfare recipients residing in Connecticut" argued that, by failing to create a method by which to waive the sixty dollars for filing and service required to obtain a divorce, the state had violated their federal constitutional rights.¹³³

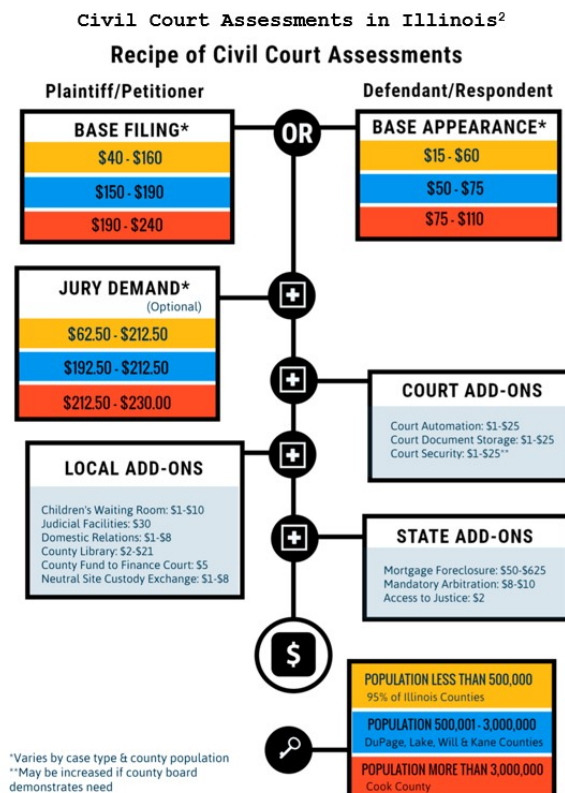
Justice Harlan, writing for the Court in *Boddie v. Connecticut*,¹³⁴ agreed that the combination of "the basic position of the marriage relationship in this society's hierarchy of values and the . . . state monopolization" of lawful dissolution resulted in a due process obligation for the state to provide access.¹³⁵ Although the concurrences argued for broader principles that would have applied beyond the context of divorce,¹³⁶ Justice Harlan's language shaped a narrow obligation to waive fees that permitted other exclusionary fees to remain in place. For example, the Court thereafter refused to require fee waivers when individuals sought to challenge a reduction in welfare benefits or to file for bankruptcy.¹³⁷ The Court likewise concluded that the inability to pay a fine after serving a sentence could not be the basis for continuing to keep a person in prison,¹³⁸ nor could the inability to pay - absent inquiries into capacity to do so - be the basis for jailing a person sanctioned by a fine itself.¹³⁹

The issue has returned to the fore as the kinds and numbers of court assessments have multiplied – reflected in the new term “LFO” – legal financial obligations incurred as jurisdictions raise fees and impose surcharges in civil, criminal, and traffic filings that put many people into debt.¹⁴⁰ Unlike the U.K. and Canadian, in which lawsuits have argued that amounts set are too high for middle-class and lower middle-class litigants, the U.S. challenges are focused on how the consequences of the inability to pay violate constitutional rights. For example, the use of money bail for persons otherwise eligible to be released is one practice that a few courts have recently found unconstitutional. While poverty is not generally a protected class, these decisions reason, intrusions on liberty have to be supported by rationality. If persons are eligible for release but then prevented because of high bail bonds, poverty is the basis for detention, and that is constitutionally impermissible.¹⁴¹ In addition, lawsuits have challenged whether states can automatically suspend the drivers’ licenses of individuals who owe courts fees.¹⁴² Yet another theory is that court-imposed fees undermine the impartiality of the judges deciding to levy them.¹⁴³

Litigation has been one response, and another is new legislation and policy changes. Concerned about this pile-up of fines and fees, many states have commissioned task forces on “access to justice,” and they, in turn, have proposed statutory revisions to reduce or limit fees. To provide a glimpse, I borrow a chart, described as “Recipe of Civil Court

Assessments" (figure 5) from a 2016 Task Force on Civil Assessments commissioned by the Illinois judiciary.

Figure 5



Each county in the state can decide on charges, plus the state has "add-ons" – resulting in fees of several hundred dollars – levied unless a person can show that he or she is "indigent." Moreover, not only are plaintiffs charged to file cases, but also defendants can be charged to answer them. That task force focused on both civil and criminal fees, which it termed "assessments" and others have called LFOs. Figure 6 provides a sampler from five major states in the United States

that details the wide variation in fees in both small claims court and regular first instance courts.

Figure 6

A Sampler of Fees in Civil Litigation, 2017

	Small Claims	General	Response	Surcharge	Child Support
California*	\$30-\$75	\$225-\$435	\$225-\$435	\$0-\$15	\$435 (0 if state agency)
Florida*	\$50-\$295	\$399	\$0		\$300
Illinois**	\$96-\$161	\$40-\$240	\$15-\$110	\$13-\$794	\$40-\$75
New York**	\$15-\$20	\$210	\$0		\$0
Washington*	\$14	\$200		\$15-\$40	

*Uniform across the state

**County-by-county variation

Of course, filing fees are the tip of the iceberg. Disputants pay vastly more for lawyers and experts. Thus, three important facets of contemporary civil litigation in the United States need to be brought into focus. A first is that many people are in court without lawyers. About a third of the civil filings in the federal courts are brought by individuals lacking lawyers;¹⁴⁴ on appeal, more than fifty percent who seek review do so without lawyers.¹⁴⁵ Research on state courts identified a set

of about 650,000 civil cases in which at least one side in three-quarters of the cases had no lawyer.¹⁴⁶ Most often that party was the defendant.¹⁴⁷

The second facet of U.S. litigation is that remarkably few cases actually involve much adjudication. The National Center on State Courts evaluated almost a million cases dealt with between 2012 and 2013.¹⁴⁸ Most of the civil cases involved debt collection, in which most debtor-defendants were not represented. Specifically, about two-thirds of the filings involved contract claims; more than one half of that set of claims were landlord-tenant and debt collection.¹⁴⁹ Almost all of the decisions took place without adjudication (defined to include summary judgments and court-annexed arbitration as well as trials) on the merits.

In federal court, the statistic that has become familiar is that one-in-one-hundred civil cases starts a trial. The shorthand is the “vanishing trial.” Opportunities for the public to watch proceedings other than trials are also diminishing. Research on “bench presence” counts the hours that federal judges spend in open court, whether on trial or not. One study reported a “steady year-over-year decline in total courtroom hours” from 2008 to 2012 that continued into 2013.¹⁵⁰ Judges spent less than two hours a day on average in the courtroom, or about “423 hours of open court proceedings per active district judge.”¹⁵¹

The numbers of unrepresented individuals and the dearth of adjudication may seem counter-intuitive, given the public face of courts. But a third facet of adjudication in the

United States helps explain that visibility, which is the role played by collective actions through rules authorizing “class actions” and through pre-trial consolidation as “multi-district litigation” (MDL) proceedings. As of 2016, of the 325,000 pending civil cases in the federal system, about a third were part of an MDL, in which a single judge is assigned to oversee and manage the pretrial phases of what, formally, are tens of hundreds of individual cases but functionally are handled in the aggregate.¹⁵²

Thus, while courts in the United States are populated by many people with no lawyers, much of the “real” litigation happens through scaling up by way of collective actions in which lawyers provide representation because of the economies of scale. Many of the lawsuits challenging the system of pricing of court services that I have referenced come through class actions.

* * *

To summarize, one of the reasons to have a discussion about the form taken by ADR is because it developed in response to the success of courts – welcoming new claimants and providing innovative remedies in the wake of the expansion of government functions. My account of the changes also requires revisiting the drivers of change. In Bentham’s days, the repeat players shaping the rules were “Judge & Co.,” – lawyers and judges. But today, the repeat players range from social egalitarian movements to governments, corporations, and

the media.¹⁵³ The rise of this array of repeat players underscores competing visions of courts. Some aim to distribute the social services that courts provide by enlisting their power to be and to achieve more egalitarian practices. Others seek to prevent use of those services.

John Rawls famously imagined a “veil of ignorance” to invite us all to make just rules without knowing how they would affect us.¹⁵⁴ No such veil is at work here. Rather, entrenched and new interest groups – some understanding they are likely plaintiffs and others seeing themselves as defendants – are playing for the rules about openness, transparency, privatization, and aiming to redefine the contours of “justice” systems.

This backdrop provides the frame for a brief overview of contemporary technologies and processes for decision-making in courts and in their alternatives/replacements. In some parts of Europe and in the United States, during the last decades of the twentieth century, governments reiterated commitments to litigation through their significant investments in new and large courthouses, as judges, lawyers, and architects succeeded in obtaining funds for signature buildings.¹⁵⁵ One translation of rising filings and a robust economy is figure 7, the federal courthouse in St. Louis Missouri, with its 29 stories and dozens of courtrooms.

Figure 7



Thomas F. Eagleton Federal Courthouse, St. Louis, Missouri, 2000.
 Architects: Hellmuth, Obata + Kassabaum, Inc. Photographer: The Honorable
 David
 D. Noce, U.S. Magistrate Judge for the Eastern District of Missouri. Photograph
 courtesy of and reproduced with the permission of the photographer.

But contrast that imposing building with the advice posted in 2014 on the website of the U.S. Courts. In a text box, the judiciary counsels that, to “avoid the expense and delay of having a trial, judges encourage the litigants to try to reach an agreement resolving their dispute.”¹⁵⁶ A translation of that admonition in ordinary practices comes from the federal “local rules” implementing the national regime in the District of Massachusetts. In a subpart entitled

"Settlement," the court proposes that at "every conference conducted under these rules, the judicial officer shall inquire as to the utility of the parties conducting settlement negotiations, explore means of facilitating those negotiations, and offer whatever assistance may be appropriate in the circumstances. Assistance may include a reference of the case to another judicial officer for settlement purposes. Whenever a settlement conference is held, a representative of each party who has settlement authority shall attend or be available by telephone."¹⁵⁷

This rule provides instructions for the judges who sit in a courthouse (figure 8), designed by the architect Harry Cobb, opened in 1998, and adorned with Ellsworth Kelly panels.

Figure 8



John Joseph Moakley United States Courthouse, Boston, Massachusetts.
 Architect: Harry Cobb, 1998. Photograph Copyright: Steve Rosenthal, 1998.
 Photograph reproduced with the permission of the photographer.

The courthouse has twenty-five thoughtfully adorned courtrooms. Each of the four walls is marked by stenciled arches of equal size to denote the four sets of participants in adjudication – the judge, the plaintiffs, the defendants, and the public – forming the square that ought to be substituted for the triad commonly in view that depicts judge and disputants in a triangle mimicking scales.

Figure 9



Interior of a courtroom, John Joseph Moakley Federal Courthouse, Boston, Massachusetts, 1998.
 Photographer: Steve Rosenthal. Photograph Copyright: Steve Rosenthal. Photograph reproduced with the permission of the photographer and courtesy of the court.

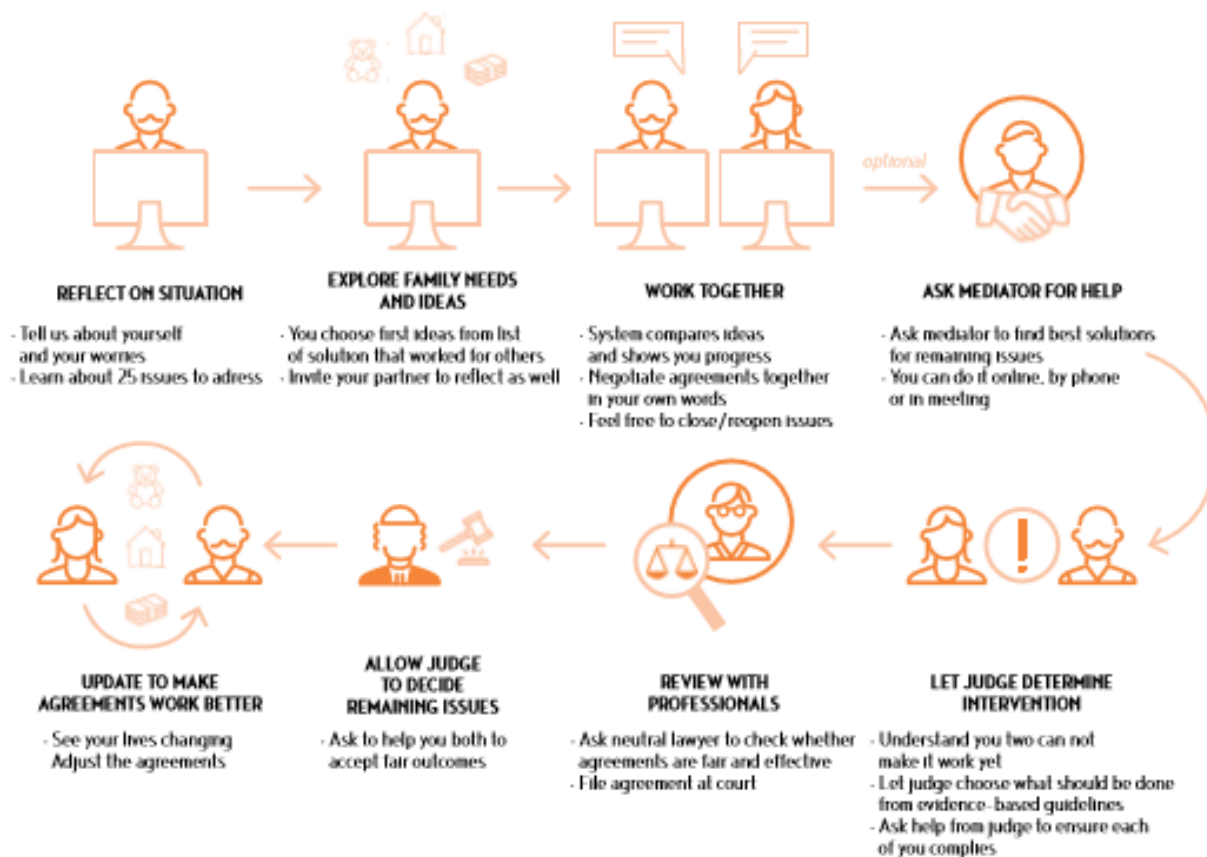
Even as a number of benches for observers have been built into the courtroom, rules of court have limited their relevance. As the excerpt from the federal district court of Massachusetts reflects, no place is written into its settlement practices for third party observation. That approach is not idiosyncratic. Across the country, published ADR rules rarely reference the public.¹⁵⁸ To the extent third parties are mentioned, the context is usually an admonition that confidentiality is required of participants in court-based ADR processes.

As I mentioned, of 100 civil cases filed in the federal system, one starts a trial. Less appreciated is that filings

are also flattening in both state and federal court systems. The denouement, as one esteemed trial judge put it, is that the image of a federal judge sitting on the bench in a black robe "presiding publicly over trials and instructing juries" is obsolete; it should be replaced by a picture of a person in business dress in "an office setting without the robe, using a computer and court administrative staff to monitor the entire caseload and individual case progress."¹⁵⁹

That point is made again, and celebrated, in a pictograph, borrowed from the 2016 Report entitled "*ODR and the Courts: The Promise of 100% Access to Justice?*".¹⁶⁰

Figure 10



Hiil, "ODR and the Courts: The Promise of 100% Access to Justice?," Online Dispute Resolution, 2016.

The images and text outline steps for responding to conflicts. Depicted are individuals behind computers working through whether they can reach a resolution. In another frame, a person is labeled as a mediator, and another a judge. The public is not in sight. The text of the monograph reflects its title, insistent that ODR will promote users' "fairness experience;"¹⁶¹ the "users" referenced are disputants. Unlike the 2017 account of the U.K. Supreme Court, requiring that

filing fees be limited in employment tribunals because everyone needs to know about the enforceability of rights, "which underpins everyday economic and social relations,"¹⁶² this monograph neither addresses the public nor describes how users and consumers should be understood as citizen-agents empowered to participate in shaping dispute resolution processes.

The exclusion of the public is not inevitable. Some ODR processes, such as those underway in the courts of British Columbia, include efforts to preserve the principle of openness¹⁶³ even as ODR is becoming what is "the court." Policymakers describe their efforts as responding to concerns about individual privacy and the appropriation of web-based information while maintaining commitments to institutional openness.¹⁶⁴ A new "Tribunal Decision Process" in British Columbia's Civil Resolution Tribunal ("CRT") aims to "replace a model" of in-person open dispute resolution of property disputes (that had been "generally open to the public") with an ODR process reliant on written submissions and available unless parties opt out.¹⁶⁵

The procedures aim to encourage a first phase, of negotiation. The policy did not organize access to materials related to settlement efforts that, it notes in its "Access to Records and Information in CRT Disputes" provisions,¹⁶⁶ often take place in private settings. As for the disputes that proceed to the Tribunal, the policy concluded that it was "not practical to provide the public with the opportunity to observe the Tribunal Decision Process as it occurs."¹⁶⁷

Instead, the policy offers “transparency . . . by posting CRT final decisions on a publicly accessible website” and permitting the public (upon payment of a fee) then to see the “evidence submitted.”¹⁶⁸

To summarize this aspect of my discussion, a good deal of court-based ADR/ODR/reconfiguration celebrates ODR as the answer to the “global crisis” in access to justice. These new technologies are argued to advance one sense of openness – *accessibility* for disputants - in part through lowering the cost of the process. Enthusiasm in many quarters runs high.¹⁶⁹ But much of the discussion of ODR and ADR ignores the other sense of openness, the role of third parties welcomed to observe. And, relatedly, also ignored is a role for collective action. The models are focused on single-file decision-making rather than on group-based information and resource sharing. This approach exemplifies the complacency I noted earlier. The implicit assumption is that *the law as we have it is good but what we are lacking is access to it*.

But what about how the law could/would/should change – in all directions? When rejecting high filing fees in the Employment Tribunal in the U.K., the Supreme Court insisted that access to courts was not “of value only to the particular individuals involved;” the Court cited a 1932 ruling (*Donoghue v. Stevenson*) as the example of an ordinary dispute resulting in a rule, that producers of consumer goods were under a duty to take care for the health and safety of the consumers of those goods, which was “one of the most important developments” in twentieth-century U.K. law.¹⁷⁰ Theorists from

Habermas to Pierre Bourdieu have analyzed the interplay between fact and law and the reflexivity that constructs our professional habitus. My concern about this functional privatization is on how democratic change can take place through iterative exchanges in courts and/or their replacements.

Procedures always allocate authority, and as Bentham instructed long ago, privatization takes away the public's authority to scrutinize, let alone to discipline, the decision-making and the norms that undergird it. Just as I cannot know how Google is balancing the interests under EU law on data protection and access to information, I do not know the judgments made and the norms promoted in these ADR-ODR courts.

* * *

What I have focused on thus far is the privatization of court-based processes. A brief account is in order of another form of ADR that is very visible in the United States, which are mandates to use arbitration in lieu of courts. I do not discuss large-scale investment and commercial or international arbitrations, but a host of smaller claims, arising from employment and consumer relationships and predicated on statutory, constitutional, and common law claims.

The legislation that is at the base of this practice in the United States dates from 1925. The Federal Arbitration Act (FAA) was heavily influenced by transatlantic developments and

aimed to make obligations in contracts to arbitrate enforceable by courts.¹⁷¹ The key repeat players who brought this statute into being were the Chamber of Commerce and the American Bar Association, and in particular the New York Bar Association.¹⁷²

For a period of about fifty years, the act was interpreted as only applying to genuine volunteers. In a 1953 U.S. Supreme Court decision involving a form mandating arbitration between a securities broker and a customer, the Supreme Court explained that even if some buyers and sellers dealt “at arm’s length on equal terms,” the federal securities laws were “drafted with an eye to the disadvantages under which buyers labor.” Moreover, arbitrators’ “award[s] may be made without explanation of their reasons and without a complete record of their proceedings.”¹⁷³ Hence, one could not examine “arbitrators’ conception of the legal meaning of such statutory requirements as ‘burden of proof,’ ‘reasonable care’ or ‘material fact’”¹⁷⁴

Thus, the Court stressed the need to regulate inequalities in bargaining power and the function of courts as obliged to enforce legal provisions and subject to appellate oversight. Deficits in the processes of bargaining and of decision-making meant that arbitration was for volunteers only. In other words, this excerpt reflects what I understand the law in the EU and in Canada and other jurisdictions requires – enforcement of arbitration clauses is predicated on the equality of those binding themselves to use that procedure.¹⁷⁵

But in the 1980s, the U.S. Supreme Court shifted its approach and held such mandates enforceable even if those clauses were in forms and even if the less-well-resourced party objected. At the time, the Court explained itself by noting that arbitration offered an “effective” means of enforcing rights. Over the decades, the Court’s doctrine has become increasingly insistent on using arbitration. To glimpse this approach in practice, I provide two pages from an exhibit in a Supreme Court case between the Equal Employment Opportunity Commission and Waffle House, describing itself on its form as “America’s place to work;” “America’s place to eat.”

Figures 11A/B



AMERICA'S PLACE TO WORK
AMERICA'S PLACE TO EAT®

MUST BE COMPLETED IN THE RESTAURANT

APPLICATION FOR EMPLOYMENT

(PLEASE PRINT PLAINLY)

TO BE COMPLETED UPON EMPLOYMENT

Work Location _____	Rate _____
Position _____	Date _____

To Applicant: We deeply appreciate your interest in our organization and assure you that we are sincerely interested in your qualifications. A clear understanding of your background and work history will aid us in placing you in the position that best meets your qualifications and may assist us in possible future upgrading.

Date JUNE 23, 1994
Social Security No. 251-75-4655
Name BAKOR ERIC SCOTT Telephone No. (803) 774-4777
Last First Middle
Present Address 106 OAKDALE ST. GASTON SC 29053
No. Street City State Zip
Next of kin to be notified in event of emergency: Name: Robert G OR Sylvia G BAKOR
Relationship: FATHER/MOTHER Address: 106 OAKDALE ST. GASTON SC 29053 Telephone No. (803) 774-4777

GENERAL INFORMATION

To Applicant: READ THIS INTRODUCTION CAREFULLY BEFORE ANSWERING ANY QUESTIONS IN THIS BLOCKED-OFF AREA. The Civil Rights Act of 1964 prohibits discrimination in employment practice because of race, color, religion, sex, or national origin. P.L. 90-202 prohibits discrimination on the basis of age with respect to individuals who are at least 40 years old. The following requested information is needed for a bona fide occupational qualification, business necessity, or other legally permissible reasons. Answers to any questions below will not automatically bar employment to any applicant. Questions pertaining to race, color, sex, national origin, age, and marital status are necessary to insure our compliance with applicable discrimination laws.

Race: WHITE Birthdate: 10/27/74 Sex: M Height: 5'7" in. Weight: 152 lbs.
Marital Status: Single ☒ Engaged ☐ Married ☐ Separated ☐ Divorced ☐ Widowed ☐
Number of dependents including yourself: 0 Are you a citizen of the U.S.A.? YES
Have you ever been bonded? NO If yes, on what job? _____
Have you ever been convicted of a crime in the past ten years? NO If yes, describe in full: _____
Are you now or have you been a user of or addicted to: Drugs NO Alcohol to excess

What kind of car do you drive? Make BUICK Model SKY HAWK Year 1985
Will you use your car to get to work? YES
If not, what method of transportation will you use to get to work? _____
Position(s) applied for _____ Rate of pay expected \$ _____ per/hr. \$ _____ per/wk.
Would you work Full-Time ☒ Part-Time _____ Specify days and hours if part-time _____
Were you previously employed by Waffle House? NO If yes, when and where? _____
List any friends or relatives working for us and where NONE (Name) _____
If your application is considered favorably, on what dates will you be available for work? TWO WEEKS FROM TODAY 19 94
Are there any other experiences, skills, or qualifications which you feel would especially fit you for work with the Company? I CAN A
CRUEL WORK IN THE FOOD BUSINESS FOR 4 YEARS.
Have you been refused a Health Permit to work at any occupation? NO If yes, explain fully: _____
Can you lift 20 lbs to shoulder height? YES
Are you able to remain standing on your feet for a full 7-10 hour shift? YES
Are you able to sweep, mop, etc.? YES
MILITARY SERVICE: Are you a veteran? NO If yes, dates of service: _____ Branch: _____
Rank attained: _____ Date/Type of dismissal: _____
Are you a member of any Reserve organization or National Guard? NO

• IMPORTANT • NOTICE TO APPLICANT

Before we can hire you, the Government requires that we review and verify certain information. Please bring the following items with you on your first day.

1. Drivers license with your picture AND
2. A U.S. social security card OR an original or certified copy of your birth certificate.

If you don't have any of the above, please tell the unit manager and he will tell you what other documents are acceptable for completing the I-9 form.

The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

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FORM # 4002

EXHIBIT A

PERSONAL REFERENCES (Not former employers or relatives)

Name and Occupation	Address	Phone Number
Krista Guster	P.O. Box 201 Gaston SC 29053	791-6601
Debbie Adams	104 Oakdale Str Gaston SC 29053	934-0797
NETA Bridger	P.O. Box 1416 Gaston SC 29053	791-7860

RECORD OF EDUCATION

School	Name and Address of School	Dates Attendance Mo./Year	Course of Study	Circle Last Year Completed	Did You Graduate?	GPA	List Diploma or Degree
High	Suwanee High School	90-94	Business	1 2 3 (4)	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		Diploma
College				1 2 3 4	<input type="checkbox"/> Yes <input type="checkbox"/> No		
Other (Specify)				1 2 3 4	<input type="checkbox"/> Yes <input type="checkbox"/> No		

WORK EXPERIENCE (List below last three employers, starting with last one first)

NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM		TO		DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
	MO.	YR.	MO.	YR.					
Little Ceasars Restaurant	2	94	-	-	PIC. Run crew; handle money (cash, credit, exp., change, etc.)	4.15	5.50	Still employed.	Patricia PHONE# 791-1704
Winn-Dixie	6	93	7	94	Deli. Ass mdr. Run crew, rest. Clean, etc.	4.35	4.35	School.	Buenece PHONE#
Bi-Ette	12	92	5	93	Wigger. Stocker	4.25	4.35	Manager. Medical. Work. etc.	Scott W. dale PHONE#

NOTICE TO EMPLOYEES

Failure to be truthful on the application may affect the applicant's subsequent ability to receive workers' compensation benefits.

The facts set forth above in my application for employment are true and complete. I understand that if employed, false statements or omission of facts called for on this application shall be considered sufficient cause for dismissal. You are hereby authorized to make any investigation of my personal history and financial credit record through any investigative or credit agencies or bureaus of your choice. I further understand that I am an "Employee at Will" and that Waffle House, Inc. does not guarantee my employment for any specific period of time.

In making this application for employment I also understand that an investigative consumer report may be made whereby information is obtained through personal interviews with my neighbors, friends, or others with whom I am acquainted. This inquiry includes information as to my character, general reputation, personal characteristics, and mode of living. I understand that I have the right to make a written request within a reasonable period of time to receive additional, detailed information about the nature and scope of this investigative consumer report.

I FULLY UNDERSTAND THAT IF ASSIGNED TO ANY POSITION WHEREBY MONIES, EQUIPMENT, OR OTHER SUPPLIES OF WAFFLE HOUSE, INC. ARE ASSIGNED TO ME, I SHALL BE ACCOUNTABLE FOR THE AFORESAID ITEMS AND LIABLE FOR ANY SHORTAGES IN SAME. I AGREE THAT WAFFLE HOUSE, INC. MAY DEDUCT FROM ANY MONIES DUE ME, AN AMOUNT TO COVER ANY SHORTAGES WHICH MAY OCCUR AND WILL INDEMNIFY WAFFLE HOUSE, INC. AGAINST ANY LEGAL LIABILITY FOR WITHHOLDING SAID SHORTAGES FROM MONIES DUE ME AS A RESULT OF MY EMPLOYMENT WITH WAFFLE HOUSE. IF THERE ARE ANY SHORTAGES OR LOSSES IN MONEY, FOOD, OR EQUIPMENT WHICH IS ASSIGNED TO ME OR TO WHICH I HAVE ACCESS, I AGREE TO SUBMIT TO A POLYGRAPH OR OTHER SCIENTIFIC EVALUATION TEST CONDUCTED IN COMPLIANCE WITH APPLICABLE LAW DURING ANY INVESTIGATION OF SUCH SHORTAGE OR LOSS, AS PART OF THIS APPLICATION PROCESS AND AS A CONDITION OF MY CONTINUED EMPLOYMENT, AT THE REQUEST OF WAFFLE HOUSE, INC. I AGREE TO SUBMIT TO TESTING TO DETERMINE MY USE OF DRUGS OR ALCOHOL. I UNDERSTAND THAT REFUSING TO SUBMIT TO A TEST OR A POSITIVE RESULT IN ANY TEST INDICATING DRUG OR ALCOHOL USE MAY RESULT IN MY IMMEDIATE TERMINATION FROM EMPLOYMENT.

IF THE POSITION TO WHICH I AM ASSIGNED SHALL BE A POSITION WHERE I NORMALLY RECEIVE TIPS, I UNDERSTAND THAT IT IS MY OBLIGATION TO REPORT ALL TIPS TO THE INTERNAL REVENUE SERVICE FOR INCOME TAX PURPOSES. THIS MAY BE DONE EITHER BY REPORTING THEM ON THE PRELIST OR ON MY TAX RETURN AT THE END OF THE YEAR. DELIBERATELY NOT REPORTING ALL INCOME COULD RESULT IN SEVERE PENALTIES.

I UNDERSTAND AND ACKNOWLEDGE THAT WAFFLE HOUSE IS TAKING A CREDIT AGAINST MY WAGES FOR TIPS RECEIVED, IN THE EVENT I DO NOT RECEIVE TIPS EQUAL TO THAT CREDIT. I SHALL NOTIFY MY UNIT MANAGER SO THAT MY TIPS CAN BE COUNTED AND AUDITED TO ESTABLISH WHAT LEVEL OF TIPS I AM MAKING. I UNDERSTAND WAFFLE HOUSE, INC. IS ALSO BOUND TO REPORT TO THE IRS THE AMOUNT OF THOSE TIPS THAT THEY COUNT. THE TIPS COUNTED WILL BE POSTED BY THE UNIT MANAGER ON THE PRELIST.

MEAL POLICY: As a part of your compensation, Waffle House allows its employees to eat during their shift at a reduced rate. This includes 1 full meal if your workday is 4 hours or less and 2 full meals if your workday is over 4 hours. In addition, beverages and snacks as desired are allowed. The only limitation is that dinner steaks, chicken and pork chops are not offered under this meal policy. Please try to eat the meal at some time during the shift. However, this should be during a slow time and must not interfere with customer service. To cover the cost of the meal, drinks, snacks and the time to eat these items, Waffle House will deduct from your paycheck an amount based on the number of hours worked that day. Please see your Unit Manager for the schedule of meal charges.

I have read and understand the above notice and agree to comply with the provisions above.

Signed this 23 day of June, 19 94 [Signature]
Signature of Applicant

The micro-print on this job application is not easy to read, whether reproduced or in the original. Two key paragraphs are below. One is about using store equipment (or eating the food) and the other is about dispute resolution.

" . . . I agree that Waffle House, Inc. may deduct from any monies due me, an amount to cover any shortages which may occur and will indemnify Waffle House, Inc. against any legal liability for withholding said shortages from monies due me as a result of my employment with Waffle House. If there are any shortages or losses in money, food, or equipment which is assigned to me or to which I have access, I agree to submit to a polygraph or other scientific evaluation test conducted in compliance with applicable law"

"The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc. . . . will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties."¹⁷⁶

In the case in the U.S. Supreme Court, Eric Baker was hired and then fired after he had a seizure at work. He went to the Equal Employment Opportunities Commission (EEOC), which can pursue both back pay and injunctive relief if the EEOC investigates and believes that federal discrimination laws are violated. Waffle House argued that because Baker had signed the job application, the EEOC was prevented from bringing a

claim to help Mr. Baker get back pay. The majority of the U.S. Court disagreed – that such forms do not bind the government agency that had statutory authority to pursue both future and remedial relief.¹⁷⁷

The next form, Figure 12, was sent to me by my cellular service but is not unique to that provider.

Figure 12

DOCUMENT ACCOMPANYING THE PURCHASE OF A CELLULAR PHONE, 2002**INDEPENDENT ARBITRATION**

INSTEAD OF SUING IN COURT, YOU'RE AGREEING TO ARBITRATE DISPUTES ARISING OUT OF OR RELATED TO THIS OR PRIOR AGREEMENTS. THIS AGREEMENT INVOLVES COMMERCE AND THE FEDERAL ARBITRATION ACT APPLIES TO IT. ARBITRATION ISN'T THE SAME AS COURT. THE RULES ARE DIFFERENT AND THERE'S NO JUDGE AND JURY. YOU AND WE ARE WAIVING RIGHTS TO PARTICIPATE IN CLASS ACTIONS, INCLUDING PUTATIVE CLASS ACTIONS BEGUN BY OTHERS PRIOR TO THIS AGREEMENT, SO READ THIS CAREFULLY. THIS AGREEMENT AFFECTS RIGHTS YOU MIGHT OTHERWISE HAVE IN SUCH ACTIONS THAT ARE CURRENTLY PENDING AGAINST US OR OUR PREDECESSORS IN WHICH YOU MIGHT BE A POTENTIAL CLASS MEMBER. (We retain our rights to complain to any regulatory agency or commission.) YOU AND WE EACH AGREE THAT, TO THE FULLEST EXTENT POSSIBLE PROVIDED BY LAW:

(1) ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, OR TO ANY PRIOR AGREEMENT FOR CELLULAR SERVICE WITH US . . . WILL BE SETTLED BY INDEPENDENT ARBITRATION INVOLVING A NEUTRAL ARBITRATOR AND ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION ("AAA") UNDER WIRELESS INDUSTRY ARBITRATION ("WIA") RULES, AS MODIFIED BY THIS AGREEMENT. WIA RULES AND FEE INFORMATION ARE AVAILABLE FROM US OR THE AAA;

(2) EVEN IF APPLICABLE LAW PERMITS CLASS ACTIONS OR CLASS ARBITRATIONS, YOU WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST US . . . AND WE WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST YOU. . . .

(3) No arbitrator has authority to award relief in excess of what this agreement provides, or to order consolidation or class arbitration, except that an arbitrator deciding a claim arising out of or relating to a prior agreement may grant as much substantive relief on a non-class basis as such prior agreement would permit. NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T AFFECT THE SUBSTANCE OR AMOUNT OF ANY CLAIM YOU MAY ALREADY HAVE AGAINST US OR ANY OF OUR AFFILIATES OR PREDECESSORS IN INTEREST PRIOR TO THIS AGREEMENT. THIS AGREEMENT JUST REQUIRES YOU TO ARBITRATE SUCH CLAIMS ON AN INDIVIDUAL BASIS. In arbitrations, the arbitrator must give effect to applicable statutes of limitations and will decide whether an issue is arbitrable or not. In a Large/Complex Case arbitration, the arbitrators must also apply the Federal Rules of Evidence and the losing party may have the award reviewed by a panel of 3 arbitrators.

(4) IF FOR SOME REASON THESE ARBITRATION REQUIREMENTS DON'T APPLY, YOU AND WE EACH WAIVE, TO THE FULLEST EXTENT ALLOWED BY LAW, ANY TRIAL BY JURY. A JUDGE WILL DECIDE ANY DISPUTE INSTEAD;

(5) NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T APPLY TO OR AFFECT THE RIGHTS IN A CERTIFIED CLASS ACTION OF A MEMBER OF A CERTIFIED CLASS WHO FIRST RECEIVES THIS AGREEMENT AFTER HIS CLASS HAS BEEN CERTIFIED, OR THE RIGHTS IN AN ACTION OF A NAMED PLAINTIFF, ALTHOUGH IT DOES APPLY TO OTHER ACTIONS, CONTROVERSIES, OR CLAIMS INVOLVING SUCH PERSONS.

The text prevents me from using courts and from being in class actions in and out of court. It is another bad graphic, in that it cannot be easily read. Yet it is a good graphic,

because there is no point in reading it. Doing so is a waste of time. When I called the provider to object to its terms, I was told that no negotiation was possible – take it or stop using that cell phone service.

EU law would not enforce these terms; many state courts in the United States shared that view. California had both a statute and a decision holding such a waiver unenforceable; its rule was that in “a consumer contract of adhesion [when] . . . disputes . . . involve small amounts of damages . . . the waiver [of a class action] becomes in practice the exemption of the party ‘from responsibility for [its] own fraud.’”¹⁷⁸

But the U.S. Supreme Court, in a case in which the wireless service provider AT&T sought to enforce a class action ban, read the 1925 FAA as preempting state courts from reaching that judgment.¹⁷⁹ The Court returned to the 1925 statute and concluded that such state laws were an “obstacle” to the support of arbitration that is the federal policy.¹⁸⁰ The Supreme Court has also read the FAA mandate to govern claims of wrongful death of individuals in nursing homes – absent a showing that an individual was subjected to an unconscionable contract.¹⁸¹ Pending (as of this writing) are other cases about whether provisions of the 1935 National Labor Relations Act, protective of collection action, limit the ability of employers to impose single-file arbitration clauses, including for claims by workers of wrongly withheld wages.¹⁸²

Proponents of enforcing such mandates to arbitrate make two claims in support of enforcement. The first is contract,

that the parties consented. But read what AT&T has on its website about what it calls its "customer agreement." "We may change any terms, conditions . . . or charges . . . at any time."¹⁸³ That is why I have not used the term "contract" or "agreement" when discussing these documents. They are neither negotiated nor negotiable.¹⁸⁴

The second argument advanced is that arbitration is as effective as or better than courts. That position has been advanced by proponents of class action bans, including the U.S. Chamber of Commerce, which relies heavily on the language of "access to justice." In 2017, its lawyer argued that arbitration "empowers individuals, freeing them from reliance on lawyers" and making "dispute resolution easy to access and claims easy to prosecute."¹⁸⁵

But does it? Concerned about these arbitration mandates and collective action bans for some time, I have sought to find evidence of "empowerment." I honed in on AT&T because of its leadership role in enforcing class action bans. AT&T's mandates for consumer dispute resolution use the American Arbitration Association (AAA) to administer arbitration. Because the AAA complies with California requirements that arbitration providers post information on websites about consumer arbitrations,¹⁸⁶ learning about consumer usage of that process is possible.

A first point is that in total, the AAA administers relatively few consumer filings; it reports providing about 1400 to 1600 nationwide, each year.¹⁸⁷ The second point is that by filtering information about thousands of posted claims, we

could identify how many arbitration cases involved AT&T. From 2008-2017, the company had between 85-147 million customers. As the chart in Figure 13 summarizes, fewer than sixty people a year filed individual claims during this eight-year period.

Figure 13

Consumer Arbitration Filings with the American Arbitration Association

July 2009 – June 2017	Average per Year	8-Year Total
AT&T 85 to 147 million customers	56 consumer-filed 0 company-filed	451
AAA Consumer Data	1,485 consumer-filed 238 company-filed	13,780

Credit and Bank Consumer Filings Analyzed by the Consumer Financial Protection Bureau (2015)

2010-2012	Average per Year	3-Year Total
6 Product Markets 80 million plus consumers	411 consumer-filed 205 company-filed	1,847

As this chart also reflects, parallel findings come from the Consumer Financial Protection Bureau (CFPB), which analyzed consumer filings involving credit cards and loans. Again, hundreds of millions of people have credit cards, and the CFPB found about 400 filings per year during a three-year period.¹⁸⁸ In short, almost no consumers use this route to seek redress.

Of course, one explanation is that consumers have no legal claims. But regulatory actions, for example in 2014 against all the major wireless providers in the United States, make that assumption implausible.¹⁸⁹ Rather, returning to the opening discussion on different senses of transparency, the processes for pursuing claims are not easy to sort out. Arbitration administrators have websites, and one has to navigate bodies of rules and supplementary protocols that apply to different kinds of claims.

Further, the low value of individual claims (in the AT&T case in the U.S. Supreme Court, the consumer sought to recoup \$30 for an alleged violation of a fair advertising law) has to be measured against the costs of filing. The AAA imposes a \$200 administrative fee on consumers (and \$1700 on businesses), even as it also requires that employers and service providers absorb the costs of the arbitrators when employees and consumers seek redress.¹⁹⁰

Another barrier is the lack of information about the underlying wrongs. Arbitration providers' rules in the United States make the proceedings private; no third parties can attend without permission.¹⁹¹ In addition, some but not all of

the company or employer mandates to use arbitration include confidentiality clauses. Enforcement of confidentiality clauses in such documents has become commonplace, even as judges acknowledge the repeat player effect - that one side derives advantages from knowing the track record of past proceedings, while individual opponents do not.¹⁹² This mix of a lack of knowledge and a need for energy to figure out how to pursue remedies means that many individuals "lump it." Absent collective actions, they do not proceed alone.

In this context as in others, one can see the array of repeat players seeking to reshape rules. In 2017, the Consumer Financial Protection Bureau had proposed regulations that would have made unenforceable ex ante waivers of courts and of class actions for consumers dealing with credit card companies. The CFPB also sought to provide more public information about arbitrations. In addition to proposing that pre-dispute class action waivers not go into effect in the financial products and services markets over which it had jurisdiction, the CFPB also sought to require reporting on arbitration – databased on a website, with redactions if needed for individuals' privacy.¹⁹³ That rule required information on the initial claim requested, the documents mandating arbitration, and communications between individual arbitrators and the administrator (such as the AAA) related to problems if the service provider had not paid required fees.¹⁹⁴ (As I noted, a few states, such as California, have statutes requiring information on consumer arbitrations as well).

The opponents, with the Chamber of Commerce at the helm,

argued against the regulations. The Chamber and its allies won in October of 2017 when Congress (with the Vice President voting in the Senate) passed a resolution providing that the CFPB's proposed "rule shall have no force or effect."¹⁹⁵

Audiences outside the United States may think that the law I have recounted reflects the exceptional, the aberrational, and the unwise approach in the country. But as political upheavals of the last few years make plain, we do not live in insulated cultures. Efforts are underway around the world to expand the use of collective actions, and efforts are underway to try to block that expansion.

Prompts in Europe for more collective methods of dispute resolution come from recommendations from the EU to provide more by way of consumer redress,¹⁹⁶ and (as of the spring of 2018) for Member States to provide some forms of collective action for data protection claims.¹⁹⁷ In addition, Member States have shaped a variety of their own rules on collective actions.¹⁹⁸ The contours of permissible methods have been debated, including in the CJEU, which in the winter of 2018, interpreted consumer-protective provisions in its ruling in *Maximilian Schrems v. Facebook Ireland, Limited*.¹⁹⁹ The underlying claim was that Facebook has "committed numerous infringements of data protection provisions" under Austrian, Irish, and European law. Mr. Schrems, a frequent litigant, filed claims in Austria, his home, against Facebook Ireland, and he also sought to be permitted to proceed on behalf of others, who had assigned claims to him.

Under EU law, special jurisdictional provisions protect

consumers, entitled to file in their domicile rather than go to the defendant's domicile.²⁰⁰ Facebook challenged Schrems' reliance on that provision because he had two Facebook accounts, one for personal interactions and another for his professional work as a critic of Facebook and a lecturer on access to legal rights.²⁰¹ The consequence, according to Facebook, was that Schrems was not eligible to bring an action as a "consumer" and hence would have been required to file in Ireland.²⁰² The CJEU held that the test of a consumer was "objective," albeit not static, and that being in a trade or profession for some activities did not necessarily deprive an individual of being a consumer in another.²⁰³

The second question before the CJEU was whether, when litigating in Austria, other users who had assigned their claims to Schrems could be included in that action. The CJEU concluded that the protocol enabling filing in a consumer's domicile had been focused on the "economically weaker" party, rather than having been designed to enable collective actions.²⁰⁴ The result was that Schrems could not continue on behalf of the seven assigned claims referenced in the decision²⁰⁵ or the tens of thousands of consumers reported to have assigned claims to him.²⁰⁶

This is but one example of the law being developed in Europe on the forms and functions of collective action, which has become the focus of discussions by scholars of procedure. Sharing that focus is the U.S. Chamber of Commerce, which in 2017 published a monograph concerned about what it described as the "growth of collective redress in the EU,"²⁰⁷ that

reflected a worrisome trend of “making it easier to sue.”²⁰⁸ The Chamber sought to bring attention to what it calls “early warning signals” of problems that Europe will face if “U.S. class action firms” are permitted to import U.S.-style class actions. The Chamber warned against third-party financing, which it described as an “explosive growth of a new and unregulated litigation funding industry” that would exploit “loopholes” and result in inappropriately-filed lawsuits.²⁰⁹ Thus, the Chamber, a successful repeat player in the United States, aims to replicate its impact in Europe, which is again considering the parameters of collective actions. In January of 2018, the EU Commission issued a report on the implementation of its 2013 recommendations for collective redress and the EU Parliament has called for additional reports from experts.²¹⁰

* * *

Return then to my overarching themes: the political economy of procedural and substantive rules of law, the roles played by repeat players, litigant asymmetries, the centuries-old calls for reforms of court processes, and the functions of publicity and privatization. I have relied on Galanter’s template of repeat players and one-shot participants. Two points need to be clarified in conclusion. First, what procedures repeat players take to be in their interest is not fixed. Second, the complexity of the relationship between publicity and dispute resolution cuts in favor of insisting on forms of openness in service of redistributing power between

repeat players and one-shot participants, including those authorized to impose judgment.

To show the dynamics that can drive change, a bit more of the history of collective action and privatization in the United States is needed. As in cases like *Schrems*, one impetus for the creation of the U.S. class rule in 1966 was to help consumers who were seen as not having “effective strength” to proceed without collective action.²¹¹ Another was to make enforceable injunction remedies for civil rights plaintiffs, calling for racial desegregation of schools.²¹² But many commentators miss that the 1966 Federal Class Action Rule built on innovations from a decade earlier, when the U.S. Supreme Court revised its rules on personal jurisdiction and reinterpreted the due process class in 1950. The impetus for doing so came from the banking industry.

In the 1940s, banks in New York lobbied the state legislature to authorize them to pool assets in trust, so that smaller sums of money could be managed more economically and with a wider range of investment opportunities. But the banks worried that by merging funds, thousands of beneficiaries could potentially file claims objecting to investment decisions. To avoid that problem, the banks succeeded in obtaining a statute creating a special procedure, called a “settlement of accounts.” Banks were authorized by the state to file a kind of declaratory action against all the beneficiaries. Upon that filing, a court would appoint a guardian *ad litem* (a kind of class representative) to protect the beneficiaries. Once the banks received a judgment that the

investments had been prudent, that decision would be *res judicata* and preclude subsequent claimants.

But could New York State create that representative structure and exercise jurisdiction to bind beneficiaries all over the United States? In *Mullane v. Central Hanover Bank*, decided in 1950, the U.S. Supreme Court held that given the “vital interest of the State” in this form of collective investment opportunity, New York State could invent its new procedure to reach those beneficiaries.²¹³ A law review essay at the time described the ruling as “jurisdiction by necessity.”²¹⁴ *Mullane* changed U.S. law on territorial jurisdiction by relying on the presence of the trust in New York to permit the state to reach outside its boundaries and bind absentees who had not affirmatively agreed to participate.²¹⁵

While upholding the N.Y. collective action procedure, the Court also found that the statutory system for providing notice to absentees was wanting. New York had required that information about this procedure be provided in the initial investment documents and through newspaper publication.²¹⁶ The Court held that the bank had the obligation to provide the best notice “practicable under the circumstances,” and given that it had the names and addresses of living beneficiaries, mailed individual notice was required.²¹⁷ Thus, in terms of both jurisdiction over individuals and of their relationship with courts, the Supreme Court redefined the “process due.”²¹⁸ When the 1966 federal class action rule was adopted, it relied on that form of “notice” and required it once a class was

certified if monetary relief was sought; notice at the outset was not required for injunctive class actions.²¹⁹

Critics of today's class actions in the United States complain that millions of notices are mailed, while few people reply. But the value of those notices has to be understood in the term that Jeremy Bentham provided – publicity. Mandating notice forces knowledge about aggregate claims into the public sphere and produces the debates ongoing today about their fairness and utilities. Although individuals rarely respond to required notices, notice requirements put the fact of claiming into the mailboxes of millions and onto the public screen.²²⁰

The twentieth-century development of collective actions undermines another dichotomy, between disputants and litigants. Old style adjudication put the disputants in one category and the public in another. But collective actions blur those lines, as the absentees are constructed to be parties (and bound, under U.S. law) but they are also in some ways observers. No one expects participation from the hundreds or the thousands affected by the judgments. Just as collective actions are a form of publicity, banning class actions is one way to privatize process. Conflicts about rules on collectivity are part of the larger debate about enforcement of legal obligations. The challenges of single-file pursuit means that courts and their replacements need to see their own dependence on groups, be they non-profits or government enforcement or collectives constituted by other means, as contributors to the functioning and the legitimacy of their proceedings.

Figure 14 brings me to my closing point, about the need to build in the public, sometimes regulated, into dispute resolution system. The pictogram below comes from the volume I referenced on ODR, and it was proffered to depict old-style adjudication.²²¹

Figure 14



Hiil, "ODR and the Courts: The Promise of 100% Access to Justice?," Online Dispute Resolution, 2016

The judge is shown weighing the law, symbolized through the books, against the claims of disputants who are shown as two people. Missing in this triangle are all of us – whether part of aggregates in collective actions or in the audience, engaged as participants in courts, enabled to function as democratic venues in which to view debates about what law means and how it should change. This vision of the landscape of dispute resolution makes apparent that public and private providers seem not to believe in the need to demonstrate the propriety of their exercise of authority. They do not seem themselves as in dialogue with equally-authorized others – the many public(s) – who, as I said at the outset, sit both to be educated and to educate those authorized to impose judgment. Google can name its reports “transparency” but it controls the screens through which we see what it decides to report. The assumption is that the political capacity to decide about legal misbehavior does not depend on welcoming the public as

central participants in the processes of judgment.

My goal is not to impose an unfettered public on ODR and on the replacements for courts but to transpose the norms of public engagement in courts to their replacement/alternatives. Openness under these conditions requires the many publics to behave respectfully whenever present, be the procedures styled ADR, ODR, or something else. Therefore, rules can be crafted to recognize the risks and harms of dissemination of private information on the web while also recognizing the risks and the harms of private dispute resolution.²²² Moreover, rules need to permit collective actions not only in courts that are live but also online and, if mandates to arbitration remain in force, in that form as well. Doing so is not fanciful, as class action arbitrations in the United States have taken place through rules of providers such as the AAA, which modeled its approach on the federal class action rules. Binding absentees is an evident concern,²²³ and one response has been to craft a “hybrid,” in which judges certify classes and arbitrators rule on other claims.²²⁴

Generating more methods to create group-based litigation to provide resources for litigants and to seek public processes requires political will. The question is whether, across the spectrum, repeat players do or will understand the utility of a system that includes both public access and collective action. Above, I pulled together a range of rules privatizing process. Yet, as I have also sketched, pressures are emerging by challenging the political legitimacy of the institutions generating outcomes.

For example, the need for more legitimacy is said to have animated the UNCITRAL rules on increased transparency of investment arbitration.²²⁵ The market is also a factor, as there are proposals to create a Multilateral Court for Investment Disputes,²²⁶ as well as efforts to argue that because states are parties, the arbitration is a court from which references can be made to the CJEU.²²⁷

Rejection of privatization is vivid in the context of the popular mobilization of “#MeToo.” The outpouring of stories about predatory behavior shows that secrecy has its costs, both for third parties who might have avoided being put in harm’s way and for those directly involved. The reiterative *cri de coeur* has been for accountability, which reflects how, in the past, the results of investigations into misbehavior have been closed off.

In the fall of 2017, members of the U.S. Congress proposed to protect court-based remedies for sexual harassment claims filed by employees by exempting them from being routed exclusively to closed arbitration.²²⁸ Arbitration providers are likewise concerned about their market share and reputation. They have new incentives to distinguish arbitration from “closed” proceedings per se, and some are reconsidering how to treat sexual harassment claims. Those worries were given new grounding when Microsoft announced it would discontinue arbitration requirements for sexual harassment claims. The public sector weighed in soon thereafter, in an unusual letter sent to the congressional leadership in February of 2018 by all fifty state Attorneys General. They “strongly support[ed]

appropriately-tailored legislation to ensure that sexual harassment victims have a right to their day in court."²²⁹

The political appeal of a day in court ought to be seen for those accused as well as for those accusing individuals of misbehavior. #MeToo exemplifies the ways in which the dissemination of information without the constraints of legal process makes it hard to sort among different kinds of harms, to probe the accuracy of information, and to calibrate sanctions.²³⁰ This rebellion against secrecy should therefore serve as a reminder of what court-based, public processes can offer: deliberate decision-making that insists on due process norms of even-handedness and that requires analysis of liability and remedies appropriate to the misconduct, when established.

Not only does the act of rendering judgments require knowledge, but assessing the justice of those judgments requires that third parties be able to understand particular cases, watch interactions, and know the systems in which individual judgments are made. Without some forms of public access, one cannot know whether fair treatment is accorded regardless of litigants' status, and that the remedies required are appropriate. Without oversight, one cannot ensure that judges are independent of parties. Without independent judges acting in public and treating disputants in an equal and dignified manner, outcomes lose their claim to legitimacy. And without public accountings of how legal norms are being applied, one cannot consider the need for revisions of underlying rules, remedies, and procedures by which to decide

claims of right. We lose the very capacity to debate what our forms and norms of fairness are. Whether we call it "court," or "ADR," or "ODR, without openness, we cannot decide whether the processes or resolutions are just.

¹ Judith Resnik, Arthur Liman Professor of Law, Yale Law School. Draft, March 2018, not for distribution without permission. © All rights reserved. Thanks are owed to many, and especially to Burkhardt Hess, Ana Koprivica, and Marta Requejo Isidro at the Max Planck Institute, as well as to participants at the conference, Open Justice, organized by the Max Planck Institute, Luxembourg, in cooperation with Saarland University. Their generosity enabled me to understand a good deal more about the nuances of European law. Thanks are also due to Denny Curtis, John Langbein, Hazel Genn, Daniel Markovits, Sadie Blanchard, Nancy Welsh, Tanina Rostain, Shannon Salter, Stacie Strong, and Darin Thompson for many exchanges; to participants in the faculty workshop at University of Texas, Austin; to current and former law students Jason Bertoldi, Matt Butler, David Chen, Kathleen Claussen, Greg Conyers, Adam Grogg, Kate Huddleston, Clare Kane, Adam Margulies, Catherine McCarthy, Michael Morse, Devon Porter, Heather Richard, Regina Wang, Emily Wanger, and Iva Velickovic for so much thoughtful engagement; and to Bonnie Posick for her expert advice and editorial assistance. Thanks are also owed to Ryan Boyle, Vice President, Statistics and In-House Research, and to staff at the American Arbitration Association for clarifying data questions, and to Philip Schofield, for guiding me through materials from the Bentham Project at UCL.

² This panel was one of several in the Max Planck Institute's *Open Justice* Conference, held Feb. 1-2, 2018 in Luxembourg. Other panels addressed rights to public hearings in civil and in criminal proceedings in Europe, appointment of judges, and communicating with the public.

³ See Ana Koprivica, *Revisiting the Principle of Public Hearings in the Light of the Ongoing Reform in Germany: Much Ado about Nothing?* (working paper, on file 2017); and published in S. Clavara, & T. Garber (Eds.), *Grundsätze des Zivilverfahrensrechts auf dem Prüfstand: 5. Österreichische Assistententagung zum Zivil- und Zivilverfahrensrecht der Karl-Franzens-Universität Graz NWV 73-90* (Vienna, July 2017).

⁴ See TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (Dimitrij Euler, Markus Gehring & Maxi Scherer eds., 2015): Janice Lee, *The Evolving Role of Institutional Arbitration in Preserving Parties' Due Process Rights* (SSRN, 2017). Arbitration practices may also be a source of inter-jurisdictional exchanges and the default procedure when alternatives are not specified. See Gilles Cuniberti, *RETHINKING INTERNATIONAL COMMERCIAL ARBITRATION: TOWARDS DEFAULT ARBITRATION* (2017); *The Recognition of Foreign Judgments Lacking Reasons in Europe: Access to Justice, Foreign Court, Avoidance, and Efficiency*, 57 ICLQ 25 (2008).

⁵ Hazel Genn, *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW*, (Hart, 1999); Hazel Genn, *JUDGING CIVIL JUSTICE* (Hamlyn Lecture, 2008).

⁶ Sir Ernest Ryder, *Securing Open Justice*, <https://www.judiciary.gov.uk/wp-content/uploads/2018/02/ryder-spt-open-justice-luxembourg-feb-2018.pdf> (lecture/web site, Feb. 1, 2018); John Sorabji, *The Online Solution Court: A Multi-Door Courthouse for the 21st Century*, *Civil Justice Quarterly* (2017). MINISTRY OF JUSTICE, *TRANSFORMING OUR JUSTICE SYSTEM* 5 (2016), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf [<https://perma.cc/HS29-HPWP>]; see also Joe Tomlinson, *A Primer on the Digitisation of Administrative Tribunals*, UNIV. OF SHEFFIELD 14-17 (Sept. 12, 2017),

<https://lawandgoodadministration.files.wordpress.com/2017/09/a-primer-on-the-digitisation-of-administrative-tribunals1.pdf> [<https://perma.cc/9FNW-HEPV>]; Dame Hazel Genn, Dean, Univ. Coll. of London Faculty of Laws, 2017 Birkenhead Lecture (Oct. 16, 2017) (on file with author).

⁷ The British Columbia provisions are at *Rules, CIVIL RESOLUTION TRIBUNAL* 3, 5 (July 12, 2017), <https://civilresolutionbc.ca/wp-content/uploads/2017/07/CRT-rules-effective-July-12-2017.pdf> [<https://perma.cc/2PQF-YN5Q>] [hereinafter British Columbia CRT 2017 Rules].

⁸ See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015) [hereinafter Resnik, *Diffusing Disputes*].

⁹ Cécile Chainais, Public Hearings in Civil Proceedings (MPI-Luxembourg/manuscript on file, 2018).

¹⁰ Fed. R. Civ. P. 16 [subsection] (1983). The terminology and the import of its changes are analyzed in Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793 (2014).

¹¹ For example, a 2015 Pound Civil Justice Institute Forum entitled its symposium, "Judicial Transparency and the Rule of Law," and many presentations focused on aspects of obligations for courts to be open as part of the concern about transparency. See, e.g., Nancy S. Marder, *Judicial Transparency and the Rule of Law*, Pound Civil Justice Institute 2015 Forum for State Appellate Court Judges (2015), <http://www.poundinstitute.org/sites/default/files/2015PoundForumPaper-NancyMarder.pdf>.

¹² See David E. Pozen, *Transparency's Ideological Drift*, 128 Yale L. J. (forthcoming 2018), SSRN [number]. Pozen tracked the progressive aspirations for transparent government administration, presumed to generate better processes that in turn would produce faith in and a more rational acting government. He argued that transparency has come to be seen as an independent metric of "good governance" that can be marshaled to undermine government authority and that a nuanced understanding of its regulatory utility and limits is needed.

¹³ The use of the term transparency is used in a similarly broad fashion in TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION, *supra* note __, at 5.

¹⁴ As Lord Ryder explained, "open justice" encompasses "the principle of equal Access to court," which is a "common law constitutional right in the United Kingdom." See Ryder, *supra* note __, at para. 3.

¹⁵ For example, Article 31 of the Statute of the Court of Justice of the European Union states: "The hearing in court shall be public, unless the Court of Justice, of its own motion or on application by the parties, decides otherwise for serious reasons." Statute of the Court of Justice of the European Union (Consolidated Version), CURIA, art. 31, https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf. *Public Hearings*, CURIA, https://curia.europa.eu/jcms/jcms/Jo2_22322/en/. The public can listen to each of the parties' presentations. The custom is for the

lawyers to provide an uninterrupted summary of the arguments, and thereafter, judges ask questions of any of the advocates. The commitment to orality raises questions about the lawfulness of plea bargaining in criminal proceedings. See Katrin Gierhake, *Public Hearings in Criminal Proceedings* (MPI paper, Feb. 2018); Koprivica, *Revisiting the Principle of Public Hearings*, *supra* note __, at 73-90.

¹⁶ The Brazilian Constitution has two provisions mandating openness. A first is "Art. 5º - LX, providing that "the law may restrict publicity of procedural acts only if required to defend privacy or the social interest." The other is Art. 93 - IX, which states that " all judgments of judicial bodies shall be public, and all decisions shall be substantiated, under penalty of nullity; in cases in which preservation of the right of intimacy of the interested parties in secrecy does not prejudice the public interest in information, the law may limit attendance at determined occasions to only the parties themselves and their attorneys, or only to the latter." (translation by <https://www.constituteproject.org/>, original http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm). The Code of Proceedings provides for exceptions, and regulations also come from the National Council of Justice. Portuguese provisions, not available to my knowledge in English, are at http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm; and Resolução Nº 215 de 16/12/2015). Art. 22 provides that "The sessions of collegiate organs of the Judiciary Power are public and shall be, whenever possible, live broadcasted online, being considered each organ or tribunal's internal rules, as well as its budgetary availability" <http://www.cnj.jus.br/busca-atos-adm?documento=3062>. Thanks to Juliana Cesario Alvim Gomes for this information and the translations.

One researcher concluded that the live televised broadcasting of deliberations, begun in 2002, resulted in the court's justices behaving "as politicians," seeking "to maximize their individual exposure" to the public. Thus, judges talk more in discussion with their peers, and write longer decisions. See Felipe de Mendonça Lopes, *Television and Judicial Behavior: Lessons from the Brazilian Supreme Court* 9-10, 21-22 (draft Oct. 2017), <https://lawle2014.files.wordpress.com/2017/10/felipe-lopes-artigo-8e0c2f65ae1b52d70e73a447fa5d07885d5a8f73-arquivo.pdf>, at 3. The court also has a radio station partially dedicated to broadcasting, and it has a TV channel, and sometimes uses YouTube. See Virgílio Afonso da Silva, *Deciding without deliberating*, 11 I•CON 557, 580 (2013). Da Silva argued that the televised proceedings were but one facet of practices producing an individualized approach to adjudication and that such publicity could work to limit frank exchanges and in some respects render a justice less "open" to differing viewpoints and less willing to try alternative approaches. *Id.* at 580-582. The concern was that the public interactions, along with other practices, undercut fulsome deliberation. *Id.* at 584.

¹⁷ India is one example. See Aparna Chandra [dissertation on the India Supreme Court's use of international law, Yale Law School, date]

¹⁸ In the United States, California is the famous example. See Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004). A debate in the federal system about whether courts can publish decisions described as "without precedential value" or "not for citation" entailed arguments that a court constituted under Article III had no power to issue a judgment but stated

others could not rely upon it in subsequent cases. See *Anastasoff v. United States*, 223 F.3d 898 (8th Cir.), *vacated en banc as moot*, 235 F.3d 1054 (8th Cir. 2000). See also Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1530 (1994).

¹⁹ See, e.g., *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93–96 (2d Cir. 2004); *United States v. Amodio*, 44 F.3d 141, 145–46 (2d Cir. 1995); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983); For discussion of the doctrine on what constitutes a “judicial document” and its potential application to ADR, see Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, Economic Inequalities, and Open Courts and Arbitrations*, 96 N.C. L. REV. — (forthcoming 2018) [hereinafter Resnik, *Open Courts and Arbitration*].

The U.K. changed its practice in the 2006 procedural reforms and permitted some non-party access to certain filings. See 2006 CPR r. 5.4C (Civil Procedure (Amendment), Rules 2006, SI 2006/1689); *Part 5-Court Documents*, Ministry of Justice r. 5.4C (Nov. 28, 2017), <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part05>; see also Civil Procedure (Amendment) Rules 2006, http://www.legislation.gov.uk/uksi/2006/1689/pdfs/ukxi_20061689_en.pdf (original print PDF version of the 2006 Amendment adding rule 5.4C); *Practice Direction 5A-Court Documents*, Ministry of Justice (Jan. 30, 2017), https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part05/pd_part05a; *Practice Direction 5B-Communication and Filing of Documents By Email*, Ministry of Justice (Jan. 30, 2017), https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part05/pd_part05b. In November 2006, the Civil Procedure Rule Committee added sub-paragraph (1A) to rule 5.4C, providing that non-parties will not be able to obtain statements of cases filed before October 2, 2006, the date on which the original access rule came into force, without court permission. See Civil Procedure (Amendment No. 2) Rules 2006, SI 2006/3132. In January 2011, the Civil Procedure Rule Committee added sub-paragraph (1B) to rule 5.4C, providing that certain documents related to mediation may not be inspected by non-parties without court permission. See Civil Procedure (Amendment) Rules 2011, SI 2011/88. In October 2015, the Civil Procedure Rule Committee added a signpost after rule 5.4D to assist users. See Civil Procedure (Amendment No. 4) Rules 2015, SI 2015/1569; see also *Civil Procedure Rules*, Ministry of Justice (Nov. 24, 2017), <https://www.justice.gov.uk/courts/procedure-rules/civil>. For more on the diversity of common law traditions and limits on non-party access to documents, see Vanessa Yeo, *Access to Court Records: The Secret to Open Justice*, 2011 Sing. J. Legal Stud. 510 (2011).

²⁰ A summary of those access-to-document provisions can be found in *Sweden v. API and Commission*, Opinion of Advocate General Poiares Maduro, Oct. 1 2009, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-514/07>, para. 26–28 [hereinafter *Sweden v. API Maduro Opinion*].

²¹

As Maduro explained, of the EU Member States in 2008, Finland and Sweden were the only two to permit document access when cases were pending. *Id.* at para. 29. The more common practice was that courts could permit access in particular cases. *Id.* In a few Member States (including Luxembourg in which the CJEU sits), access to documents in case files was prohibited. *Id.* Maduro therefore proposed that it should be up to the CJEU to decide

in pending cases about access to submissions. *Id.* at para. 30. Once cases were closed, he opined that access should be permitted. *Id.* at para. 31-33. He argued the special utility for doing so in the CJEU system, where dissenting opinions are not issued.

The Grand Chamber concluded that access to materials in pending cases would risk subjecting both the participants and the court to “external pressures” and “disturb the serenity of the proceedings.” See *Sweden and Others v API and Commission* 21 September 2010, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, para. 93, [hereinafter *Sweden v. API*, Grand Chamber 2010 Decision]. The Court thus shaped a presumption of closure in pending cases, subject to an individual assessment about whether that presumption should not preclude access to particular documents in a pending case. *Id.* at para. 94, 103. As of closed cases, the CJEU concluded that a case-by-case determination was again required, to consider whether disclosure would affect other pending cases. *Id.* at para. 133-34.

²² See Article 20(2) of the Statute of the Court of Justice [web site]. That provision restricts access to the parties as well as the institutions (such as the Commission) whose decisions are the subject matter of the dispute. The rules do not provide third-party access. See *Sweden and Others v API and Commission* 21 September 2010, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541 para. 98 [hereinafter *Sweden v. API*, Grand Chamber 2010 Decision].

²³

See *Sweden v. API*, Grand Chamber 2010 decision, para. 130.

²⁴

Id. at para. 93.

²⁵ *Id.* at para. 86-91.

²⁶

Id. at para. 103, 104, 130.

²⁷

Id. at para. 131-136.

²⁸ *Id.* at para. 68. Pozen’s account of the progressive goals in the twentieth century in the United States for transparency in government to make it “stronger and more egalitarian” resembles the EU’s linkage of democracy, transparency, and legitimacy. As he chronicles, some of the mandates installed – such as open meeting laws – have created incentives to avoid creating advisory boards subject to such obligations. Pozen, *supra* note __, at 22-23. Moreover, those with resources can attend such activities and lobbyists can gather information to target individuals with whom they disagree. Some political scientists see the declining legitimacy of the U.S. Congress as linked to some of its “openness.” *Id.* at 24.

²⁹ See *Commission v. Breyer*, C213/15P, 21 Dec. 2016 (Opinion of Advocate General Bobek), and 18 July 2017 (Grand Chamber). Patrick Breyer sought pleadings submitted in a case brought by the Commission against Austria; the Commission had alleged that Austria had failed to implement the Transposition of Data Retention Directive 2006/24. The request related to proceedings that had closed, and not those pending. Breyer relied on EU Regulations, the TFEU, and Article 42 of the European Charter, entitled “Right of access to documents,” and providing that citizens of the Union have “a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.” See paragraphs 4-18 of

Advocate General Bobek's opinion.

³⁰ See Regulation on Access to Documents (Reg. 1049/2001), Art. A(3).

³¹ *Id.* The regulation aims to enable citizens "to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizens in a democratic system." See http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=186495&occ=first&dir=&cid=961696 4/26. But another provision (Declaration No 35 attached to the Final Act of the Treaty of Amsterdam) imposed the limitation that a "Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement." Reg. 1049/2001 para. 10 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001R1049>.

³² Reg. 1049/2001 at Article 4(2).

³³ The Advocate General's decision focused on the Treaty on the Functioning of the European Union (TFEU), Article 15(1), which states that "in order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible." Also relevant was Article 15(3), providing that "Any citizen of the Union . . . shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, . . . [subject to limits based on] public or private interest governing this right of access as decided by the European Parliament and the Council. . . . Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents" Regulations stated that they applied to the "Court of Justice of the European Union, the European Central Bank and the European Investment Bank" only when those institutions exercised "administrative tasks," in this context as distinct from "judicial tasks." *Commission v. Breyer*, C213/15P, 21 Dec. 2016 (Opinion of Advocate General Bobek) [paragraph 57-58].

In his Opinion, Advocate General Bobek departed from the idea that submissions by parties were part of the court's internal processes that the *Sweden v. API* had articulated. Rather, Bobek delineated a category of "internal judicial documents," which he described as drafted within the Court and for the Court, such as "draft opinions and judgments, preliminary reports, notes for a decision on procedure, or notes for deliberation." *Id.* at para. 126. He concluded that unless "the nature of the judicial function was to change considerably, those documents cannot be concerned by openness." Bobek, *Breyer* 2016 opinion at para. 125.

In contrast, he detailed another category, "external judicial documents," which were either "drafted by the Court for the purpose of the Court's judicial communication with external bodies (parties, interveners, or the national courts) or . . . submitted by third parties to the Court in judicial proceedings, such as pleadings submitted by the parties, but also the requests for a preliminary ruling submitted by national courts." In his view, external documents ought to be accessible subject to specific reasons in individual cases for closure. *Id.* at 127. Bobek suggested that the Court "grant physical and remote access to external judicial documents upon request," and should "ideally" also

"provide access to certain documents of its own motion."

The Grand Chamber decision agreed that Breyer should be given the opportunity to request the documents; it did not address the proposal made by Advocate General Bobek for a general framework. Rather, the Grand Chamber relied on its earlier decision discussing "the principle of transparency in EU law." Documents "originating from a Member State, such as the written submissions at issue," held by the Commission "in connection with proceedings before the Court of Justice of the European Union" could be provided. Moreover, the fact that the Commission had received submissions from the CJEU was not a barrier to the application of Regulation 1049/2001, which applied to documents in the Commission's "possession." Origin and authorship did not undercut that obligation. Judgment at para. 55.

Under the ruling, Breyer could request documents, but whether disclosure was to follow was a separate question, as other exceptions could shield them. Because by then Breyer had already posted on the internet pleadings he had obtained without authorization, he was awarded only a portion of the costs for the appeal that he won. *Id.* at para. 61-62.

Concerns about the need for more openness have emerged in part based on the role of the CJEU in a widening array of issues. See, e.g., Grainne de Burca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20 MASTRICHT J. EUR. & COMP. L. 168 (2013).

³⁴

Manuel José Cepeda-Espinosa & Judith Resnik, *Puzzles of State Identity, Privatization, and Constitutional Authority*; Jon Michaels & Susan Rose-Ackerman, *Privatization and Regulation*, in GOVERNMENTS' AUTHORITY, Global Constitutionalism 2013, A Part of the Gruber Program for Global Justice and Women's Rights (Judith Resnik, ed. 2013), <https://documents.law.yale.edu/sites/default/files/global-constitutionalism-2013.pdf>.

³⁵

Judith Resnik, *Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century*, 11 I•CON 162 (2013).

³⁶

Distinctive questions are court enforcement of such rights. See Judith Resnik, *Courts and Economic and Social Rights/Courts as Economic and Social Rights*, in THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS (ed. Katharine G. Young, forthcoming 2018) [hereinafter Resnik, *Economic and Social Rights*]; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2983853dd; see also A.R. Mowbray, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS (Bloomsbury, 2004).

³⁷

See generally Resnik, *Economic and Social Rights*, *supra* note ____.

³⁸

See Ryder, *supra* note __, at paras. 3, 4.

³⁹

See Ryder, *supra* note __, at paras. 3, 4.

⁴⁰ *Id.* at paras. 5-13.

⁴¹ Frank Sander, one of the early proponents of ADR in the United States, used the metaphor of opening "many doors" in a courthouse, rather than of closing off doors. Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 131 (1976).

⁴² In Europe, the shorthand had been Article 6, Right to a Fair Trial of the European Court of Human Rights, European Convention on Human Rights, Nov. 4 1950, 213 U.N.T.S. 221, [hereinafter Article 6 ECHR], now augmented by Article 47 of the Charter of Fundamental Rights of the European Union, art. 47, 2010 O.J. C 83/02 [hereinafter Article 47 Charter]. I discuss the bases of the constitutional and common law mix in the United States in Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917 (2012).

⁴³

Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98-103 (1974); see also Joel B. Grossman, Herbert M. Kritzer & Stewart Macaulay, *Do the "Haves" Still Come Out Ahead?*, 33 LAW & SOC'Y REV. 803 (1999). Galanter's analysis focused on courts and did not compare the impact of repeat playing and resources in obtaining or structuring the rules for other services, such as health care. See Richard Lempert, *A Classic at 25: Reflections of Galanter's "Haves" Article and Work It Has Inspired*, 33 L. & SOC'Y REV. 1099, 1108 (1999). Efforts to discipline the processes of federal court rulemaking are analyzed by Robert Bone in *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887 (1998).

⁴⁴ In the United States, Galanter's analysis explains how *functional privatization* has become so salient a feature of dispute resolution. See Resnik, *Open Courts and Arbitrations*.

⁴⁵

7 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 232-33 (John Bowring ed., 1843) [hereinafter BOWRING].

⁴⁶

JEREMY BENTHAM, LAW AS IT IS, in 6 BOWRING, *supra* note __, at 233-34.

⁴⁷

Anthony J. Draper, *"Corruptions in the Administration of Justice": Bentham's Critique of Civil Procedure, 1806-1811*, 7 J. BENTHAM STUDIES 7 (2004); WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 29, 52 (1985).

⁴⁸

Quoted in Draper, *supra* note __, at 5. Bentham criticized the court system as a technically abstruse system replete with "jargonization." Jeremy Bentham, *Scotch Reform: Considered with Reference to the Plan, Proposed in the Late Parliament, for the Regulation of the Courts, and the Administration of Justice in Scotland* (1808), at Letter I, in 5 BOWRING, *supra* note __, at 23 [hereinafter Bentham, *Scotch Reform*].

⁴⁹ Burkhardt Hess, Introducing the Symposium, Open Justice. Feb, 1, 2018.

⁵⁰

Jeremy Bentham, *Draught for the Organization of Judicial Establishments, Compared with that of the National Assembly, with a Commentary on the Same*, in 4 BOWRING, *supra* note __, at 316.

⁵¹

In the United States, we call that practice an "individual" calendar system, as contrasted with the "master" calendar system. MAUREEN SOLOMON, CASEFLOW MANAGEMENT IN THE TRIAL COURT 9 (1973).

⁵² TWINING, *supra* note __, at 31.

⁵³ TWINING, *supra* note __, at 90.

⁵⁴

JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 357 (1827) [hereinafter BENTHAM, RATIONALE OF JUDICIAL EVIDENCE], in 6 BOWRING, *supra* note __, at 351.

⁵⁵

See UCL Faculty of Laws, Bentham Project, *The More Strictly We Are Watched The Better We Behave* (2007), available at http://www.ucl.ac.uk/Bentham-Project/site_images/Leaflets/Panopticon%20Bentham%C2%0DL%20UPDATED.pdf. The quote comes from POOR LAWS: VOLUME I at 277 (Michael Quinn, ed., 2001).

⁵⁶

Robert Post, *Data Privacy and Dignitary Privacy: Google Spain, The Right to be Forgotten, and the Construction of the Public Sphere* (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2953468.

⁵⁷ BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, *supra* note __, at 355.

⁵⁸ *Id.* at 543.

⁵⁹

Draper, *supra* note __, at 8-9; Bentham, *Scotch Reform*, *supra* note __, at 23.

⁶⁰

TWINING, *supra* note __, at 48.

⁶¹

BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, *supra* note __, at 355.

⁶²

BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, *supra* note __, at 360.

⁶³ *Id.*

⁶⁴

Id.

⁶⁵

Id.

⁶⁶

For example, the European Convention on Human Rights provides that:

Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 222. Examples of debates about closure in the context of national security can be found in *Botmeh v. United Kingdom*, App. No. 15187/03, 46 Eur. H.R. Rep., 659, 662-67 (2008).

⁶⁷ The attack was written in 1795 in an essay that is also known as "Anarchical Fallacies." See Philip Schofield, *Jeremy Bentham's "Nonsense Upon Stilts,"* 15 UTILITAS 1, 10 (2003).

⁶⁸

Bentham could also be understood as a proto-feminist. See Nicola Lacey, *Bentham as Proto-Feminist? Or an Ahistorical Fantasy on "Anarchical Fallacies,"* 51 CURRENT LEGAL PROBS. 1 (1998).

⁶⁹ Jeremy Bentham, *A Protest Against Law-Taxes: Showing the Peculiar Mischievousness of All Such Impositions as Add to the Expense of Appeal to Justice*, in 2 BOWRING, *supra* note __, at 582.

⁷⁰

PHILIP SCHOFIELD, *UTILITY AND DEMOCRACY: THE POLITICAL THOUGHT OF JEREMY BENTHAM* 310 (2006).

⁷¹

FREDERICK ROSEN, *JEREMY BENTHAM AND REPRESENTATIVE DEMOCRACY: A STUDY OF THE CONSTITUTIONAL CODE* 153-54 (1983).

⁷²

See Thomas P. Peardon, *Bentham's Ideal Republic*, 17 CAN. J. ECON. & POL. SCIENCE. 184, 196 (1951).

⁷³

Charter or Fundamental Laws, of West New Jersey, Agreed Upon, ch. XXIII (1676), *reprinted in* SOURCES OF OUR LIBERTIES 188 (Richard L. Perry ed., 1959), http://avalon.law.yale.edu/17th_century/nj05.asp.

⁷⁴

CONN. CONST. art. I, § 12 (1818).

⁷⁵ ALA. CONST. art. I, § 14 (1819).

⁷⁶

For the history of courthouse construction, see LINDA MULCAHY, *LEGAL ARCHITECTURE: JUSTICE, DUE PROCESS AND THE PLACE OF LAW* (2011); CLARE GRAHAM, *ORDERING LAW: THE ARCHITECTURAL AND SOCIAL HISTORY OF THE ENGLISH LAW COURT TO 1914* (2003); JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (2011) [hereinafter *REPRESENTING JUSTICE*].

⁷⁷

See, e.g., Samantha Schmidt, *#MeToo: Harvey Weinstein case moves thousands to tell their own stories of abuse, break silence*, WASH. POST (Oct. 16, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/10/16/me-too-alyssa-milano-urged-assault-victims-to-tweet-in-solidarity-the-response-was-massive/>.

⁷⁸ Avi Selk & Lori Aratani, *United Airlines CEO apologizes for 'horrific event,' promises review of policies after passenger violently deplaned*, WASH. POST (Apr. 11, 2017), <https://www.washingtonpost.com/news/dr-gridlock/wp/2017/04/11/amid-pr-fiasco-over-dragged-passenger-united-ceo-defends-his-crew/> [<https://perma.cc/BW3G-KL8U>].

⁷⁹ Pozen, *supra* note __, at 37 summarizes some of that literature.

⁸⁰ Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in HABERMAS AND THE PUBLIC SPHERE (Craig Calhoun ed., 1992).

⁸¹ See, e.g., Jane Mansbridge, *The Descriptive Political Representation of Gender: An Anti-Essentialist Argument*, in HAS LIBERALISM FAILED WOMEN?: ASSURING EQUAL REPRESENTATION IN EUROPE AND THE UNITED STATES 19 (Jytte Klausen & Charles S. Maier, eds., 2001).

⁸²

See, e.g., JONATHAN CRARY, *TECHNIQUES OF THE OBSERVER: ON VISION AND MODERNITY IN THE NINETEENTH CENTURY* (1992).

⁸³ Examples are provided by many. See, e.g., Karen Eltis, *The Judicial System in the Digital Age: Revisiting the Relationship Between Privacy and Accessibility in the Cyber Context*, 56 MCGILL L.J. 289 (2011).

⁸⁴

Nicholas Confessore, Gabriel J.X. Dance, Richard Harris & Mark Hansen, *The Follower Factory*, N.Y. TIMES, Jan. 27, 2018, <https://www.nytimes.com/interactive/2018/01/27/technology/social-media-bots.html>.

⁸⁵ The term “right to be forgotten” was foregrounded in the CJEU’s press office’s release about the opinion. Press Release, Court of Justice of the European Union, Press Release No 70/14, Judgment in Case C-131/12 (May 13, 2014), at 1-2. The decision itself noted that Spanish Court had referred a question on the scope of the “‘derecho al olvido’ (the right to be forgotten’).” Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos para. 20 (2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&doclang=EN>. [hereinafter Google Spain].

⁸⁶

Google Spain, para. 4, 94. The case had been filed by Costeja Gonzalez, who argued that an old report about the auction of his repossessed home had ceased to have relevance; while true, he claimed it ought not to be available by searching Google. Id. at para. 14-16. See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, repealing 95/46/EC [hereinafter 2016 Data Protection Directive.]

⁸⁷ See Eltis, *supra* note __, at 303. The term was also used in United States (Department of Justice) v. Reporters' Committee for Freedom of the Press, 489 US 749, 762, 780 (1989).

⁸⁸ See Post, *supra* note __, at 9.

⁸⁹ Google’s choices about much of what it does are seen as protected, as is the press, under the First Amendment. See, e.g., e-ventures Worldwide, LLC v. Google, Inc., No. 214CV646FTMPAMCM, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017.)

⁹⁰

See Luciano Floridi, Sylvia Kauffman, Lidia Kolucka-Zuk, Frank La Rue, Sabine Leutheusser-Schnarrenberger, José-Luis Piñar, Peggy Valcke & Jimmy Wales, Report of the Advisory Council to Google on the Right to be Forgotten, (Feb. 6, 2015), <https://static.googleusercontent.com/media/archive.google.com/en//advisorycouncil/advisement/advisory-report.pdf>.

⁹¹ See Google’s Transparency Report: Government Requests to Remove Content, https://transparencyreport.google.com/government-removals/overview?removal_requests=group_by:reasons&lu=removal_items&removal_items=group_by:reasons.

⁹² See, e.g., Daphne Keller, *The New, Worse “Right to be Forgotten,”* Stanford Center for Internet & Society Blog (Jan. 27, 2016), <http://cyberlaw.stanford.edu/publications/new-worse-%E2%80%98right-be-forgotten%E2%80%99> (“A platform that simply erases users’ content on

demand risks nothing.”); Daphne Keller, *Empirical Evidence of “Over-Removal” By Internet Companies Under Intermediary Liability Laws*, Stanford Center for Internet & Society Blog (Oct. 12, 2015), <http://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws>.

⁹³ See Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016, art. 48, 2016 O.J. (Art. 83 (5)). See also Daphne Keller, *The Right Tools: Europe’s Intermediary Liability Laws and the 2016 General Data Protection Regulation* (forthcoming BERKELEY TECH. L. J.), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2914684.

⁹⁴ See Google, Search Removals Under European Privacy Laws, <https://transparencyreport.google.com/eu-privacy/overview> at page 2.

⁹⁵ *Id.* See also Jennifer Daskal, *Borders and Bits*, 71 VAND. L. REV. 179, 212-13 (2018).

⁹⁶ Google, Search Removals Under European Privacy Laws, *supra* note __, at 3.

⁹⁷ *Id.* at 1 (reporting taking down 43.3% of the requested URLs). That document includes a chart mapping the requests from July 2014 to (as of my reading) February 2018. *Id.* at [pagination?] See also Post, *supra* note __, at 6.

⁹⁸ Ryder, *supra* note __, at para. 5. ETHAN KATSH & OMA RABINOVICH-ELNY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES 35 (2017).

⁹⁹ Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. REG. 547, 554-69, 578-85 (2016).

¹⁰⁰ See, e.g., Theo Bertram, Eli Burstein, Stephanie Caro (and nineteen co-authors, all “affiliated with Goggle”), *Three Years of the Right to be Forgotten*, 2018, <https://drive.google.com/file/d/1H4MKNwf5MgezTG70nJRnl3ym3gIT3HUK/view>. This article offered a “retrospective measurement of the 2.4 million URLs sought to be delisted from May 2014 until the end of 2017. The variables included the countries from which request come, entities like governments, media, and other directories in which information appears, and the “prevalence of extraterritorial requests.” *Id.* at 1, 3. The Google authors report that their “results dramatically increase transparency . . . and reveal the complexity of weighing personal privacy against public interest when resolving multi-party privacy conflicts that occur across the Internet.” *Id.* at 1. For example, they reported that twenty percent of the URLs sought to be delisted involved what they called a “requester’s legal history,” while thirty-three percent were about “personal information.” France, Germany, and the U.K. accounted for more than fifty percent of the requests, and some of the requests came from law firms and “reputation management services.” *Id.* at 2.

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A 2016 article reported that Google notified web publishers in about one quarter of delisting cases, after delisting. Aleksandra Kuczerawy & Jef Ausloos, *From Notice-and-Takedown to Notice-and-Delist: Implementing Google Spain*, 14 COLO. TECH. L. J. 219 (2016). Google and other third-party intermediaries may be held liable for providing identifying information to webmasters. For example, in September 2016, the Spanish Agencia Española de Protección de Datos fined Google 150,000 Euros for

disclosing identifiable information when it informed webmasters that their URLs had been deindexed for particular individual names. Agencia Española de Protección de Datos, Resolución R/02232/2016 (Sept. 14, 2016), http://www.agpd.es/portalwebAGPD/resoluciones/procedimientos_sancionadores/ps_2016/common/pdfs/PS-00149-2016_Resolucion-de-fecha-14-09-2016_Art-ii-culo-10-16-LOPD.pdf.

¹⁰² See, e.g., Sylvia Tippman & Julia Powles, Google Accidentally Reveals Data on “Right to be Forgotten” Requests, *THE GUARDIAN* (July 14, 2015), <https://www.theguardian.com/technology/2015/jul/14/google-accidentally-reveals-right-to-be-forgotten-requests>; Julia Powles, Google’s Data Leak Reveals Flaws in Making It Judge and Jury Over Our Rights, *GUARDIAN* (July 14, 2015), <https://www.theguardian.com/technology/2015/jul/14/googles-data-leak-right-to-be-forgotten>; James Ball, *EU’s Rights to be Forgotten: Guardian Articles Have Been Hidden By Google*, *GUARDIAN*, July 2, 2014, <https://www.theguardian.com/commentisfree/2014/jul/02/eu-right-to-be-forgotten-guardian-google>; Gail Sullivan, “Right to be Forgotten” Gets Real as Google Wipes Stories from Search Results, *WASH. POST*, July 3, 2014, https://www.washingtonpost.com/news/morning-mix/wp/2014/07/03/google-erases-unflattering-news-stories-because-of-right-to-be-forgotten-is-this-like-burning-books-in-a-library/?utm_term=.a42a4b803b4f.

As noted, questions that reach courts remain accessible to third-parties. See, e.g., Alex Hern, *ECJ to Rule on Whether ‘Right to be Forgotten’ Can Stretch Beyond EU*, *GUARDIAN* (July 20, 2017), <https://www.theguardian.com/technology/2017/jul/20/ecj-ruling-google-right-to-be-forgotten-beyond-eu-france-data-removed>. Google Inc. v Commission nationale de l’informatique et des libertés, Case C-507/17 (lodged Aug. 21, 2017), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=195494&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1368192>. At issue is scope of the obligation to delist, with variables including both the venue from which the person searches and the domains searched, and that some Member States have concluded that the requirement extends to domains beyond the one linked to their borders. The decision below is [full cite] Conseil d’état, July 19, 2017, 399922 (Fr), [web cite]. Additional discussion comes from Draskal, *supra* note __, at 214-18.

See also *op Court Rejects “Right to be Forgotten” Demand*, *JAPAN TIMES* (Feb. 1, 2017), <https://www.japantimes.co.jp/news/2017/02/01/national/crime-legal/top-court-rejects-right-forgotten-demand/#.Wnuvhpm-frl>.

¹⁰³ Google provided information on the factors it relied upon when deciding not to delist. See Q3 2015: Common Material Factors Involved in a Decision Not to Delist a Page (Nov. 2015), https://storage.googleapis.com/transparencyreport/faqs/eu-privacy/Google_EU_privacy_data_nov2015.pdf.

¹⁰⁴ For example, pending before the European Court of Justice of the European Union is on whether “sensitive personal data” – such as the political allegiance of an individual, or a past criminal conviction reported in the press – should be used generally as the factor that outweighs the public interest in obtaining the data. See *G.C. and Others*, Request for a preliminary ruling from the Conseil d’État (France) lodged on 15 March 2017 – *G.C., A.F., B.H., E.D. v. Commission nationale de*

l'informatique et des libertés (CNIL); (Case C-136/17) (2017/C 168/33). The scope of the mandate is also in issue. The questions referred include whether "the prohibition imposed on other controllers of processing data caught by Article 8(1) and (5) of Directive 95/46, (1) subject to the exceptions laid down there, also apply to this operator as the controller of processing by means of that search engine? C 168/24 EN Official Journal of the European Union 29.5.2017," and if so, whether "such an operator refuse a request for 'de-referencing', if it establishes that the links at issue lead to content which, although comprising data falling within the categories listed in Article 8(1), is also covered by the exceptions laid down by Article 8(2)(a) and (e) of the directive." Also at issue are the bases for refusing to delist. Further, if other operators cannot refuse to delist, how are such operators to meet those duties? Also at issue is "whether or not publication of the personal data on the web page at the end of the link at issue is lawful, must the provisions of Directive 95/46 be interpreted as requiring the operator of a search engine, when the person making the request establishes that the data in question has become incomplete or inaccurate, or is no longer up to date, to grant the corresponding request for 'de-referencing'." Yet another issue is whether Article 8(5) of Directive 95/46 should "be interpreted as meaning that information relating to the investigation of an individual or reporting a trial and the resulting conviction and sentencing constitutes data relating to offences and to criminal convictions? More generally, does a web page comprising data referring to the convictions of or legal proceedings involving a natural person fall within the ambit of those provisions?"

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European Privacy Requests Search Removals FAQs,
<https://support.google.com/transparencyreport/answer/7347822>.

¹⁰⁶ Questions include the scope of the obligation and the relevance of variables such as the venue from which the search is launched and the domain linked to particular Member States. See, e.g., Case C-398/15, *Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v. Manni*, ECLI:EU:C:2017:197 (March 9, 2017); Case C-398/15, Opinion of Advocate General Bot, *Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v. Manni*, ECLI:EU:C:2016:652 (Sept. 8, 2016). The CJEU held that national courts had the responsibility of determining the possible existence of "legitimate and overriding reasons" which might justify limiting third parties' access to data concerning Mr. Manni from publicly available companies registers. ECLI:EU:C:2017:197 (March 9, 2017) at para. 63. See also CHRISTIAN KOHLER, CONFLICT OF LAW ISSUES IN THE 2016 DATA PROTECTION REGULATION OF THE EUROPEAN UNION, in *Anno LII 3/2016 Rivista di diritto internazionale private e processuale Pubbl.* See generally Paul Fleischer, *Three Years of Striking the Right (to Be Forgotten) Balance*, Google Blog (May 15, 2017), <https://www.blog.google/topics/google-europe/three-years-right-to-be-forgotten-balance/>.

¹⁰⁷ Letter from Stefan Hirsch, the artist, to Forbes Watson, Advisor to the Section of Painting & Sculpture of the Treasury Department (May 18, 1938) (on file with GSA Archives, Public Building Services, Fine Arts Collection, 477, Stefan Hirsch); see also REPRESENTING JUSTICE, *supra* note __, at 111-13.

¹⁰⁸ MARLENE PARK & GERALD E. MARKOWITZ, DEMOCRATIC VISTAS: POST OFFICES AND PUBLIC ART IN THE NEW DEAL 61, 90 n. 30 (1984), cited in REPRESENTING JUSTICE, *supra*

note ___, at 112. See also KARAL ANN MARLING, WALL-TO-WALL AMERICA: A CULTURAL HISTORY OF POST OFFICE MURALS IN THE GREAT DEPRESSION 64-65 (1982).

¹⁰⁹ REPRESENTING JUSTICE, *supra* note ___, at 112.

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Id. at 112-13.

¹¹¹

See Judith Resnik & Dennis E. Curtis, *Inventing Democratic Courts: A New and Iconic Supreme Court*, 38 J. SUP. CT. HIST. 207, 233 (2013).

¹¹² DEL. CONST. §9 (1999).

¹¹³

See, e.g., *Valiuliene v. Lithuania*, App. No. 33234/07, Eur. Ct. H.R. 25 (Mar. 26, 2013).

¹¹⁴ See, e.g., Tatjana Hörnle, *Democratic Accountability and Lay Participation in Criminal Trials*, in 2 THE TRIAL ON TRIAL: JUDGMENT AND CALLING TO ACCOUNT 135-53 (Antony Duff, Lindsay Farmer, Sandra Marshall & Victor Tadros eds., 2006).

¹¹⁵ Others in this symposium address this obligation in Europe. See generally Jens Hillebrand Pohl, *The Right to be Heard in European Union Law and the International Minimal Standard - Due Process, Transparency and the Rule of Law* (Nov. 9, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3070106; *Waste Mgmt., Inc. v. Mexico*, ICSID Case No. ARB (AF)/00/3 (Apr. 30, 2004).

¹¹⁶

See *Press-Enter. Co. v. Superior Court* (Press Enterprise I), 464 U.S. 501, 503-05 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 559-63, 580 (1980) (plurality opinion); see also Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 409 (1987) [hereinafter Resnik, *Public Dimension*]. The Sixth Amendment right of the defendant is sometimes either itself the basis of access by third parties or related to a First Amendment right or “freedom” of the public to “listen.” See *Richmond Newspapers*, 448 U.S. at 576.

¹¹⁷ For the history of the development of this administrative apparatus, see Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000); David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65 (1981); PETER G. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 91-95 (1973). The current governing statutes are 28 U.S.C. §§ 601, 604, 610 (2015), and under those provisions, the Director of the Administrative Office publishes reports annually. See, e.g., *Judicial Business 2013*, U.S. Cts., <http://www.uscourts.gov>

/Statistics/JudicialBusiness/2013.aspx [http://perma.cc/8J9U-8AWZ].

¹¹⁸ See *State Court Caseload Statistics*, Court Statistics Project, NATIONAL CENTER FOR STATE COURTS, <http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx>.

¹¹⁹ See EUROPEAN COMMISSION, THE 2017 EU JUSTICE SCOREBOARD 18-36 (2017), http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2017_en.pdf. Concerns about the data and its uses comes from Adriani Dori, *The EU Justice Scoreboard: Judicial Evaluation as a New*

Governance Tool, Max Planck Working Papers, 2015, at https://www.mpi.lu/fileadmin/mpi/medien/persons/Dori_Adriani/Dori_The_EU_Justice_Scoreboard_-_Judicial_Evaluation_as_a_New_Governance_Tool_25_8.pdf.

¹²⁰ For fiscal year 2017, the federal judiciary requested (and received) \$7.0 billion in discretionary appropriations, a 3.2 percent increase above fiscal year 2016 funding. *Judiciary Transmits Fiscal Year 2017 Budget Request to Congress*, U.S. CTS. (Feb. 12, 2016), <http://www.uscourts.gov/news/2016/02/12/judiciary-transmits-fiscal-year-2017-budget-request-congress> [https://perma.cc/76B2-YJPB]. For fiscal year 2018, the courts requested \$7.2 billion, a 3.2 percent increase over the previous year. *Federal Judiciary Seeks Funds to Support Court Operations in Coming Year*, U.S. CTS. (May 17, 2017), <http://www.uscourts.gov/news/2017/05/17/federal-judiciary-seeks-funds-support-court-operations-coming-year> [https://perma.cc/H7E3-7625].

¹²¹ See, e.g., JUSTICE AT STAKE & NATIONAL CENTER FOR STATE COURTS, *FUNDING JUSTICE: STRATEGIES AND MESSAGES FOR RESTORING COURT FUNDING* (2013), available at http://www.justiceatstake.org/media/cms/Funding_Justice_Online2012_D28F63CA32368.pdf.

¹²² In 2017, 790,830 bankruptcy petitions were filed, which was part of a seven year decline in filings. JOHN ROBERTS, 2017 YEAR-END REPORT ON THE FEDERAL JUDICIARY 15-16 (Dec. 31, 2017), <https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf>.

¹²³ Hiil, *ODR and the Courts: The Promise of 100% Access to Justice?* 54 (2016) [hereinafter Hiil, *ODR and the Courts*], <http://www.onlineresolution.com/hiil.pdf>. The monograph argues that using ODR lowers the costs and thereby would overall result in a reduction of fees by changing the “dynamics” that had led governments to raise fees. *Id.* at 56.

¹²⁴ *Trial Lawyers Ass’n of B.C. v. British Columbia*, [2014] 3 S.C.R. 31, paras. 35-36 (Can.).

¹²⁵ Constitution Act, 1867 § 96 (Can.).

¹²⁶ *Trial Lawyers Ass’n*, 3 S.C.R. at para. 29, citing *MacMillan Bloedel Ltd. v. Sampson*, [1995] 4 S.C.R. 725, para. 52.

¹²⁷ *Id.* at paras. 46, 52. Thereafter, British Columbia amended its fee rules. See B.C. SUP. CT. CIV. R. 20-5(1). That rule authorizes judges to waive fees if imposing an “undue hardship” unless the judge determines that “no reasonable claim or defense” is made, or the case is otherwise abusive. *Id.*

¹²⁸ *R (UNISON) v. Lord Chancellor* [2017] UKSC 51, ¶ 117 (Lord Reed).

¹²⁹ *Id.* ¶¶ 16-20; see also Abi Adams & Jeremias Prassl, *Vexatious Claims: Challenging the Case for Employment Tribunal Fees*, 80 MODERN L. REV. 412, 414, 418 (2017).

¹³⁰ *R (UNISON) v. Lord Chancellor*, ¶ 66. Lady Hale’s opinion focused on the discriminatory disparate impact of the fees. *Id.* ¶¶ 121-34.

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Id. ¶ 71 (Lord Reed). The court also commented: “That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable.” *Id.*

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Id. ¶ 93.

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Id. at 372.

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401 U.S. 371 (1971).

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Id. at 347.

136 *Id.* at 383 (Douglas, J., concurring); *id.* at 387 (Brennan, J., concurring).

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See *Ortwein v. Schwab*, 410 U.S. 656, 658–61 (1973); *United States v. Kras*, 409 U.S. 434, 446 (1973); see also Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 86 (2011).

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Williams v. Illinois, 399 U.S. 235 (1970).

139 *Beardon v. Georgia*, 461 U.S. 660 (1983).

140 See generally ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016). See also MARIE CLAIRE TRAN-LEUNG, SHRIVER CTR., DEBT ARISING FROM ILLINOIS’ CRIMINAL JUSTICE SYSTEM: MAKING SENSE OF THE AD HOC ACCUMULATION OF FINANCIAL OBLIGATIONS 1 (Nov. 2009), <http://povertylaw.org/files/docs/debt-report.pdf> [<https://perma.cc/YPN9-P32C>].

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ODonnell v. Harris County, 227 F. Supp. 3d 706 (S.D. Tex. 2016), *aff’d in part, rev’d in part*, *ODonnell v. Harris County*, No. 17-20333, 2018 WL 851776 (5th Cir. Feb. 14, 2018), <http://www.ca5.uscourts.gov/opinions/pub/17/17-20333-CV0.pdf>; *In re Humphrey*, No. A152056, 2018 WL 550512 (Cal. Ct. App. Jan. 25, 2018); *People v. Mullen*, 2018 IL App (1st) 152306, 2018 WL736120 (Feb. 5, 2018).

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Stinnie v. Holcomb, No. 3:16-CV-00044, 2017 WL 963234 (W.D. Va. Mar. 13, 2017), appealed filed, No. 17-1740 (4th Cir. June 16, 2017); *Fowler v. Johnson*, No. CV 17-11441, 2017 WL 6379676 (E.D. Mich. Dec. 14, 2017); *Cain v. City of New Orleans*, No. 15-4479, 2017 WL 6372836, at *21–2 (E.D. La. Dec. 13, 2017).

143 See, e.g., *Cain v. City of New Orleans*, No. 15-4479, 2017 WL 6372836, at *21–22 (E.D. La. Dec. 13, 2017). The court discussed *Tumey v. Ohio*, 273 U.S. 510 (1927), in which money raised by fines levied “was divided between the state, the village general fund, and two other village funds.” *Cain*, 2017 WL 6372836, at *22. As in that famous Prohibition-era case, the district court in *Cain* concluded that the judges’ “direct pecuniary interest in the outcome” created financial motives to convict. *Id.* at *22, 25 (quoting *Tumey*, 273 U.S. at 535).

Pending before the U.S. Supreme Court is a challenge to a gun-user fee; there the argument is that because the fees go to general revenues and not to the service provided, the fee impermissibly imposes on the constitutional right to bear arms. See *Bauer v. Becarra*, 2017 WL 5495938 (U.S.) (cert petition). The petitioners argue that, while “the government may charge a fee for a parade permit, or impose a fee on firearms transactions,” those fees must be used to offset the specific costs of the activity. *Id.* at *1. The argument is that the “cost-recovery principle ensures that the government may not leverage constitutionally protected conduct as a general revenue-raising measure.” *Id.* Applying those propositions to courts may be attractive for some, but the problem identified in *Cain* of self-interest affecting adjudication would have to be addressed.

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The federal district court database provides information on unrepresented litigants (termed “pro se filings”) beginning in 2005. U.S. COURTS, CIVIL PRO SE AND NON-PRO SE FILINGS (2005–2010), <http://www.uscourts.gov/report-names/judicial-business?tn=c-13&pt=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D=> [https://perma.cc/NES9-E9W3]. Some 25 percent of civil cases are filed by unrepresented plaintiffs. *Id.* See U.S. CTS., U.S. DISTRICT COURTS—CIVIL PRO SE AND NON-PRO SE FILINGS (Sept. 30, 2016), http://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2016.pdf [https://perma.cc/9AAL-EGHM].

145 U.S. COURTS, U.S. COURTS OF APPEALS—PRO SE CASES FILED tbl.2.4 (2014), http://www.uscourts.gov/sites/default/files/table_2.04_0.pdf [https://perma.cc/7E3H-25ZQ]).

146 NAT’L CTR. FOR STATE COURTS & STATE JUSTICE INST., CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iii (2015) [hereinafter STATE COURT 2012–2013 CIVIL LITIGATION].

147 *Id.* at iv. In 1992, attorneys had represented both parties in 95 percent of the cases; in 2012–2013, attorneys were present in 24 percent of the cases. See *id.* at 31.

148 NAT’L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 31–32 (2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> [https://perma.cc/4RSJ-MDUW] [hereinafter LANDSCAPE CIVIL LITIGATION STATE COURTS 2015].

149 *Id.* at _. Those numbers reflect a change in the kinds of cases coming to court and in the modes of disposition. Twenty years ago, in a parallel study, the National Center found that about half of the claims analyzed were tort cases; the NCSC’s 2012–2013 data put tort cases down to seven percent. In about three-quarters of the more recent judgments analyzed, the sums were under \$5,200, and the study reported that overall, four percent of the filings were disposed of by trials.

150 Jordan M. Singer & William G. Young, *Bench Presence 2014: An Updated Look at Federal District Court Productivity*, 48 NEW ENG. L. REV. 565, 565 (2014).

151 *Id.* at 566.

¹⁵² Details are provided in Judith Resnik, *Lawyers' Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 FORDHAM L. REV. 1899, 1912-16 (2017).

¹⁵³

See generally STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (2017).

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JOHN RAWLS, *A THEORY OF JUSTICE* 136-37 (1971).

¹⁵⁵ National and transnational building projects produced important public buildings, including the vastly expanded Court of Justice for the European Union. See Resnik and Curtis, *REPRESENTING JUSTICE*, *supra* note __, at 225-246.

¹⁵⁶ Box insert from detail from the home page of United States Federal Courts website, April 2, 2014.

¹⁵⁷ Local Rule D. Mass., 16.4 (a)-(b), <http://www.mad.uscourts.gov/general/pdf/combined01.pdf>, last visited January 24, 2018.

¹⁵⁸ Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L.J. 1631 (2015).

¹⁵⁹ The Honorable Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 453, 462 (2007).

¹⁶⁰ Hill, *ODR and the Courts*, *supra* note __, at 38.

¹⁶¹

Id. at 41. The terms of informational justice, distributive justice, restorative justice, procedural justice, and interpersonal justice, *id.* at 42, likewise do not have roles for observing publics. "Transparency of outcomes" is in view, but not of process. The monograph spoke of concerns about how to scale up ODR to lower marginal costs (*id.* at 54) and to enable a "respectful dialogue" (*id.* at 44). The monograph did not provide the metrics of respect.

¹⁶² *Id.* ¶ 71 (Lord Reed). The court also commented: "That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable." *Id.*

¹⁶³

See generally *Access to Records and Information in CRT Disputes: Policy 001-20151215*, BRITISH COLUMBIA CIVIL RESOLUTION TRIBUNAL 1-5, 12-17 (2015) [hereinafter *British Columbia CRT, Access to Records*], <https://civilresolutionbc.ca/wp-content/uploads/2017/02/Access-to-Info-in-CRT-Case-Records.pdf>.

¹⁶⁴

Id. at 3. See Darin Thompson, *Rationalizing Openness: Access to British Columbia Court and Tribunal Records in a New Era of Technology and Privacy* (on file manuscript, 2017).

¹⁶⁵

Id. at 2.

¹⁶⁶

Id. at 1.

¹⁶⁷ *Id.* at __.

¹⁶⁸

Id. at 2. To summarize, the negotiation and mediation phases are distinct from the Tribunal Decision Process, which is the phase where information can be provided publicly. See *Information Access & Privacy Policy*, CIVIL RESOLUTION TRIBUNAL, <https://civilresolutionbc.ca/resources/information-access-privacy-policy/#will-the-crt-share-my-information-with-the-public>.

¹⁶⁹

For example, the UK's Courts and Tribunals Judiciary website describes two impacts of ODR: increasing access to justice because it "will be cheaper, more convenient, less forbidding" and lowering the cost to individual participants in disputes. Richard Susskind, *What is ODR?*, COURTS AND TRIBUNALS JUDICIARY (2018), <https://www.judiciary.gov.uk/reviews/online-dispute-resolution/what-is-odr/>.

¹⁷⁰

R (UNISON) v. Lord Chancellor at ¶ 69.

¹⁷¹

Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2013)). Two key facets provide that an arbitration provision "written . . . in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. At the time, expressly exempted were employment that Congress was then understood to have the authority to regulate ("nothing . . . contained [in the Federal Arbitration Act] shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"). 9 U.S.C. § 1.

¹⁷² For a history of the development of the doctrine on the FAA, see Resnik, *Diffusing Disputes*, *supra* note __, at 2860-74.

¹⁷³ *Wilko v. Swan*, 346 U.S. 427, 435-36 (1953).

¹⁷⁴ *Id.*

¹⁷⁵ European Union Council Directive 93/13 on Unfair Terms in Consumer Contracts creates a rebuttable presumption that pre-dispute arbitration clauses in consumer contracts are invalid because of the unequal bargaining power between the contracting parties. Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts, 1993 O.J. L. 95/29. The Supreme Court of Canada permitted a consumer to pursue a class action and did not enforce a consumer provision mandating arbitration and waiving class action proceedings. See *Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531 (Can.).

¹⁷⁶ *EEOC v. Waffle House*, 534 U.S. 279 (2002) (No. 99-1823), excerpted from *Waffle House Application for Employment*, Joint Appendix at 58-59.

¹⁷⁷ *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002).

¹⁷⁸

Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005) (quoting Cal. Civ. Code § 1668).

¹⁷⁹ AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

¹⁸⁰

"States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons Because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' . . . California's Discover Bank rule is preempted by the FAA." AT&T Mobility LLC v. Concepcion, 131 S. Ct. at 1753.

¹⁸¹

See Kindred Nursing Centers, L.P. v. Clark, 137 S. Ct. 1421 (2017). The Supreme Court earlier held that the FAA contained no exception for personal injury or wrongful death claims in actions against nursing homes in West Virginia. Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012). Some limits exist. Arbitrators concluded public law injunction actions were not arbitral. See AAA, Order Regarding Claimant's Motion for Order for All Claims to Proceed in Court of Law, DeVries v. Experian Information Solutions, Civ. No. 01-17-0001-7722, following McGill v. Citibank, 393 P. 3d 85 (Ca., 2017).

¹⁸²

The permissibility of bans on class actions in employment disputes is pending before the Court in the 2017-2018 term. The question is whether the rights to collective actions under the National Labor Relations Act are buffers against bans on class actions. See Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1155-56 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); Murphy Oil USA, Inc. v. NLRB, 808 F.3d. 1013, 1019-20 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017); see also Convergys Corp. v. NLRB, 866 F.3d 635, 637-39 (5th Cir. 2017).

¹⁸³ *Wireless Customer Agreement*, ATT (January 24, 2018), <https://www.att.com/legal/terms.wirelessCustomerAgreement.html>.

¹⁸⁴ This point comes from Art Leff, who argued in the 1970s that contract theorists had made a category error when developing doctrines of unconscionability. Rather than a "contract," non-negotiable obligations were "things," to be regulated or not. See Arthur Allen Leff, *Contract as a Thing*, 19 AM. U. L. REV. 131, 132, 143 (1970); see also MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013).

¹⁸⁵

Examining the CFPB's Proposed Rulemaking on Arbitration: Is it in the Public Interest and for the Protection of Consumers?: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the House Comm. on Fin. Servs., 114th Cong. 4 (2016) (Statement of Andrew Pincus, Partner, Mayer Brown LLP).

¹⁸⁶ For a discussion of the data and caveats on its potential for incomplete accountings, see Resnik, *Diffusing Disputes*, *supra* note __, at 2897-90; and Resnik, *Open Courts and Arbitration*, *supra* note __, at [page cites.].

¹⁸⁷

Analysis of the American Arbitration Association's Consumer Arbitration Caseload: Based on Consumer Cases Awarded Between January and August 2007, AM. ARB. ASS'N, <https://perma.cc/LPG6-S6F9>. ("Each year, the AAA administers approximately 1,500 consumer cases"). The AAA does not publish "statistics on [its] total consumer caseload," but in 2017 had 3,547 new consumer arbitration filings. Email from Ryan Boyle, Vice-President, Statistics and in-House Research, March 6, 2018.

¹⁸⁸ CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), at § 1.4.2, 11 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

¹⁸⁹ See, e.g., Stipulated Order for Permanent Injunction and Monetary Judgment at 2-3, FTC v. AT&T Mobility, LLC, No. 1:14-CV-3227-HLM (N.D. Ga. Oct. 8, 2014).

¹⁹⁰ *Consumer Arbitration Rules*, AM. ARBITRATION ASS'N 34 (rules amended and effective September 2014, cost of arbitration effective January 1, 2016) [hereinafter AAA *Consumer Arbitration Rules*], <https://www.adr.org/sites/default/files/Consumer%20Rules.pdf> [https://perma.cc/W85Q-CQ8S]. *Consumer Arbitration Fact Sheet*, AM. ARBITRATION ASS'N, <http://info.adr.org/consumer-arbitration/> [https://perma.cc/AMC6-UZTZ].

¹⁹¹ *JAMS Comprehensive Arbitration Rules & Procedures*, JAMS (eff. July 1, 2014), <https://www.jamsadr.com/rules-comprehensive-arbitration/> (limiting public access to proceedings before the Judicial Arbitration and Management Services); *Rules of Conditionally Binding Arbitration*, BETTER BUS. BUREAU, <https://www.bbb.org/bbb-dispute-handling-and-resolution/dispute-resolution-rules-and-brochures/rules-of-conditionally-binding-arbitration/#ConfidentialityofRecords> ("It is our policy that records of the dispute resolution process are private and confidential.").

¹⁹² See, e.g., *Guyden v. Aetna Inc.*, 544 F.3d 376, 384-85 (2d Cir. 2008) (finding enforceable arbitration mandates imposed by an employer despite recognizing that "in the context of individual statutory claims, a lack of public disclosure may systematically favor companies over individuals" (quoting *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1477 (D.C. Cir. 1997))); *Iberia Credit Bureau Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) ("While the confidentiality requirement is probably more favorable to the cellular provider than to its customer, the plaintiffs have not persuaded us that the requirement is so offensive as to be invalid."); *Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269, 279-81 (3d Cir. 2004) (finding no unfairness in employee confidentiality clause because "[e]ach side has the same rights and restraints . . . and there is nothing inherent about confidentiality itself that favors or burdens one party . . . in the dispute resolution process").

¹⁹³ See *Arbitration Agreements*, 81 Fed. Reg. 32,830, 32,838, 32,868 (to have been codified at 12 C.F.R. pt. 1040) (proposed May 24, 2016).

¹⁹⁴ See *id.* The proposal is analyzed in Nancy A. Welsh, *Dispute Resolution Neutrals' Ethical Obligation to Support Reasonable Transparency* (Nov. 14, 2017) (unpublished manuscript) (on file with author). As she details, the proposal garnered "strong support" from the American Bar Association's Section of Dispute Resolution. *Id.* at 7-9; see also Section of Dispute Resolution of the American Bar Association, *Comment Letter on the Bureau of Consumer Financial Protection Proposed Rule on Arbitration Agreements* (July 29, 2016) [hereinafter ABA Dispute Resolution Section 2016

Comments],
https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/bars/dr-cfpb-comments_7-29-16.authcheckdam.pdf
[<https://perma.cc/KD79-V5FT>].

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See Joint Resolution Providing for Congressional Disapproval under Chapter 8 of Title 5, United States Code, of the Rule Submitted by Bureau of Consumer Financial Protection Relating to “Arbitration Agreements,” Pub. L. No. 115-74, 131 Stat. 1243 (Nov. 1, 2017).

¹⁹⁶ Commission Recommendation 13/396/EU on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law, 2013 O.J. L. 201/60.

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See Regulation 16/679/EU on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 2016 O.J. L. 119/1, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32016R0679> (effective April 2018). Article 80 provides for two models of collective redress to be developed at the national level.

¹⁹⁸ The Dutch are described as at the forefront of developing mechanisms, one for injunctive and the other for monetary relief. See Dutch Collective Settlements Act, including the “WCAM” procedure by which liability can be established and individuals can then seek damages. Dutch Act on Collective Settlements, Law of 23 June 2005, Stb. 340. That effort has been the subject of critique by the U.S. Chamber of Commerce. See, e.g., U.S. CHAMBER INST. FOR LEGAL REFORM, THE GROWTH OF COLLECTIVE REDRESS IN THE EU: A SURVEY OF DEVELOPMENTS IN 10 MEMBER STATES at 22-23, 42, 46, 52 (Mar. 2017) [hereinafter GROWTH OF COLLECTIVE REDRESS], http://www.instituteforlegalreform.com/uploads/sites/1/The_Growth_of_Collective_Redress_in_the_EU_A_Survey_of_Developments_in_10_Member_States_April_2017.pdf [<https://perma.cc/2YMQ-WSZ3>].

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Schrems v. Facebook Ireland Ltd, 62016CJ0498 (Jan. 25, 2018) [hereinafter Schrems/Facebook, 2018]. Mr Schrems is an activist and has used litigation as one means of bringing his concerns about data protection to public attention, as detailed in the decision by Advocate General Bobek, C498/16, 14 Nov. 2017, para. 9-17 [hereinafter Schrems, 2017 Advocate General]. See also Schrems v. Data Protection Commissioner, C-362/14 (Third Chamber 2015).

²⁰⁰ At issue were interpretations of Articles 15 and 16 of the Council of Regulation (EC) No. 44/2001 of Dec. 22, 2000, which enabled a “weaker party” to be protected by special rules. Schrems/Facebook, 2018, paras. 1-6.

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Schrems has been described by others as a “privacy activist,” and his non-profit organization uses “targeted and strategic litigation” to enforce EU privacy protections. See Tobias Lutzi, *Fifty Shades of (Facebook) Blue – ECJ Renders Decision on Consumer Jurisdiction and Assigned Claims in Case C-498/16 Schrems v Facebook*, CONFLICT OF LAWS.NET (Jan. 26, 2018), <http://conflictoflaws.net/2018/fifty-shades-of-facebook-blue-ecj-renders-decision-on-consumer-jurisdiction-and-assigned-claims-in-case-c-49816-schrems-v-facebook/>. Some 25,000 people had registered on

the web to join him, and 50,000 were on a waiting list. Schrems, 2017 Advocate General at 16.

²⁰²

Id. at paras. 19-24. The Supreme Court of Austria had sent the reference to the CJEU to understand the meaning of the term “consumer” under EU law and the impact of assigned claims.

²⁰³

Id. at paras. 40-41.

²⁰⁴ *Id.* at paras. 42-49. See also Schrems 2017 Advocate General at paras. 119-123.

²⁰⁵ As the Chamber explained, “an assignment of claims such as that at issue in the main proceedings cannot provide the basis for a new specific forum for a consumer to whom those claims have been assigned” under Article 16(1) of the Regulation NO. 44/2001. Schrems/Facebook, 2018, paras. 48 and 49.

²⁰⁶ CJEU Schrems, paras. 46-69. This case related to the Austrian collective action mechanism; a related case coming via Ireland filed by Schrems is pending before the CJEU. See <http://fortune.com/2018/01/25/facebook-max-schrems-privacy-cjeu/>. The issue of assignment entailed questions of using Article 16(a) Brussels I for consumers in the same domicile, in another Member State, or in a non-member state.

²⁰⁷

See U.S. CHAMBER INST. FOR LEGAL REFORM, THE GROWTH OF COLLECTIVE REDRESS IN THE EU: A SURVEY OF DEVELOPMENTS IN 10 MEMBER STATES 1, 2 (Mar. 2017) [hereinafter GROWTH OF COLLECTIVE REDRESS], http://www.instituteforlegalreform.com/uploads/sites/1/The_Growth_of_Collective_Redress_in_the_EU_A_Survey_of_Developments_in_10_Member_States_April_2017.pdf [https://perma.cc/2YMQ-WSZ3], and calls for “safeguards,” see U.S. CHAMBER INST. FOR LEGAL REFORM, SUPPORTING SAFEGUARDS: EU CONSUMER ATTITUDES TOWARDS COLLECTIVE ACTIONS AND LITIGATION FUNDING 1 (Sept. 2017), http://www.instituteforlegalreform.com/uploads/sites/1/EU_Paper_Web.pdf [https://perma.cc/J6QY-EB4M] The monograph spoke about a “perceived ‘access to justice deficit’.” GROWTH OF COLLECTIVE REDRESS, *supra* at 2.

²⁰⁸ *Id.* at 19.

²⁰⁹ “Experience with collective redress, including the notorious U.S. class action system, demonstrates that mechanisms for the aggregation of lawsuits are prone to abuse, including the filing of weak or meritless claims.” *Id.* at 6.

²¹⁰ See Report from the Commission to the European Parliament, The Council and the European Economic and Social Committee, Brussels, 25.1.2018, Com (2018) 40 final [website].

²¹¹ Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969). I provide some of the history of the drafting of the 1966 revisions to Rule 23 in Judith Resnik, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. REV. 1017, 1019-31 (2017) [hereinafter Resnik, *Reorienting the Process Due*]; and Judith Resnik, “Vital” State Interests: From Representative Actions for Fair Labor Standards to

Pooled Trusts, Class Actions, and MDLS in the Federal Courts, 165 U. PA. L. REV. 1765, 1788-95 (2017) [hereinafter Resnik, "Vital" State Interests].

²¹² Resnik, "Vital" State Interests, *supra* note __, at 1790-91. See also David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981-1994*, 86 FORDHAM L. REV. 1785 (2018).

²¹³ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

²¹⁴ George B. Fraser, Jr., *Jurisdiction by Necessity-An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305 (1951).

²¹⁵ More details in Resnik, "Vital" State Interests, at 1779.

²¹⁶

Mullane, 339 U.S. at 309-310. The relationship of notice to representation is complex. See Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577 (2011); Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 Tex. L. Rev. (2009).

²¹⁷ *Mullane*, 339 U.S. at 319.

²¹⁸

See Resnik, *Reorienting the Process Due*, at 1037-39.

²¹⁹ For details of history and of distinctions drawn, see Resnik, "Vital" State Interests, 1788-95.

²²⁰ My discussion assumes that aggregation is taking place under the supervision of a court, and hence has a layer of regulation which non-court aggregates lack. See Linda Mullenix, *Reflections from a Recovering Aggregationist*, 15 NEVADA L. REV. 1455 (2015).

²²¹

Hill, *ODR and the Courts*, *supra* note __ at 11.

²²²

See David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385, 1387 (2017); Karen Eltis, *The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context*, 56 MCGILL L. J. 289 (2011); Nancy S. Marder, *From "Practical Obscurity" to Web Disclosure: A New Understanding of Public Information*, 59 SYRACUSE L. REV. 441 (2009); see also *Access to Records and Information in CRT Disputes: Policy 001-20151215*, BRITISH COLUMBIA CIVIL RESOLUTION TRIBUNAL 1-5, 12-17 (2015) [hereinafter British Columbia CRT, *Access to Records*], <https://civilresolutionbc.ca/wp-content/uploads/2017/02/Access-to-Info-in-CRT-Case-Records.pdf> [<https://perma.cc/P542-ZNW8>].

²²³ Whether absentees can be bound is a question pending in the Second Circuit. See *Jock v. Sterling Jewelers, Inc.*, 2018 WL 418571, Jan. 15, 2018; appeal pending. Judge Rakoff held that an arbitrator had no power to bind absentees unless they opted into the proceedings.

²²⁴ See also Lindsay R. Androski, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. CHI. LEGAL F. 631, 632-33 (2003); Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 191 (2006); Joshua S. Lipshutz, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory*

Arbitration Agreements and Class Action Lawsuits, 57 STAN. L. REV. 1677, 1692 (2005). Using aggregation in settlements more generally raises yet other issues. See Robert Bone, *Replacing Class Actions with Private ADR: A Comment on "Settlement, ADR, and Class Action Superiority,"* J. TORT L. (2012); Andrew Bradt and Theodore Rave, *The Information-Forcing Role of the Judge in MDL*, 105 CAL. L. REV. 1259 (2017).

²²⁵ Information is also emerging through online reporters and databases (ORDs) that create windows into investor-State dispute settlements and can be understood through different lenses in terms of their impact and utility. See Pietro Ortolani, *Online Reporters and Databases: Four Narratives of their Role in Investor-State Disputes*, [MPI paper/or other website, 2017.]

²²⁶ See Recommendation for a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes, Commission Decision No. COM/2017/0493 (Renault), 1988 O.J. L 220/30 (Sept. 3, 2017), <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2017:493:FIN>.

See also Case C-377/13, (Second Chamber), *Ascendi Beiras Litoral e Alta, Auto Estradas da Beiras Litoral e Alta SA v. Autoridade Tributária e Aduaneira*, 2014 E.C.R. 1754; Case C-555/13, (Eighth Chamber), *Merck Canada Inc. v. Accord Healthcare Ltd, Alter SA, Labochem Ltd, Synthon BV, Ranbaxy Portugal*, 2014 E.C.R. 92.

²²⁷ The claim is that because states permit such proceedings, those arbitrators become courts of a Member State from which references can be taken. Judgment of 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta (C-377/13)* ECLI:EU:C:2014:1754; Order of 13 February 2014, *Merck Canada (C-555/13)* ECLI:EU:C:2014:92.

²²⁸ Parallel bills were introduced in December of 2017 in the U.S. House of Representatives and in the Senate. See *Ending Forced Arbitration of Sexual Harassment Claims*, H.R. 4570; S. 2203, 115th Cong. (Dec. 6, 2017).

²²⁹ Letter from Pamela Jo Bondi, joined by all the other Attorneys General to the Congressional Leadership, re "Mandatory Arbitration of Sexual Harassment Disputes," <https://www.mass.gov/files/documents/2018/02/12/NAAG%20letter%20to%20Congress%20Sexual%20Harassment%20Mandatory%20Arbitration.pdf>.

²³⁰ These are issues for courts and for administrative decision-making in colleges and universities as well. See Alexandra Brodksy, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822 (2017).