

JUDICIAL TRANSPARENCY AND THE RULE OF LAW



23RD ANNUAL FORUM FOR STATE APPELLATE COURT JUDGES



FORUM ENDOWED BY HABUSH HABUSH & ROTTIER S.C.

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“[The curtailment of public court processes is] destructive of public confidence in the judiciary. . . . It is destructive of the rule of law for us to do things in secret.”

—A judge attending the 2015 Forum

“What’s wrong with the truth? If, say, a car manufacturer creates a defective product, what’s wrong with everybody knowing that? That’s our job, to discover the truth.”

—A judge attending the 2015 Forum



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FOREWORD

The Pound Civil Justice Institute's twenty-third Forum for State Appellate Court Judges was held on July 11, 2015, in Montréal, Québec, Canada. As with all of our past forums, it was both enjoyable and thought-provoking. In the Forum setting, judges, practicing attorneys, and legal scholars were able to consider the crucial issue of transparency in judicial proceedings and the impact on the rule of law of the increasing instances of non-public dispute resolution.

The Pound Institute recognizes that the state courts have the principal role in the administration of justice in the United States, and that they carry by far the heaviest of our judicial workloads. We try to support them in their work by offering our annual Forums as a venue where judges, academics, and practitioners can have a brief, pertinent dialogue in a single day. These discussions sometimes lead to consensus, but even when they do not, the exercise is always fruitful. Our attendees always bring with them different points of view, and we make additional efforts to include panelists with outlooks that differ from those of most of the Institute's Fellows. That diversity of viewpoints always emerges in our Forum reports.

Our Forums for State Appellate Court Judges have been devoted to many cutting-edge topics, ranging from the court funding crisis, to the decline of jury trial, to separation of powers and forced arbitration. We are proud of our Forums, and are gratified by the increasing attendance we have experienced since their inception, as well as by the very positive comments we have received from judges who have attended in the past. A full listing of the prior Forums and their content is provided as an appendix to this report. Digital versions of our Forum reports—along with most of our other publications—are available free of charge via our website: www.poundinstitute.org.

The Pound Institute is indebted to many people for the success of the 2015 Forum for State Appellate Court Judges:

- Professor Judith Resnik and Professor Nancy Marder, who wrote the papers that framed our discussions;
- the Honourable Nicole Duval Hesler, Chief Justice of the Province of Québec, for welcoming us to Montréal and for providing for the judges who attended the Forum a tour of her court's beautiful building;
- our luncheon speaker, Adam Liptak, the U.S. Supreme Court correspondent of *The New York Times*, for discussing the connection between judicial transparency and the First Amendment;
- our panelists—Matthew Bailey, Hon. Anne Elizabeth Barnes, Leslie Brueckner, Lance Cooper, Ronald Hedges, Patrick Malone, John Parker Sweeney, and Hon. Jean Hoefer Toal;

- Kathleen Flynn Peterson, who, as Pound's Vice President, did a fantastic job moderating the Forum in my absence;
- the moderators of our small-group discussions—Linda Atkinson, Chris Aumais, James Bilsborrow, Kathryn Clarke, Thomas Fay, William Gaylord, Stephen Herman, Molly Hoffman Wolfe, Adam Langino, Wayne Parsons, Alinor Sterling, and John Vail—for helping us to arrive at the essence of the Forum, which is what experienced state court judges think about the issues we discussed;
- and the Pound Civil Justice Institute's efficient and dedicated staff—Mary Collishaw, our executive director, and Jim Rooks, our consultant and Forum Reporter—for their diligence and professionalism in organizing and administering the 2015 Judges Forum.

It goes without saying that we appreciated the attendance of the distinguished group of judges who took time from their busy schedules so that we might all learn from each other. We hope you enjoy reviewing this report of the Forum, and that you will find it useful to you in your future consideration of matters relating to judicial transparency, the rule of law, and trial by jury.

A handwritten signature in black ink, reading "Herman J. Russomanno". The signature is written in a cursive, flowing style with a large initial 'H'.

Herman J. Russomanno
President, Pound Civil Justice Institute, 2013-15

INTRODUCTION

On July 11, 2015 in Montréal, Québec, Canada, 172 judges, representing 38 states, took part in the Pound Civil Justice Institute's twenty-third annual Forum for State Appellate Court Judges.

The judges examined the topic, "Judicial Transparency and the Rule of Law." Their deliberations were based on original papers written for the Forum by Professor Judith Resnik of Yale Law School ("Contracting Transparency: Public Courts, Privatizing Processes, and Democratic Practices"), and Professor Nancy S. Marder of IIT Chicago-Kent College of Law ("Judicial Transparency in the Twenty-First Century"). The papers were distributed to participants in advance of the meeting, and the authors also made oral presentations of their papers to the judges during the plenary sessions. The paper presentations were followed by discussion by panels of distinguished commentators: Leslie Brueckner, a staff attorney with the Public Justice organization; Hon. Anne Elizabeth Barnes, Court of Appeals of Georgia; Matthew Bailey, Esq., of the Association of Defense Trial Attorneys; Lance Cooper, Esq., Marietta, Georgia; Ronald Hedges, Esq., Hackensack, New Jersey; and Patrick Malone, Esq., Washington D.C., John Parker Sweeney, President of the Defense Research Institute; and Hon. Jean Hoefer Toal, South Carolina Supreme Court. All provided incisive comments on the issues based on a wealth of diverse experience in the law. The judges also heard welcoming comments by the Honorable Nicole Duval Hesler, Chief Justice of the Province of Québec, and a lunch address on First Amendment considerations in judicial transparency, by Adam Liptak, the U.S. Supreme Court correspondent of *The New York Times*.

After each plenary session, the judges separated into small groups to discuss the issues, with Fellows of the Pound Institute serving as group moderators. The paper presenters and commentators visited the groups to share in the discussion and respond to questions. The discussions were recorded electronically and transcribed by court reporters. Under ground rules set in advance of the discussions, comments by the judges were not made for attribution in this report of the Forum. A representative selection of the judges' comments appears in this report.

At the concluding plenary session, the Forum Reporter, James E. Rooks, Jr., summarized points of apparent agreement among the judges, and all participants in the Forum had a final opportunity to make comments and ask questions.

This report is based on the papers written and presented by Professors Resnik and Marder, and on transcripts of the Forum's plenary sessions and group discussions.



James E. Rooks, Jr.
Forum Reporter



WELCOME BY HONOURABLE NICOLE DUVAL HESLER CHIEF JUSTICE OF THE PROVINCE OF QUÉBEC

Fellow appellate judges, members of the bar, professors, members of the Pound Civil Justice Institute, distinguished guests. Allow me to welcome you to Canada and the Province of Québec. This city is as unique as the legal landscape of our province, which, as you may already know, is the functional equivalent of an American state. With its mix of civil and common law traditions, the Province of Québec provides a singular backdrop for this year's Judges Forum. This morning I would like to begin with an overview of what makes our province such an interesting legal environment. I will then touch on the topic of judicial transparency as a prelude to the thought-provoking plenaries on today's schedule.

As a result of both French and English colonial rule, Québec's legal tradition sits at the confluence of the civil law and common law traditions. The civil law tradition of Continental Europe governs local matters such as procedural law in civil disputes, while British common law applies to federal and constitutional matters. To name a few: bankruptcy, criminal, and divorce proceedings are anchored in the common law tradition across Canada as is the field of public law generally and judicial review.

The court of appeal, which I have the privilege to lead, is composed of federally appointed judges. I will spare you the jurisdictional details. But suffice it to say that, as the highest court in the province, the jurisdiction of the Court of Appeal extends from criminal to family law, embracing a wide variety of areas, including commercial and administrative disputes. It hears more than 1,000 appeals on the merits every year. In the spirit of transparency, the court's website features data on our caseload and handling time should you be interested in this information. I have been told that our website is one of the most functional websites around. Please try to have a look.

This brings me to my second topic, which is judicial transparency. Those who visited the court of appeal yesterday might have noticed the abundance of natural light flowing through the building's 23 skylights, symbolizing transparency in action. Indeed, transparency is part of the court's DNA, just as it is the core of our legal tradition. In the words of Jeremy Bentham, "Where there is no publicity, there is no justice. Publicity is the very soul of justice."

Professor Resnik provides a thoughtful reflection on Bentham's legacy in her paper introducing this morning's plenary. I will not steal her thunder, but I do hope Bentham's remarks about the importance of public trials inform your thought processes today.

With that said, transparency, however crucial, is not unfettered. It must be balanced against a plurality of other interests and rights, be it to protect the accused's right to a fair trial or to maintain the cover of field agents in active police operations. Many legitimate concerns limit public access to legal processes. In a nutshell, the Canadian approach to resolving the conflict between such concerns and our dedication to open courts is a two-step process.

First, the court considers whether a serious risk to the proper administration of justice requires restricting the open-court principle. Second, the court evaluates whether the salutary effects of the restriction outweigh its deleterious effects on the rights and interests of the parties and the public. This second inquiry includes assessing the effect of a restriction on the right to free expression, on the right of the accused to a fair and public trial, and on the efficacy of the administration of justice. This contextual approach applies to all discretionary court orders limiting freedom of expression and freedom of the press in relation to court proceedings, including orders to seal search warrant materials.

The point of this cursory overview of Canadian case law is to underline the common challenges we face as appellate judges. Balancing open courts with a plethora of other rights is fraught with uncertainties. Regardless of how a particular jurisdiction articulates this balancing act, it is worth pausing for a moment to contemplate common challenges, both longstanding and emerging.

Balancing open courts with a plethora of other rights is fraught with uncertainties. It is worth pausing for a moment to contemplate common challenges, both longstanding and emerging.

I will leave you by raising two emerging challenges, which strike me as particularly pressing. The first is the trend towards alternative dispute resolution. We are all familiar with arbitration clauses, even in consumer contracts. How might emerging arbitration processes affect transparency and meaningful access to justice? The second game-changer is technology. While technology can lead to greater transparency,

as it has in our Canadian courts, it also presents new challenges. How effective are publication bans in an age of decentralized, instant communication? These are but two areas that we, as judges, scholars, and lawyers, must grapple with as we ponder how transparency and the rule of law interact in our current context. Today's distinguished presenters, panelists and speakers will undoubtedly provide insights for the courtroom and beyond.

On that note, I hope this event will spur meaningful exchanges with your colleagues and provide the impetus for a renewed reflection on judicial transparency. I wish you an excellent Forum and a great time in the beautiful City of Montréal. Please come again.

MORNING PAPER, ORAL REMARKS, AND COMMENTS

EXECUTIVE SUMMARY

Executive Summary prepared by James E. Rooks, Jr., Forum Reporter

In Part I of her paper, “The Obligations Democracy Imposes on Courts,” Professor Resnik sketches the historical practices of courts, evolving from efforts by monarchs wanting to impress on populations their power to enforce their laws and then developing into democracies’ constitutional obligations protecting public rights to use courts and to observe the interactions among those in court. Professor Resnik contrasts these developments with the U.S. Supreme Court’s recent expansion of the scope of the Federal Arbitration Act and its approval of dispute resolution through often invisible processes. The Court’s actions, she argues, have created “an unconstitutional system that strips individuals of access to courts to enforce state and federal rights, strips the public of its rights of audience to observe state-empowered decision-makers imposing legally binding decisions, and strips the courts of their obligation to respond to alleged injuries, absent parties’ consent to withdraw their claims.” A major loss comes from limits on what the British philosopher and social reformer Jeremy Bentham called “publicity,” which he described as “the very soul of justice.”

Part II, “Producing the Equation of the Public with Courts,” reviews two sets of public access rights—constitutional entitlements to bring disputes to courts, and third party rights to observe the functioning of courts. Courts are thus a font of information, and access is facilitated through web-based record-keeping. Over recent decades, courts have also interpreted the constitution as requiring subsidies to subsets of litigants—such as criminal defendants and families in conflict over parental status—who might otherwise be foreclosed from pursuing remedies. The result of rights to and in court has been a significant investment from both the public and private sector—reflected in the growing number of courthouses, their staff, and the millions of cases filed (illustrated by Figures 1 and 2).

In Part III, “Diffusing Disputes and Homogenizing Judges and Other Dispute Resolvers,” Professor Resnik introduces what she terms “Dispute Diffusion,” relocating adjudication in various venues and putting courts on a spectrum with a host of other dispute resolution systems under the umbrella of “alternative civil procedure rules” that do not take public access to process as a central tenet. Through a mix of court-based procedural reforms, anxiety over caseloads, reinterpretations of the Federal Arbitration Act, and some sectors’ aversion to litigation, major areas of dispute resolution are being sent to privatizing processes, in and out of court. As a result, in the federal system, judges have shifted away from work on the bench to managing dockets and promoting settlements. In both state and federal systems, the new interpretations of the Federal Arbitration Act have sent claimants to arbitration, and whether in or out of court, processes and outcomes are often confidential. To think of these shifts as a result of “private” ordering is to miss just how much public regulation is at work.

Part IV, “Gateways and Barriers: The Absence of Arbitration in Practice,” provides a window into the effects of the shift in attitudes toward, and practices involved in, dispute resolution (illustrated by Figures 3 and 4). Despite a massive production of clauses requiring employees and consumers to use arbitration rather than courts, the numbers of arbitrations are startlingly small. Professor Resnik mined the data required under California’s 2002 mandate that arbitration providers post details of claims filed, and learned that, although tens of millions of wireless customers are required to use arbitration, almost none do. The data parallel those of the Consumer Financial Protection Bureau, which likewise found that, despite arbitration clauses applying to millions of consumers, virtually none file arbitrations. In contrast, those with the capacity to negotiate often tailor contracts to leave open the option to use courts. Moreover, the Delaware court system has sought to make its judges available to conduct private arbitrations of business disputes in public courthouses, but behind closed doors.

In Part V, “The Contingency of Courts,” Professor Resnik uses the constitutional challenge to the Delaware statute authorizing its Chancery court to provide confidential arbitration as an illustration of the current debate about the parameters of the constitutional law of open courts. The U.S. Supreme Court, she argues, has been wrong to enable diffuse modes of dispute resolution without requiring public access and judicial oversight. The stakes are high, for the “publicity” that is being lost “forwards informed discussions of government, fosters perceptions of fairness, checks corruption, enhances performance, discourages fraud, and permits communities to vent emotions in the criminal context.” Its loss is more than a problem for litigants and judges—it is a problem for democracy itself.

CONTRACTING TRANSPARENCY: PUBLIC COURTS, PRIVATIZING PROCESSES, AND DEMOCRATIC PRACTICES

Judith Resnik, Yale Law School¹

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”

U.S. Const., Am. VI. (1791)

“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.”

Ala. Const. of 1819, art. I, § 14

“To avoid the expense and delay of having a trial, judges encourage the litigants to try to reach an agreement resolving their dispute.”

“Understanding the Federal Courts/How Courts Work,” website of the U.S. Courts, 2015²

“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.”

Wireless Service “Customer Agreement” 2002³

“We may change any terms, conditions, rates, fees, expenses, or charges regarding your Services at any time.”

Wireless Provider’s “Customer Agreement,” 2015⁴

I. The Obligations Democracy Imposes on Courts

The term “transparency” has come to be used in a host of fields—politics, the humanities, the sciences, engineering, architecture, and sports—to reference openness, visibility, accountability, and communicative exchanges. As this diverse deployment suggests, transparency is readily embraced even as its content and commitments can vary. Transparency has also become a term of art *in law*, as illustrated by “Rules on Transparency in Treaty-based Investor-State Arbitration,” adopted in 2014.⁵

But for centuries, law has used other words to capture commitments to public exchanges and developed a jurisprudence about their import. The epigraphs from the U.S. Bill of Rights of 1791 and from the 1818 Constitution of Alabama rely on the words “public” and “open” to create two kinds of constitutional

During the last centuries, [the terms “public” and “open”] have shaped a rich jurisprudence, grounded in political theory, about how courts are to function in democracies.

entitlements—that people have the right to come to court to make claims and that third parties have the right to observe judicial proceedings. During the last centuries, these terms have shaped a rich jurisprudence, grounded in political theory, about how courts are to function in democracies. These forms of access to courts seem so historically anchored in practices as to be invulnerable. Yet we are watching their deterioration through the privatization of processes, both in and outside of courts.

This essay reflects on the functions of open processes in courts and the contemporary challenges posed by privatization of courts through the reconfiguration of processes inside courts and the outsourcing of disputes to arbitration. I first sketch the history of open courts—stemming from eras when kings and emperors aimed to enshrine their own authority through public performance of their power to make and enforce laws. In the centuries thereafter, constitutional provisions (such as those quoted above), predicated on democratic views of the importance of controlling government power, turned those “rites” into “rights,” requiring that courthouse doors be open.

Second, I map the privatization of processes in court through new mandates for judges to promote settlement (exemplified by the quote taken from the 2015 website of the U.S. federal district courts) and through enforcing obligations to arbitrate (illustrated by the two quotes from wireless service providers). Practices of adjudication, arbitration, and other forms of “alternative dispute resolution” (ADR) are coming to be styled as fungible options on a “dispute resolution” (DR) spectrum.

An increasingly common parlance (criss-crossing the globe) aims to replace the term ADR with DR, so as to put courts—now termed “Judicial Dispute Resolution” (JDR) or “Judicial Conflict Resolution” (JCR)⁶—on a continuum of mechanisms to respond to conflict. Under this formulation, courts sit alongside a range of options, and their identity as a unique constitutionally-obliged mode of decision-making recedes.

Practices of adjudication, arbitration, and other forms of “alternative dispute resolution” (ADR) are coming to be styled as fungible options on a “dispute resolution” (DR) spectrum.

The reasons for and goals of this homogenization are varied, as the field of DR is capacious. Among its proponents are those seeking to respond to the high demand for adjudicatory services by augmenting “paths to justice” so as to expand access,⁷ reformers aspiring to shape more collegial problem-solving processes,⁸ entrepreneurs looking for business,⁹ and potential defendants hoping to avoid the publicity and regulation that courts entail.¹⁰ Their methods include expanding the forms of process, increasing the power of private providers to issue binding judgments, and broadening the repertoire of providers. Their shared aim is to resolve cases with the force of law through methods other than (and sometimes including) adjudication.

“Dispute Diffusion” is the term I offer to capture these new commitments to the eclipse of court-based adjudication as the primary paradigm for government-authorized dispute resolution. Implementation in the United States comes through a mix of policymaking through statutes, rules, regulations, and doctrines, which press trial-level judges to become conciliators, to deploy other individuals as “neutrals” to mediate or to arbitrate in courts, and to outsource decision-making to the private market.

Much of the work seeks to quiet conflict by relying on confidential interactions among disputants and decision-makers. The claims filed, the methods used by decision-makers, and the results are often outside the public’s purview. A myriad of provisions—forming what I term “Alternative Civil Procedural Rules” (ACPR)—reflects the developing deregulatory norms. While conferring adjudicatory license on a variety of private processes, the ACPR rarely address the needs of indigent users, the independence of the decision-makers, and the rights of the public to participate.

“Dispute Diffusion” [captures] these new commitments to the eclipse of court-based adjudication as the primary paradigm for government-authorized dispute resolution.

Some aspects of Dispute Diffusion can be attributed to private ordering through negotiated contracts among equals. But the mandates that are my focus apply to hundreds of millions of consumers and employees, whose obligations to arbitrate flow less from volition than the public authorization to privatization adjudication. The United States Supreme Court opened those floodgates during the last three decades, as it reinterpreted the 1925 federal arbitration legislation, now as the Federal Arbitration Act (FAA), to require courts to enforce a host of arbitration provisions promulgated by issuers of consumer credit, manufacturers of products, and employers. Thus, I detail some of the bases for the mass production of arbitration clauses, requiring that claimants, alleging violations of federal and state statutory and common law wrongs, proceed single-file to decision-makers designated by the clauses’ providers. What may be surprising is that the result has not been a massive number of arbitrations. Once cut off from using the courts and required (rather than choosing) to arbitrate, virtually no one files claims—thereby erasing as well as diffusing disputes.

Procedural change is synonymous with the history of courts, and transnational exchanges have shaped and reshaped both adjudication and arbitration. The development of new modes for responding to disputes and the proliferation of sites for resolution are not problems, *per se*. Exemplary is the growth of administrative adjudication, through which many (but not all) powers of courts are delegated to other kinds of judges who

The development of new modes for responding to disputes and the proliferation of sites for resolution are not problems, *per se*.

work under rules crafted in public exchanges and subjected to constitutional limitations.¹¹ In doctrinal terms, as long as the Court determines that the “process due” suffices, delegation to an alternative forum is permissible.¹² But instead of exercising its obligation to analyze the alternatives and assess their quality, the Court has spun off decision-making without imposing safeguards.

The recent Supreme Court FAA case law was the subject of the 2014 Pound Forum, and the law has garnered a good deal of criticism for cutting off the production of law,¹³ for undermining the role of Article III courts,¹⁴ for limiting associational rights,¹⁵ and for constricting access to law by enforcing bans on the collective pursuit

of claims.¹⁶ The reallocation of disputes through the FAA to non-public service providers should also be understood as a shadow conflict over public subsidies for litigants. Justices who object to reading the federal constitution as imposing positive obligations to support civil litigants and who are leery of court-based class actions can avoid debates about the scope of such rights by obliging disputants to use single-file arbitration.¹⁷ The consequence, as one researcher of arbitration provisions for employees has concluded, is a system that exacerbates inequalities.¹⁸

The FAA case law has also troubled contract scholars,¹⁹ because obligations to arbitrate arise not from negotiation but by signing (or clicking on) documents, some of which stipulate (as exemplified in the epigraph) that the drafter of the provisions “may change any terms”—unilaterally.²⁰ Deeming an obligation to proceed (usually on an “individual basis”²¹) through a designated dispute resolution system to be an enforceable “contract” undervalues private law,²² rightly admired for facilitating cooperative agreements, reflecting the will of the participants and tailored to their needs.

My argument is that the cumulative impact of recent Supreme Court decisions on arbitration produces an unconstitutional system, providing insufficient oversight of the processes it has mandated as a substitute for adjudication and shifting control over third-party access to arbitration providers and disputants. Legal claims are a species of property, and courts are the venues designated under constitutions to respond through open processes to claims of deprivation of those property rights. Limitations on rights—and new procedures for their

vindication—are readily permissible but cannot, constitutionally, be imposed arbitrarily or be insulated from tests of fairness and lawfulness.

The cumulative impact of recent Supreme Court decisions on arbitration produces an unconstitutional system.

The Court’s own explanations of its decisions licensing arbitration reflect this concern—that procedural innovations protect the rights at stake. The

Court has repeatedly described its rulings as resting on the requirement that arbitration provides opportunities for the “effective vindication” of statutory rights,²³ and the Court has regularly drawn the analogy between arbitration mandates and forum selection clauses in which disputants designate one jurisdiction’s court system or another.²⁴ Thus, the Court’s reallocation of adjudicatory authority to arbitration could be constitutional if the Court would have to police the alternatives to assess the adequacy and fairness of the procedures *ex ante*, to understand how they are used in practice, and to impose oversight on both process and outcomes *ex post*. When doing so, the Court would have to ensure that the alternatives provide egalitarian dispute resolution mechanisms, responsive to the asymmetries among disputants through offering fee waivers for the indigent, collective actions, and other means to ensure opportunities for voice and participation. Further, the Court would have to protect public access to the processes and outcomes and, thereby, enable insight into the procedures and governing norms, to make the alternatives transparent and accountable.

But the Court has not done so. Despite the heralding of arbitration as a speedy and effective alternative to courts, the mass production of arbitration clauses has not resulted in “mass arbitrations.”²⁵ Instead, the number of documented consumer arbitrations is startlingly small. One example comes from wireless service providers, chosen because the Supreme Court addressed the ban on class arbitrations in that context in its 2011 decision involving AT&T Mobility.²⁶ According to information from the American Arbitration Association (AAA),

designated by AT&T to administer its arbitrations and complying with state reporting mandates, 134 individual claims (about 27 a year) were filed against AT&T between 2009 and 2014.²⁷ During that time period, between 85 and 120 million people used AT&T for their wireless service, and a variety of lawsuits (including filings by the federal government) charged the company with a range of legal breaches, including systematic overcharging for extra services and insufficient payments of refunds when customers complained.²⁸

The number of documented consumer arbitrations is startlingly small.

More generally, the AAA, which is the largest non-profit provider of arbitration services in the United States, averages about 1,650 consumer arbitrations annually;²⁹

its full docket includes 150,000 to 200,000 filings a year.³⁰ Thus, were ADR providers to be in high demand, their capacity to respond would be limited. An estimated 290 million people have cell phones,³¹ and “99.9% of subscribers” to the eight major wireless service providers are subject to arbitration clauses.³² For those with credit card debt, about 50 percent are subject to arbitration,³³ as are more than 30 million employees.³⁴ Virtually all of these clauses bar class actions in courts or in arbitration.³⁵ By way of contrast, thousands of courts operate in the state and federal systems, where civil filings are estimated to run between 25 and 40 million cases annually, excluding about 60 million family, juvenile, and traffic cases.

As those numbers suggest, the market *for courts* remains robust, including among those who have the capacity to draft their own contracts. Reviews of the contracts of companies with the resources to customize

The market *for courts* remains robust.

indicate that they do not regularly bind themselves to arbitrate, or that they seek to obtain the benefits of both arbitration and courts by bargaining for judicial review of arbitrators’ rulings.³⁶ Yet the Supreme Court has also rejected parties’ efforts to permit judicial oversight of arbitrators’ decisions.³⁷

Debate is underway about whether arbitration is cheaper or slower than courts and whether consumers or employees do better or worse in either venue.³⁸ My goal is to turn attention to the underlying fact that almost no consumers or employees “do” arbitration at all. The lack of use reflects the limited oversight of arbitration’s fairness and lawfulness, the failure to require a comprehensive system of fee waivers, the bans on collective actions that could augment complainants’ resources, and the inability of third parties to gain easy access to the proceedings. Thus, the Court’s expansion of the FAA—diffusing disputes through outsourcing them to deregulated and variable processes—produces an unconstitutional system that strips individuals of access to courts to enforce state and federal rights, strips the public of its rights of audience to observe state-empowered decision-makers imposing legally binding decisions, and strips the courts of their obligation to respond to alleged injuries, absent parties’ consent to withdraw their claims.

These problems are avoidable. Many other models of arbitration exist. In some tailor-made contracts for arbitration, parties seek to maintain quality in arbitration by authorizing appeals for review to courts, and some parties with resources seek to use state judges as arbitrators. Further, in 1988, Congress authorized federal courts to offer “court-annexed arbitration” but permitted it only for certain claims and generally if freely chosen.³⁹ Federal regulation of securities arbitrations and European oversight of consumer arbitrations provide additional examples of regulated arbitration, insistent on forms of public accountability and transparency.

Thus, my purpose is not to idealize courts as the sole path to or the embodiment of justice.⁴⁰ Barriers to entry are significant, and examples of “junk justice,” in which the judicial process works its own unfairness, are plentiful. Illustrative is one study of 4,400 lawsuits filed by debt buyers in Maryland courts; unrepresented debtors regularly defaulted on amounts owed (averaging about \$3,000)—all without trials, lawyers, or much judicial oversight.⁴¹ The Department of Justice’s 2015 account of the failures of the municipal court in Ferguson, Missouri is another example of the disjuncture between government-empowered judges and just systems.⁴² Rather than “administering justice or protecting the rights of the accused,” the court sought to “maximiz[e] revenue” and it did so through “constitutionally deficient” procedures that had a racially biased impact.⁴³ Yet the ability to uncover the intricacies of how these systems fail comes from legal obligations of courts, required to maintain records and to permit public observation—opening paths to correct injustices, if popular will to do so exists.⁴⁴

What courts can offer are open doors, the potential for egalitarian redistribution of authority, and the possibility of public oversight of legal authority. What arbitration under the FAA currently lacks is that

Courts can offer open doors, the potential for egalitarian redistribution of authority, and the possibility of public oversight of legal authority.

transparency. Without public access, one cannot know whether fair treatment is accorded regardless of status. Without publicity, judges have no means of demonstrating their independence. Without oversight, one cannot ensure that judges, tasked with vindicating public rights, are loyal to those norms. Without independent judges acting in public and treating the

disputants in an equal, dignified manner, outcomes lose their claim to legitimacy. And without public accountings of how legal norms are being applied, one cannot debate the need for revisions.

The final segment of this essay addresses the constitutional law of open courts and focuses on First Amendment doctrine about rights of the public to observe court proceedings. The formulation for determining whether a particular closure is lawful is often described as a mix of “experience” and “logic.”⁴⁵ that the First Amendment right of public access attaches when “the place and process have historically been open to the press and general public” and when “access plays a significant positive role in the functioning of the particular process in question.”⁴⁶ But as trials recede and judges rely on closed-door conferences and outsourced arbitrations, the experiences of these new forms of process make more difficult the claim that public access plays a critical and generative role.

My argument is that losing the public dimension of courts is a problem *for* democracy. When the term “democracy” is linked to courts, the discussion is usually about whether judicial review is counter-majoritarian or about the role of jury trials, particularly in criminal cases. My invocation of democracy here aims to expand that focus. Adjudication expresses the values of democracy by constraining the state’s power through structuring how judges can function legitimately. Democracy insists that all persons are eligible to participate in courts, that they must be treated as equals, and that they are entitled to respect from their adversaries and from judges.

Losing the public dimension of courts is a problem *for* democracy.

The constitutional obligation that such exchanges occur in public serves many functions. This “publicity”—to borrow the term Jeremy Bentham provided in the nineteenth century—has many utilities. As Bentham put it, when the public was present and judges preside at trial, they themselves are “on trial.”⁴⁷ As Michel Foucault later explicated, with public oversight comes the disciplinary powers of surveillance.⁴⁸ Further, Bentham assumed that judges would want to explain their actions to the audience, who would learn why and how judgments were made. The immediacy of an audience would, Bentham thought, turn judges into teachers and courts into “schools” as well as “theaters of justice.”⁴⁹ These different functions made publicity, for Bentham, “the very soul of justice.”⁵⁰

The idea of the public as an authoritative overseer of the judiciary was part of a broader reconception of courts’ relationship to the body politic and of people’s relationship to government. Historically, judges served at the pleasure of the monarchs who appointed them. The English Act of Settlement of 1701 is one marker of shifting norms; judges no longer lost their commissions when the monarchy changed.⁵¹ A century later, Bentham argued that spectators ought to become active participants (“auditors” was his term),⁵² disseminating their own notes, taken without state control. The public could thus report on how judges treated all litigants, including when the government (which appointed judges) appeared before them.

Bentham admired publicity for its capacity to enhance accuracy, provide education, impose discipline, and legitimate outcomes. In the book, *Representing Justice: Invention, Controversy and Rights in City-States and Democratic Courtrooms*, Dennis Curtis and I take a somewhat different tack, overlapping with Bentham in inquiring about public courts as sources of knowledge but interested in different kinds of production. While Bentham stressed the protective side of adjudication (policing judges as well as witnesses), we focused on how the public facets of adjudication engender participatory obligations and enact democratic precepts of the state’s relationship to its citizenry.

On this account, diminution of public adjudication is a loss for democracy because adjudication itself can teach about how to function responsibly in democracies. The obligations of judges in both criminal and civil proceedings to hear the other side, to welcome all persons as equals, to be independent of the government that employs and deploys them, enable two kinds of democratic discourses. One is between public observers, judges, lawyers and litigants. The other comes from exchanges among the direct participants in an adjudicatory triangle. Debates can therefore be had about what law means, how difficult it can be to apply rules to facts, whether liability should attach, what remedies ought to flow, and whether the process itself fairly enabled legitimate decision-making.

Diminution of public adjudication is a loss for democracy because adjudication itself can teach about how to function responsibly in democracies.

Thus, public and open courts are intertwined with judicial independence. These two attributes, coupled with equal access and treatment for all disputants, have become the hallmarks of legitimate and binding adjudication in democratic orders. And these are the attributes that the reconfiguration of process in and outside courts puts at risk.

II. Producing the Equation of the Public with Courts

Constitutional text, doctrine, and common law traditions establish both the authority of individuals to bring claims to courts and the obligation that courts welcome third parties to observe their proceedings. State constitutions regularly linked the two by mandating rights-to-remedies in open courts. The 1776 Delaware Declaration of Rights (echoing the Magna Carta as filtered through natural and common law traditions) provided:

“That every Freeman for every Injury done him in his Goods, Lands or Person, by any other Person, ought to have Remedy by the Course of the Law of the Land, and ought to have Justice and Right for the Injury done to him freely without Sale, fully without any Denial, and speedily without Delay, according to the Law of the Land.”⁵³

The 1792 Delaware Constitution added that “[a]ll courts shall be open.”⁵⁴ The first constitutions of Maryland (1776) and Massachusetts (1780), and the second of New Hampshire (1784) had similar directions,⁵⁵ while Pennsylvania’s 1776 version instructed that all “courts shall be open, and justice shall be impartially administered without corruption or unnecessary delay.”⁵⁶ Early nineteenth-century formulations, such as the 1818 Connecticut Constitution and the 1819 Alabama Constitution, used the locution that such rights were to be accorded to “every person.”⁵⁷ Those terms are echoed in many state constitutions, describing public rights to observe proceedings and to use courts.⁵⁸

Criminal defendants garnered special protections with rights to disclosure of charges, representation, confrontation, speedy trials, and to jurors from the vicinage in which the crime took place.⁵⁹ Jury trial rights in criminal and civil cases put members of the public into courts as decision-makers, thereby further anchoring the practice of open proceedings.⁶⁰ Victims of crimes gained constitutional recognition in the latter part of the

twentieth century, when more than thirty state constitutions added provisions recognizing a role for victims in court proceedings.⁶¹

Jury trial rights in criminal and civil cases put members of the public into courts as decision-makers, thereby further anchoring the practice of open proceedings.

The federal constitution does not specify remedial rights in the terms used frequently in state constitutions;⁶² the phrase “open Court” appears only in the little-read Treason Clause of Article III,⁶³ and the reference to “public trials” comes in relationship to the Sixth Amendment rights of

criminal defendants. Yet the idea of federal courts as responding to claims of injury has a long history. In 1803, Chief Justice Marshall famously insisted on two precepts: that the “very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury,” and that “[o]ne of the first duties of government is to afford that protection.”⁶⁴ Repeatedly, and relatively un-selfconsciously until the current wave of objections to implied causes of action,⁶⁵ the Supreme Court responded by ruling on the merits of a variety of claims of right, often predicated on statutes that did not specify the availability of private enforcement⁶⁶ and on common law rights.⁶⁷

The First Amendment right “of the people . . . to petition the Government for redress of grievances” provides another basis for access to the federal courts.⁶⁸ The choice of the word “government” (instead of the term

“legislature”),⁶⁹ coupled with the history of legislative responses to public and private parties’ petitions,⁷⁰ supports reading the Clause to reference access to courts. The law thickened in the mid-twentieth century;⁷¹ by 2011, Justice Kennedy described litigation as necessary for “informed public participation” which was, in turn, “a cornerstone of democratic society.”⁷² That decision—*Borough of Duryea v. Guarnieri*—illustrates the related point that constraints on litigation are permissible, if grounded in rationality.⁷³

Fifth Amendment guarantees against deprivations of life, liberty, and property without due process, as well as against confiscation without just compensation, can also provide routes to court for determinations of whether the processes provided are those “due”⁷⁴ and the compensation “just.” The doctrine that legal claims themselves are a species of property⁷⁵ further supports access to courts, state or federal. Even the Court’s interpretation of the Eleventh Amendment to divest federal courts of authority over claims brought against states could be read as an implicit endorsement of judicial power otherwise extending to civil litigants properly before the federal courts.⁷⁶

The doctrine that legal claims themselves are a species of property . . . supports access to courts, state or federal.

Third-party rights to observe court proceedings have various federal constitutional bases. Public rights of attendance (beyond the Treason Clause) start with the Sixth Amendment, which guarantees criminal defendants a “speedy and public trial” before a jury drawn from the vicinage.⁷⁷ When the press and the public seek access, they rely on First Amendment speech and petition rights, inflected by common law English and American practices.⁷⁸ Although the U.S. Supreme Court has yet to rule directly on access to civil trials and related proceedings, its holdings on public access to criminal trials, pre-trial suppression hearings,⁷⁹ and voir dire⁸⁰ have prompted lower court judges to conclude that parallel rights attach to civil trials, related proceedings, and most of the documents filed in court.⁸¹ The formulation for determining whether a particular closure is lawful is, as noted earlier, described as a mix of “experience” and “logic.”⁸² This test comes from cases identifying a First Amendment right of public access as governing when “the place and process have historically been open to the press and general public” and when “access plays a significant positive role in the functioning of the particular process in question.”⁸³

Hospitality towards all persons regardless of color, gender, or age, and concerns for inter-litigant inequalities and asymmetries, are artifacts of social movements of the last two centuries.

Two other facets of the public persona of courts—hospitality towards all persons regardless of color, gender, or age, and concerns for inter-litigant inequalities and asymmetries—are artifacts of social movements of the last two centuries. Although many states promised “every person” rights-to-remedies, that reference

did not include vast swaths of the population. Married women, African-Americans, members of Indian tribes, and various other persons faced legal barriers to their direct pursuit of claims. Conflicts—in courts and on battlefields—turned judiciaries into venues obliged to recognize the juridical personhood of all persons and to accord them equal dignity.

The question of subsidies for poor litigants emerged in the mid-twentieth century as part of the domestic struggle over race relations, framed by efforts to distinguish America from “totalitarian regimes.”⁸⁴ In a series of decisions, the Court concluded that unfairness resulted if some criminal defendants had resources to pay fees for filing, transcripts for appeal, and lawyers, while others did not. The 1963 ruling in *Gideon v. Wainwright*⁸⁵ guaranteeing the right to counsel for indigent felony defendants was foreshadowed by the 1956 decision of *Griffin v. Illinois*, requiring that states fund transcripts for indigent defendants who would otherwise be unable to appeal.⁸⁶ Related precepts come from *Douglas v. California*, insisting that states providing appeals of criminal convictions appoint counsel for indigent defendants,⁸⁷ and *Miranda v. Arizona*, mandating that impoverished detainees, held for questioning by the police, be given *Gideon*-based rights to counsel.⁸⁸

Constitutional entitlements for civil litigants emerged when a class of “welfare recipients residing in . . . Connecticut” argued that state-imposed fees of sixty dollars for filing and service precluded them from filing for divorce.⁸⁹ Writing for the Court in 1971, Justice Harlan held 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 required the state, as a matter of due process, to provide fee waivers for those too poor to pay.⁹⁰

The potential capaciousness of that precept was made plain by concurring Justices, each of whom would have proceeded under different legal theories. Justice Douglas objected that a Due Process approach was too “subjective” and instead rested the access right on the Equal Protection Clause, which he read to protect against “invidious discrimination . . . based on . . . poverty.”⁹¹ (Two years later, the Court rejected poverty as a suspect classification for purposes of equal protection.)⁹² Justice Brennan agreed that the case presented a “classic problem of equal protection,” as well as a due process violation; in his view, the state’s legal monopoly meant that support was required for indigent litigants attempting to “vindicate any . . . right arising under federal or state law.”⁹³

The Court retreated in the face of high demand, limited resources, and a slippery slope of claimants.⁹⁴ The Court carved out the family as a special place in which Due Process doctrine generated substantive procedural entitlements, such as subsidized tests to establish paternity,⁹⁵ transcripts on appeal for indigents losing their status as parents,⁹⁶ and an exceedingly narrow right to counsel if facing termination of parental rights.⁹⁷ In 2011, a five-person majority Court concluded that procedural fairness—but not necessarily appointment of lawyers—was also required before incarcerating civil contemptors, sued by co-parents for failure to pay child support.⁹⁸

Struggles about access for “everyone” have prompted inquiries into whether courts themselves were failing to be fair.

Struggles about access for “everyone” have also prompted inquiries into whether courts themselves were failing to be fair. In the early 1980s, the National Association of Women Judges (NAWJ) joined with other

groups to press for inquiries into law’s biases. Building on a history of judicial efforts to improve the administration of justice by studying problems ranging from case management to juvenile offenders,⁹⁹ the NAWJ sought to bring into focus the treatment of women in courts. Chief judges in state courts took the lead, followed by some in the federal judiciary, and commissioned “task forces,” looking at “gender bias,” “racial and ethnic bias” and, occasionally, the intersection of the two.¹⁰⁰ More than sixty reports resulted; topics included interactions in courtrooms, judicial appointments of lawyers to committees and staff assignments, and the structures of various

legal regimes governing violence, sentencing, incarceration, immigration, bankruptcy, household dissolution, child support, economic marginality, and discrimination. Thousands of pages documented how experiences varied by gender and race, and these reports prompted new rules and practices aiming to improve the inclusiveness of courts.¹⁰¹

The mix of public adjudication, rule-making, litigant filings, task forces, accounting for funds, and of the need to obtain more resources has turned courts into “a huge information system—an entity that receives, processes, stores, creates, monitors, and disseminates large quantities of documents and information.”¹⁰² In the federal system, the Attorney General of the United States began providing statistical tables on filings in 1871.¹⁰³ That task shifted in 1939 to the Administrative Office of the United States, which works with each federal district and appellate court to describe the demands placed on courts.¹⁰⁴

With the advent of “PACER” (Public Access to Court Electronic Records), computer docketing puts federal court filings—aside from those sheltered based on concerns for national security and litigant safety—into a public database permitting readers to view pleadings and to track the submissions and dispositions in particular cases.¹⁰⁵ Aggregate statistics are compiled by the Administrative Office of the U.S. Courts, which reports yearly on the “business” of the federal courts.¹⁰⁶ More efforts are underway; the Chief Justice’s 2014 “state of the judiciary” speech announced that his Court was “developing its own electronic filing system” to facilitate public access.¹⁰⁷

Parallel data entry systems exist in all the states,¹⁰⁸ albeit often supported by fewer resources and with all the variations that a federal system enables.¹⁰⁹ The Court Statistics Act of Illinois, for example, calls for court officials to provide “information, statistical data, and reports bearing on the state of the dockets and business transacted by the courts and other matters pertinent to the efficient operation of the judicial system.”¹¹⁰ That state is the exemplar chosen here because it has an unusually large public arbitration program; in 2011, more than 41,000 cases were sent to “mandatory, non-binding, non-court procedure designed to resolve civil disputes by utilizing a neutral third party.”¹¹¹

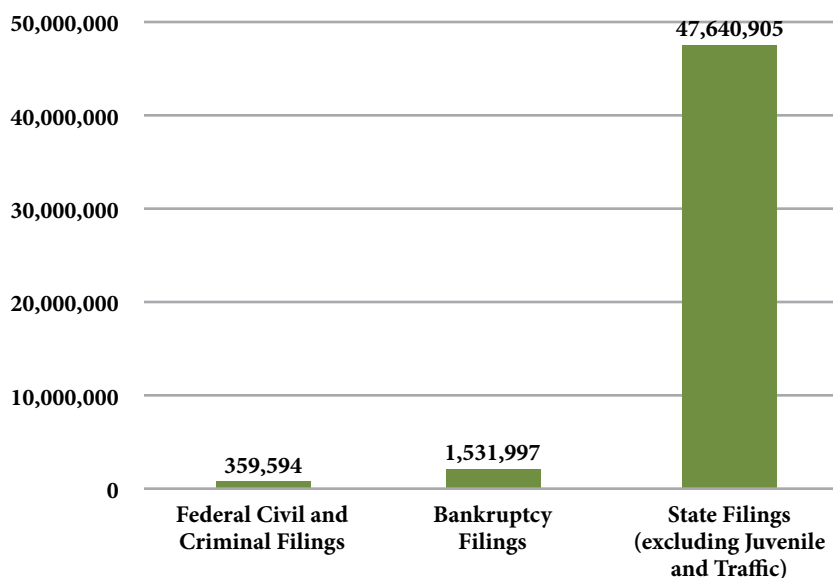
Courthouses have become iconic representations of government.

These glimpses into the volume of filings and the infrastructures reflect the investments made in courts, even as judiciaries report themselves to be under-resourced.¹¹² Given diverse streams of income and the mix of public and private funds, estimating the actual dollars flowing into courts is difficult. A few figures from the federal system offer windows into the sums committed. In 1971, the federal judiciary received \$145 million; by 2005, that allocation represents an increase from under one-tenth of a percent of the federal budget to two-tenths, for a total of \$5.7 billion dollars.¹¹³ During the same period, staff positions more than doubled to 32,000,¹¹⁴ providing a workforce responding to annual filings of about 350,000–400,000 civil and criminal cases and more than a million bankruptcy petitions.¹¹⁵ And, despite budgetary constraints producing pressures to downsize facilities and staff, the 2015 budget for the federal judiciary was \$6.7 billion, a \$182 million (2.8%) increase over the 2014 budget.¹¹⁶

While courthouses have become iconic representations of government, twenty-first-century graphics require data.¹¹⁷ Figure 1—comparing the volume of filings in federal and state courts in 2010—provides another set of proportions. This figure details the 360,000 civil and criminal filings noted above, joined by more than a million

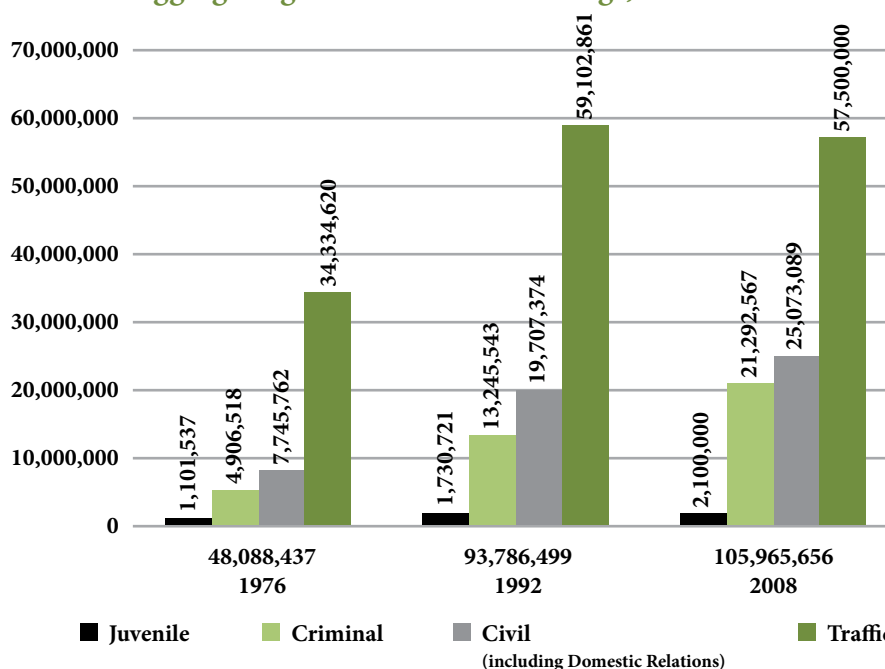
bankruptcy claimants. Those numbers are small when contrasted with the volume of state court annual filings, which number more than 47 million when juvenile and traffic filings are excluded¹¹⁸ and some 100 million when they are included.¹¹⁹

Figure 1 Comparing the Volume of Filings: State and Federal Trial Courts, 2010



Sources: Administrative Office of the U.S. Courts, Caseload Statistics, 2010, tbls C-1, D-1 and F, <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2010>. 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.

Figure 2 Disaggregating State Trial Court Filings, 1976-2008



Source: National Center for State Courts annual reports, entitled Examining the Work of State Courts. Figures are estimates, as not all states report data in all categories.

The filings are one measure of judiciaries' success. Courts are seen as hospitable to a variety of claimants, proceeding under a system not of their own personal design but fashioned by rule-makers committed to procedural neutrality. Courts are the rare venue aspiring to treat all comers equally and to respond to litigants' needs—with new forms to guide the millions of self-represented litigants, specialized clerks, information booths and kiosks, and targeted fee waivers for certain kinds of litigants.¹²⁰ The doors are open to outsiders, authorized to watch the democratic practices of government officials (judges, lawyers, and staff) as they are obliged to interact with each other and the disputants in a respectful manner.

Courts are the rare venue aspiring to treat all comers equally and to respond to litigants' needs.

And of course, these formal obligations are unevenly achieved in practice, as the current shorthand of “Ferguson” makes painfully clear. In 2015, the U.S. Justice Department detailed the absence of written rules (without “any information about [the court’s] operations on its website”¹²¹), the failure to provide notice, the misinformation provided, the calling for needless court appearance, unjust license suspensions, unduly high fines, harsh penalties for missed appearances, retaliation and biased waivers—all of which disproportionately harmed African Americans.¹²² The problems are not unique to Ferguson. Courts themselves in other jurisdictions have commissioned task forces to address questions of racial, ethnic, and gender bias in their practices.¹²³

But what court-based, public practices and record-keeping make plain is how much needs to be fixed—making interventions possible. The Justice Department’s findings of violation of federal civil rights laws¹²⁴

Court-based, public practices and record-keeping make plain . . . how much needs to be fixed.

prompted the resignations of several of Ferguson’s officials and the Missouri’s Supreme Court decision to appoint an appellate judge to take charge of the municipality’s court system.¹²⁵ The Justice Department’s remedies included increasing “transparency regarding court operations to allow the public to assess whether the court is operating in a fair manner.”¹²⁶

In sum, nothing is casual about the public’s relationship with courts. State and federal constitutions regulate judicial selection and tenure in office, impose mechanisms for protecting judicial independence, and define the parameters of courts’ jurisdiction. Detailed instructions can also be found in some constitutions, such as directions to Supreme Court justices to write or publish opinions, to make rulings freely available, to let others publish them, or to explain reasons for dissent.¹²⁷

Further, courts are funded by the public fisc and staffed by government employees working in buildings owned or rented by the government and subject to a thicket of government-crafted regulation. Courts are also public in the sense that the members of the public are entitled to file cases, to watch proceedings involving others in courts, and to know the identity of judges and staff, their salaries (set by law), their budgets, and the rationales for their rulings. Controversies about those investments and the quality of processes and outcomes regularly result.

These multiple meanings of the “public” *in* courts are in service of the authority *of* courts. From criminal penalties to the reallocation of rights in commerce and in households, law’s remedies entail coercion. Despite the convention that the federal Constitution has no positive entitlements, the judiciary is a counter-example, as

a public service largely supported by public funds.

The private sector benefits enormously from methods to protect economic growth and interpersonal obligations. Yet the dominant user is the government itself,¹²⁸ enforcing its norms through criminal prosecutions and civil litigation and protecting its contracts and

proprietary interests. The government's judges gain their legitimacy and protect their independence through the discipline of their obligations to make known their procedures and to do much of their work before the public.

Judges gain their legitimacy and protect their independence through . . . their obligations to make known their procedures and to do much of their work before the public.

III. Diffusing Disputes and Homogenizing Judges with Other Dispute Resolvers

This structure is under siege through Dispute Diffusion, propelled by revised mandates to judges about how to handle cases and by the U.S. Supreme Court's new approach to arbitration clauses. Looking only at court-based procedural reform or only at the doctrine of the FAA is to miss the interaction between the two, as during the past four decades, trial-level adjudication and arbitration have both been reconceptualized as variations on the dispute resolution theme. That shift reflects new normative commitments—to diffusion, deregulation, and to the privatization of dispute resolutions that gain the force of law.

Start with arbitration. In 2002, Justice Thomas commented on the degree to which the Court had “expanded the reach and scope”¹²⁹ of the Federal Arbitration Act.¹³⁰ Designed in 1925 by merchants and lawyers,¹³¹ the Act authorized federal courts to enforce contract clauses that committed the signatories to forgo decision-making in courts and to be bound, instead, by the decisions of arbitrators they choose. What the FAA provided was a remedy—staying or dismissing pending lawsuits in favor of arbitration.

The scope of that remedy was once understood to be limited. During much of the FAA's first six decades, congressional power to enact the statute was linked to its authority under Article III to regulate the lower federal courts.¹³² Because the Arbitration Act was “purely procedural in nature,” it conferred “no new substantive right” and thus did not apply in state courts. The federal policy related to the FAA provided one site for the development of arbitration; labor-management agreements provided another. The statutory endorsement of labor arbitration reflected unions' capacity to garner majoritarian approval of measures enhancing workers' authority. Thus, commercial and labor arbitrations were celebrated for their responsiveness to specially situated participants, many of whom were enmeshed in long-term commercial relationships.

The distinctions between the contractual rights created by agreement and public rights mandated by statute, between federal and state courts, and between judges and arbitrators were robust some fifty years after the FAA was enacted. Thus, a unanimous Court concluded in *Alexander v. Gardner-Denver Co.* in 1974 that a labor-management agreement requiring arbitration of disputes did not extinguish the ability of individual employees to pursue their statutory civil rights claims in court.¹³³ A decade later, in 1984, a unanimous Court likewise concluded that because arbitration “could not provide an adequate substitute” for adjudication, an unsuccessful arbitration under a collective bargaining agreement did not preclude an employee from filing a subsequent civil rights case.¹³⁴

Undergirding these decisions were views about the integrity of adjudication, the functions of federal statutory rights, and the rationales for arbitration. Judges were loyal to the public (embodied by their commitment to “the law of the land”¹³⁵) and arbitrators to the contract (in the context of labor, “the law of the shop”¹³⁶). Thus, justices read statutes protecting consumers and employees to limit the FAA’s scope.¹³⁷ As Chief Justice Burger explained in 1981, “[l]eaving resolution of discrimination claims to persons unfamiliar with the congressional policies . . . could have undermined enforcement of fundamental rights Congress intended to protect.”¹³⁸

Courts endowed disputants with a disciplined procedural structure, predicated on evidentiary standards, discovery, fact-finding, law application, and appellate review.

Further, until the mid-1980s, the FAA case law described litigation as entailing what arbitration lacked. Courts endowed disputants with a disciplined procedural structure, predicated on evidentiary standards, discovery, fact-finding, law application, and appellate review.¹³⁹ These attributes redistributed power to protect those without the clout to negotiate dispute resolution clauses (or much else) in contracts. Litigation’s procedural neutrality was hence another reason not to enforce arbitration provisions when one side had “unequal bargaining power”¹⁴⁰ or “excessive” and “overwhelming economic power”¹⁴¹ in a way that suggested “no genuine bargaining over the terms.”¹⁴²

Those were the views jettisoned as new majorities on the Court concluded that the FAA could require individuals signing form job applications or purchasing consumer products to pursue statutory claims exclusively in arbitration. Further, the Court abandoned its reliance on Article III and insisted instead that the FAA was the product of the Commerce Clause powers of Congress.¹⁴³ Rather than a procedural right applicable only in federal courts, the FAA became a federal substantive right, preempting state laws found by the Court to undermine its own broadening of the “liberal federal policy favoring arbitration.”¹⁴⁴

As a consequence, during the last three decades, the Court has ruled that the FAA can be used to bar access to courts when individuals claim breaches of federal securities laws;¹⁴⁵ when an employee allege discrimination on the basis of age;¹⁴⁶ when employees file sex discrimination suits under state law;¹⁴⁷ when consumers assert rights under state consumer protection laws;¹⁴⁸ when merchants allege violations of the antitrust laws;¹⁴⁹ and when family members assert that negligent management of nursing homes resulted in the wrongful deaths of their relatives.¹⁵⁰ The bases for such obligations to arbitrate are not bargained-for, and, in many contexts, consumers and employees cannot shop to avoid arbitration mandates. Deeming these obligations “contract” ignores what the opening epigraph from the wireless service provider exemplifies: producers of rights-waivers can unilaterally “change any terms, conditions, rates, fees, expenses or charges regarding your Services at any time . . .”¹⁵¹ In 2011, the Court upheld a ban on class actions, imposed as part of an arbitration clause, in a case arising under state law and in 2013, applied that approach to uphold a parallel ban applied to a federal anti-trust claim.¹⁵²

This novel approach to arbitration required new theories of its legitimacy. As consent and volition receded as the bases for enforcing rights-waivers, justices developed different rationales—that arbitration was a better process than adjudication and did just as well as an enforcement mechanism for public rights. In many decisions, justices complained that litigation was “costly and time consuming,”¹⁵³ or praised arbitration’s

capacity to produce “streamlined proceedings”¹⁵⁴ providing prospective litigants with opportunities adequate to “effectively vindicate” their federal rights.¹⁵⁵ Yet while regularly articulating that standard, the Court has—to date—never refused to enforce an arbitration mandate because it failed to provide adequate remedies.¹⁵⁶

But to focus only on the Supreme Court readings of the FAA is to ignore the social and political movements revising attitudes towards litigation in the federal courts and beyond. Beginning in the 1970s, the flexibility and informality of various forms of ADR (and not only arbitration) came to be praised as virtues—juxtaposed against the formal and public obligations of adjudication which were, in turn, gaining the negative valence of imposing undue costs on both disputants and the courts. Congress enacted statutes and agencies promulgated regulations commending arbitration, mediation, and other ADR methods in-house, for use by administrative agencies and in the federal courts.¹⁵⁷

Moreover, to look only at the United States is to miss the transnational and the contemporary cross-currents of Dispute Diffusion.¹⁵⁸ The modern history of arbitration is marked by the establishment in 1899 of the Permanent Court of Arbitration¹⁵⁹ and by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which came into force in 1959¹⁶⁰ and which the United States joined in 1970.¹⁶¹ The Convention, an international counterpart to the FAA, requires contracting states to recognize awards given pursuant to private agreements to arbitrate.¹⁶²

A measure of the transnational arbitration market comes from the AAA, founded in 1926 to nurture the FAA; this nonprofit corporation calls itself “the world’s leading provider of conflict management and dispute resolution services,”¹⁶³ with a roster of thousands of “trained and qualified”¹⁶⁴ neutrals who, as noted, deal with more than 150,000 cases yearly, mostly from contracts—public and private—naming the AAA to administer arbitration.¹⁶⁵ By 2013, the AAA had 70 cooperative agreements in 48 countries and its own international division, the International Centre for Dispute Resolution (ICDR).¹⁶⁶ These developments are part of larger patterns of globalization and privatization, celebrated by some as expanding the rule of law¹⁶⁷ and criticized by others as a neo-liberal privatization of power.¹⁶⁸

Just as a cross-continental exchange shaped arbitration in the nineteenth and early twentieth centuries, contemporary interactions across networks of judges, lawyers, and repeat-player litigants are transforming court-based practices as well. During the last four decades, in several countries, programs to revisit the practices of civil litigation have aimed to refocus the work of trial-level judges, encouraging them to become case managers pressing for resolutions without adjudication. In the 1990s, England and Wales embraced pre-filing

protocols to promote settlements through adoption of the “Woolf Reforms.”¹⁶⁹ Australia and Canada have similar initiatives “remaking” or “privatizing” their courts.¹⁷⁰

Return to the United States. Chief Justice Warren Burger insisted in 1981 that because courts had a distinctive role to play in enforcing

race discrimination law, arbitration was inappropriate for such claims. Nonetheless, he criticized his colleagues for being “oblivious to desperately needed changes to keep the federal courts from being inundated with disputes of a kind that can be handled more swiftly and more cheaply by other methods.”¹⁷¹ As the Chief Justice

Increasing caseloads were problems to be solved, and interest in protecting the courts from too many or the wrong kind of cases prompted judicial action on and off the bench.

explained, all branches of the federal government were studying how “to remove . . . routine and relatively modest-sized claims . . . from the courts.”¹⁷² The Chief Justice was referencing—and championing—the “policy of favoring extrajudicial methods of resolving disputes.”¹⁷³ The goal was to avoid having the “federal courts flooded by litigation increasing in volume, in length, and in a variety of novel forms.”¹⁷⁴

Increasing caseloads were problems to be solved, and interest in protecting the courts from too many or the wrong kind of cases prompted judicial action on and off the bench. In 1995, a special committee of the U.S. Judicial Conference (the federal judiciary’s policy-making arm) provided a “long range plan” that forecast a “nightmarish” scenario of overwhelming demand for courts.¹⁷⁵ Extrapolating from the second half of the twentieth century, the report projected that, by 2010, 610,800 cases (more than double the number in 1995) would be filed.¹⁷⁶ To buffer against this possibility, the Judicial Conference urged Congress to send cases from federal courts to state courts and to administrative agencies, to avoid creating new federal rights whenever possible and, if cases proceeded in federal courts, to rely more on ADR.¹⁷⁷

The judiciary’s enthusiasm for stemming court filings resonated with leading members of industry, other members of government, and the legal academy. Through a series of statutes and rule reforms, mediation and arbitration—methods characterized in the 1980s by both Chief Justice Burger and the Federal Rules of Civil Procedure as “extrajudicial” procedures¹⁷⁸—turned in the 1990s into everyday practices *inside* courts.¹⁷⁹ By 1993, judges had the power to insist that litigants attend settlement conferences or use “neutrals” in efforts to end cases without adjudication.¹⁸⁰

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Thus, inside the federal courts, procedural revisions pushed significant aspects of court-based dispute resolution out of sight. The Federal Rules were amended to provide that discovery materials were no longer routinely filed in courts unless appended to motions, pre-discovery confidentiality agreements became routine,¹⁸¹ and settlements conditioned on non-disclosure of terms commonplace.¹⁸² By 2014, advocates (including those on the Court) of constraining the perceived burdens imposed by federal litigation had put into place new restrictions on pleading and discovery, as well as new limits on the availability of implied causes of action, class actions, damages, and attorneys’ fees.¹⁸³

The Court is not the only public promoter or potential regulator of ADR. Since the 1970s, Congress has offered arbitration as a forum in which to pursue remedies under various federal statutes. For example, in 1978, Congress amended the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) of 1947 to require sharing

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research costs by those seeking applications authorizing their use of chemicals covered by the act; if disputes arise, resolution is exclusively by arbitration.¹⁸⁴ The Amateur Sports Act of 1978 identifies arbitration as the forum for resolving disputes between organizations, members, and a national governing body.¹⁸⁵ Two years later, in 1980,

Congress amended the Employee Retirement Income Security Act (ERISA) to mandate arbitration for disputes between employers and multi-employer plan sponsors when employers withdrew from a plan.¹⁸⁶ In 1988, Congress altered its 1976 Federal Land Policy and Management Act (FLPMA) to establish arbitration as the default for disputes over land appraisals.¹⁸⁷

More generally, in 1996, Congress enacted the Administrative Dispute Resolution Act (ADRA), exhorting federal agencies to diffuse disputes by using providers other than judges and methods other than adjudication.¹⁸⁸ Both before the ADRA and after, administrative regulations commended the use of arbitration in a wide array of contexts, such as housing,¹⁸⁹ national parks,¹⁹⁰ patents,¹⁹¹ disaster relief,¹⁹² and telecommunications.¹⁹³ In addition, as discussed below, Congress has also shaped a special arbitration process in the federal courts.

On one account, the proliferation of sites of dispute resolution is an ode to adjudication, for which demand outstrips supply. The problem to be solved is insufficient capacity, as judges cannot respond to all in need of their attention. The goal is to equip those seeking redress with more “access to justice” (the term common in the United States for dozens of state-based task forces)¹⁹⁴ or with “paths to justice” (the phrase used in many other countries).¹⁹⁵ In practice, such alternatives need not be either court-exclusive or court-preclusive: non-court options can be pursued in addition to or on the way to filing in court.

Examples of such regulated innovations come from both sides of the Atlantic. In the United States, Congress created a system of “court-annexed arbitrations,” to which parties must freely give consent and for which trials de novo are permissible.¹⁹⁶ Many state systems have parallels. In Europe, the preamble to a 2013 Directive on consumer alternative dispute resolution (“CADR”)¹⁹⁷ explained that “the right to an effective remedy and the right to a fair trial are fundamental rights Therefore, ADR procedures shall not be designed to replace court procedures and shall not deprive consumers or traders of their rights to seek redress before the courts.”¹⁹⁸ When

coupled with new mechanisms for collective relief,¹⁹⁹ the Directive aims to rectify what could be termed a market failure in adjudicatory structures by expanding the number of forums in and the modes of process through which consumers can pursue redress for alleged legal harms.

An alternative account is that litigation is itself the problem to be solved—not only because it is costly and adversarial but also because its public, regulatory effects do harm to entrepreneurship, impose costs on consumers and employees, and fetter government officials’ decision-making.²⁰⁰

These views have gained prominence in the United States, as what was once described as the “old judicial hostility” to arbitration²⁰¹ has been replaced by hesitancy about, if not hostility towards, adjudication. The gestalt is captured by the other opening epigraph: the 2014 home page of the federal judiciary’s website, helping visitors to understand how the “Federal Courts work.”²⁰² There, the judiciary set off one text box to advise disputants “to avoid the expense and delay of having a trial” whenever possible.²⁰³

In addition to encouraging parties to exit the court system, judges superintend court-based settlement efforts.²⁰⁴ As their procedures incorporate ADR, the practices of judges come to resemble those of neutrals and

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arbitrators. Together, that cohort and their work constitute a field (in the sociological sense proposed by Pierre Bourdieu),²⁰⁵ in which reflexive exchanges normalize the avoidance of the public regulation entailed in adjudication in favor of diffusing disputes to diverse private sites. At the high-end of international arbitrations, the overlapping sets of lawyers and arbitrators are developing a community of norms. And for the economically small claims of consumers and employees, the repeat player purveyors of arbitration clauses overlap with ADR providers to designate certain entities as authoritative decision-makers. As adjudication becomes repositioned as the product of “unnecessary litigation,” the rationale for public funding of courts weakens. Decisions to cut public investments in courts and, in some instances, to close courthouses become difficult to contest.²⁰⁶

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Earlier, I offered the phrase Dispute Diffusion to capture this developing normative orientation, aligning and conflating adjudication with its alternatives. Implementation comes through a host of statutes and regulations constituting what I termed Alternative Civil Procedure Rules. Unlike the tidiness of the 1938 Federal Rules of Civil Procedure, numbered from 1 to 84, and their counterparts in each state, all of which are produced and disseminated by the governments of the issuing jurisdictions, locating ACPR requires piecing together sub-constitutional doctrine, statutes, and government-promulgated rules and then linking them with the often hard-to-find manuals and protocols of hundreds of ADR providers, as affected by procedural provisions of specific arbitration clauses.²⁰⁷

The reason to group this array of sources together is to show their analytic commonality, even as they do individuated work in particular cases to generate outcomes, through settlement or imposed by third parties. Unsurprisingly, the many mini-codes of procedure incorporate some of the methods and values of the Federal Rules. And just as the substantive effects of the 1938 Federal Rules have come to be widely acknowledged,²⁰⁸ so too must the substantive norms imported into the ACPR be brought into view.

At their inception, the 1938 Federal Rules aimed to ease barriers to the federal courts by shaping trans-substantive, uniform, national provisions that expanded opportunities for obligatory information exchange among the parties and that vested discretion in trial judges, who were empowered to render public decisions based on the claim’s merits.²⁰⁹ In the mid-1960s, rule revisions facilitated the filing of class actions—thereby enabling the entry of schoolchildren, prisoners, consumers, employees, and many others into court.²¹⁰ The way was paved by dozens of new federal statutory rights, the creation in 1974 of the Legal Services Corporation, and fee-shifting provisions for civil rights and employment discrimination plaintiffs.²¹¹

The influx of diverse claimants helped to clarify the political and social consequences of adjudication—the inevitable “substance” of rules of “practice and procedure”—that made plain the stakes of different procedural opportunities.²¹² After heated debates about the processes for drafting rules, federal legislation in 1988 imposed new requirements: proposed changes had to go through a period of public notice and comment prior to their approval or modification by layers of committees (reviewing the rules before sending them to the Supreme Court), and the time for congressional override after promulgation by the Court was expanded, to run for 180 days.²¹³ Rule-making hearings became contested exchanges in which self-identified groups affiliated with “plaintiffs” or “defendants” sought to influence decisions on pleadings, discovery, aggregation, and trials.

The alternative civil procedure rules now emerging come in part from the public sector; new federal rules incorporating ADR go through the processes outlined above, just as rules for state-based arbitration or other forms of ADR go through those jurisdictions' requirements. Further, state regulations affect some of the rules;

Alternative rules are also produced by private providers, free to specify procedures without public input.

for example, California requires arbitration providers to waive fees for indigent claimants using arbitration within that state.²¹⁴

But alternative rules are also produced by private providers, free to specify procedures without public input. The variability in ACPR renders it normatively deregulatory.

To the extent that some providers—such as the AAA—solicit input from outsiders and are concerned about limiting expenses of parties, they do so by choice. Thus, the AAA's decision to convene a task force to produce its 1998 "Consumer Due Process Protocol" that includes fee schedules with caps and creates ethical standards,²¹⁵ and its later decisions to revise its rules and fee schedules, are matters of "internal policy."²¹⁶ Likewise, its standards of "Ethical Principles," such as "commitments to diversity" and "information disclosure and dissemination," are choices,²¹⁷ and many other providers do not follow that pattern. Indeed, identifying the other providers and learning about their rules and caseloads are research projects in themselves.²¹⁸

Access to information is yet another problem. One could—if energetic—read the fifty state websites and list the name of every person appointed or elected to be a judge in state and federal courts. Further, one could read thousands of pages of court filings and look at individual dockets, many of which are now on electronic filing systems.²¹⁹ And one can walk into the thousands of courthouses around the country to read files and to watch judges on the bench.

In contrast, no central registries account for the hundreds of ADR decision-makers, the claims filed before them, their rules, fees, or outcomes. The AAA, for example, does not have a list of all the institutions identifying it as the administrator of their arbitrations,²²⁰ and the AAA does not offer a public directory of its own arbitrators.²²¹ Instead, confidentiality is one of the AAA's Ethical Principles, committing the

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organization to keeping information of proceedings private.²²² Watching the work is also not an option. The major providers advertise confidentiality as a signature of their processes; the hearings are generally closed, and the rules permit arbitrators to bar third parties from attending hearings.²²³ While many arbitration clauses are "silent on confidentiality,"²²⁴ clauses may oblige participants to keep information and outcomes private.²²⁵

Aggregate data and individual filings are also not made publicly accessible, except as required under federal or state law. For example, the AAA complies with state mandates requiring posting of data, but takes down that information when the obligation to post (often for five year periods) expires.²²⁶ Some redacted employment awards are also made available.²²⁷ Researchers seeking to capture trends need to obtain special access to ADR providers' files and can also archive data before it disappears from the Internet.

Complainants and their lawyers have parallel challenges in arbitration. One consumer arbitrating cannot know from public dockets whether another won or lost based on identical allegations of overcharges or product

defects, just as one employee cannot generally know if another succeeded on discrimination or other claims of rights. Individual decisions come into the public purview through limited routes, such as when awards are contested; the decisions of arbitrators are generally enforceable in, albeit not directly reviewable by, courts.²²⁸ As the AAA explained to the United States Supreme Court, which agreed with the argument against the appellate review called for in an arbitration clause, “finality”—translated as limited court oversight—is intended to produce economy.²²⁹ Thus, the Court chose to close off judicial reconsideration even when the parties had sought court review of the lawfulness of the outcome of arbitration.²³⁰

IV. Gateways and Barriers: The Absence of Arbitration in Practice

The public law of private arbitration is anything but simple. Rather than detail the complexity of doctrines about whether judges or arbitrators are to decide the legality of arbitration provisions (a “gateway” question), about whether inquiries about the adequacy of arbitration procedures can vindicate rights relate only to federal statutory claims, and when particular clauses could be held unconscionable, I will summarize the key points related to access. First, anyone interested in challenging obligations to arbitrate needs lawyers skilled in navigating a large body of doctrinal complexities, and hence, the Court’s jurisprudence has imposed a substantial financial burden on individuals seeking to use courts instead of arbitration. Second, however muddy the legal approaches, judges are in control of decisions about when arbitration can be substituted for litigation and about which procedural features are “fundamental” to arbitration.²³¹ The focus in the case law is not on market theories about whether consumers might be willing to let producers buy their process rights in exchange for lower prices,²³² nor has the text of the 1925 FAA—referencing defenses to arbitrability based on contract law²³³—been a generative source of deference to state law. Rather, the case law is replete with federal judges’ ad hoc assessments, sometimes accompanied by a smattering of references to what should be understood as fairness analyses discussing the qualities of arbitration, such as its speed and informality.

Third, the case law lacks directions on how courts do—and ought to—define and measure effective vindication, adequacy, accessibility, and burdensomeness.

From whose vantage point—claimants, respondents, third parties, decision-

The case law lacks directions on how courts do—and ought to—define and measure effective vindication, adequacy, accessibility, and burdensomeness.

makers—is the evaluation made? Is the question comparative, with courts as the baseline? Does the analysis have an implicit narrative about what constitutes optimal levels of enforcement of the law? These issues are not novel, but reflect ongoing debates about the roles of private and public enforcement in producing compliance, and about how to maximize the utility of interventions while taking into consideration the costs of compliance and of the pursuit of violators. And, of course, assessments of the desirability of individual or collective pursuit of rights—in public—depend on knowledge about the frequency of legal violations and the degree to which voluntary compliance remediates the breaches that occur.

Getting the requisite information is difficult. Data on court-based filings do not provide a full picture of the injuries that have occurred,²³⁴ as individuals often lack the capacity to “name, blame, and claim.”²³⁵ Even if one is aware of legal injuries, the costs of pursuit may well make “lumping it” and abandoning claims appropriate, absent collective action.²³⁶ Over-claiming as well as under-claiming also makes court-based filings an imperfect measure

of harms.²³⁷ Other variables include whether informal remedies provide relief, whether options exist to use different venues (small claims court, arbitration, class actions), whether the various venues have the capacity to deal with the number of claimants seeking their services, and the role played by the government, pursuing remedies on its own or others' behalf. The quality of the procedures offered is also relevant; user-friendliness entails both ease of knowing what to do and the availability of assistance. For example, some courts now have clerks specially trained in helping self-represented litigants, and courts routinely have methods to adjust or waive fees for litigants with limited or no resources. If claimants can join together in collective actions, costs can be spread. In addition to ease of use, the kind and nature of process matters, such that a system's procedural entailments be "proportionate" (a buzzword in federal civil rule-making now²³⁸ and a standard-bearer in Europe²³⁹) to the claims at stake.

How might these concerns be translated in practice? One might expect that if arbitration were a "better" process than adjudication and levels of legal claims were constant, the availability of arbitration would produce a rise in filings. Satisfaction rates via user surveys could also be illuminating; a proxy could be whether negotiating parties bargain to stay out of court altogether or seek judicial review. Analyzing outcomes and comparing providers, as the Government Accountability Office (GAO) has done for financial services arbitrations²⁴⁰ and as a variety of researchers seek to do for employees and consumers,²⁴¹ could offer additional insights, especially if independent measures of the validity of claims are available.

In addition to empirical information, even if incomplete, value judgments are required. For example, when describing arbitration as "cheaper," "more informal," and "speedier" than adjudication, is the implicit claim that arbitration permits more claimants to bring complaints, that it imposes less burdens on potential respondents, or both? Returning to the question of the vantage point for such assessments, is the cost/benefit assessment internal to the disputants or ought third-party access to information about the proceedings be factored into the equation? Choosing goals depends in part on underlying narratives about the degree to which compliance with legal rules exists, the importance of compliance, and whether private efforts to enforce rights make a difference.

An example of efforts to increase private enforcement comes from the European Union, committed to protecting the right to an "effective judicial remedy."²⁴² A recent Directive on Consumer ADR consciously aims to increase the number of private claims filed without precluding use of courts thereafter.²⁴³ In contrast to what might be termed this claim-expressive approach, in the United States, the U.S. Supreme Court's use of the FAA to preclude court filings and to permit bans on collective actions is seen as "claim suppressive."²⁴⁴ That shift, discouraging private enforcement, could be predicated on the view that compliance with federal statutes is better achieved through other means²⁴⁵ and thus that court-based procedures are inefficient or unnecessary.

Evaluating the tradeoffs in many arenas can be difficult, but the utilities, from claimants' perspectives, of collective action are obvious; as Justice Breyer in the *AT&T* case commented, given a "maximum gain to a customer for the hassle of arbitrating a \$30.22 dispute is still just \$30.22,"²⁴⁶ individuals at risk of paying \$125 in administrative fees were unlikely to pursue their claims ("only a lunatic or a fanatic sues for \$30").²⁴⁷ A concern from the prospective defendants' vantage point was explained by Justice Scalia, writing for the *AT&T* majority and asserting that class arbitrations created "in terrorem" effects, pressing companies into inappropriate settlements.²⁴⁸ A view that collectivity had an effect was shared, but the disagreement was on how to weigh the arguments that class actions usefully police misbehavior and enable individuals to benefit as well, that class actions disserve customers because companies increase the costs of products, and that class actions result in trivial remedies for individuals and unduly large fees for their attorneys.

The institutional question is which bodies—courts, legislatures, agencies—are to make assessments of the qualities required to make arbitration effective and the relevance of collectivity to such judgments. The various federal statutes giving rise to private causes of action exemplify congressional judgments attributing some value to private enforcement of the law, just as state legislation and the common law provide legal rights to pursue injuries. Yet little evidence exists that the Supreme Court approaches those rights with deference. Rather, in the *AT&T* litigation, the majority, relying on “our cases,”²⁴⁹ read a 1925 statute (predating class actions and making no mention of the form arbitrations were to take, in terms of the numbers of parties or other features) to require enforcement of arbitration obligations, including those precluding class proceedings. Further, the Court has repeatedly stipulated the adequacy of arbitrations and rejected judicial monitoring of the outcomes. Insofar as can be known, in light of a host of closed proceedings and limited quantitative data, this diffusion of disputes has resulted in a good deal of erasure of private enforcement of federal and state litigation rights.

Congress has thus far responded in a piecemeal fashion, episodically insulating a few businesses (such as car dealerships and chicken farms²⁵⁰) from mandatory pre-dispute arbitration. Further, Congress has relied on the SEC to oversee securities arbitrations and the GAO to report on their use; chartered the Financial Services Consumers Bureau to consider more regulation; and specified the structure and reach of court-annexed arbitration in federal courts. But Congress has yet to impose general requirements addressing the kind of consent required to waive court access rights in light of the absence of bargaining, the quality of the procedural opportunities needed for arbitration, or the information that ought to be disclosed.²⁵¹

A. Effective Vindication

A key facet of the federal law of arbitration is the “judge-made” test of adequacy,²⁵² announced in 1985 in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, when the Court first applied the FAA to preclude litigation of a federal statutory right.²⁵³ The context, as Justice Blackmun explained for the Court, was a trilateral contract involving an “international commercial transaction” that included an arbitration agreement.²⁵⁴ As the dissent described the claim, the Puerto Rican dealer, Soler Chrysler-Plymouth, alleged that the two other parties (“major automobile companies”) were part of an “international cartel that has restrained competition in the American market . . . [and] allegedly prevented the dealer from transshipping some 966 surplus vehicles from Puerto Rico” to other U.S. dealers.²⁵⁵

Relying on a mix of the FAA and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (which the United States had joined fifteen years earlier), the majority sent the disputants—a Japanese automobile manufacturer, the Chrysler Corporation, and a Puerto Rican dealership—to arbitration.²⁵⁶ The ruling could easily have been cabined: the three parties were businesses (albeit with different resources), and consent to the contract was not in question²⁵⁷—even if, as the dissent argued, there had been “no genuine bargaining over the terms of the submission” to arbitration.²⁵⁸ Further, one reading of the opinion was that it applied only to international cases. The Court cited the Convention on enforcement of international awards; “even assuming that a contrary result would be forthcoming in a domestic context,”²⁵⁹ the Court emphasized the importance of “international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes.”²⁶⁰

Much of the opinion addressed the arbitrators' willingness to enforce U.S. antitrust law and their ability to deal with its complexity. Given that the parties' "intentions" were for the international arbitral body to decide claims "arising from the application of American antitrust law," the Court expressed its confidence that the arbitrators were "bound to decide [the] dispute in accordance with the national law giving rise to the claim."²⁶¹ The Court added what might have been an aside but, in retrospect, came to be read as its essential caveat: "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."²⁶²

The Court's next steps in the relocation of statutory claims to arbitration could also have been limited ones, dependent on supervision of arbitrations by federal agencies such as the Securities and Exchange Commission (SEC). In 1987, in *Shearson/American Express v. McMahon*, Justice O'Connor wrote for the Court to enforce a pre-dispute arbitration clause "between brokerage firms and their customers."²⁶³ She explained that, unlike the 1950s era of *Wilko v. Swan*, "the SEC has sufficient statutory authority to ensure that arbitration is adequate to vindicate Exchange Act rights, [such that] enforcement does not effect a waiver of 'compliance with any provision' of the Exchange Act."²⁶⁴ The role played by the SEC in ensuring the quality of arbitral processes also counted in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, which overruled *Wilko* expressly in 1989,²⁶⁵

"Effective vindication" [was deemed] satisfied without individually negotiated contracts, international transactions, or federal administrative oversight.

and in *Gilmer v. Interstate/Johnson Lane Corp.*, which enforced the FAA in a case alleging that a brokerage firm had engaged in age discrimination.²⁶⁶

"Effective vindication" became the mantra thereafter, but the Court deemed that test to be satisfied without individually negotiated

contracts, international transactions, or federal administrative oversight. This approach could have developed as a federal analogue of unconscionability doctrines used by state courts to evaluate the structure of proposed arbitrations.²⁶⁷ Illustrative is a 2013 decision by the Supreme Court of Washington, which concluded that a four-sentence arbitration clause proffered by a debt adjuster, LDL Freedom Enterprises, Inc., was unconscionable in three ways.²⁶⁸ First, that state's consumer law provided a four-year period in which to bring a claim, but the arbitration clause imposed a thirty-day statute of limitations.²⁶⁹ Second, the amount at stake was \$3,500 in actual damages, yet by requiring travel to California, the arbitration clause imposed prohibitive costs.²⁷⁰ Third, the "loser pays" provision was one-sided, benefiting only the company.²⁷¹

In contrast, the U.S. Supreme Court has not produced a single decision finding arbitration clauses inadequate, inaccessible, or ineffective to vindicate rights.²⁷² For example, in 2000, Chief Justice Rehnquist, writing for the Court, rebuffed Larketta Randolph, who had alleged that Green-Tree Financial Corporation-Alabama had violated the Truth in Lending Act and the Equal Credit Opportunity Act.²⁷³ Randolph argued that the arbitration clause had failed to address the question of costs, rendering the clause unenforceable.²⁷⁴ Over Justice Ginsburg's objections for the four dissenters that the burden of detailing costs ought to lie with the "repeat player" and that the question of arbitration's accessibility required a remand,²⁷⁵ the Court held that the opponent of arbitration had the burden to demonstrate that costs would be "prohibitive."²⁷⁶

The difficulty of meeting that burden became vivid in the 2013 decision of *American Express v. Italian Colors*,²⁷⁷ which, like *Mitsubishi*, involved antitrust claims but this time in the "domestic context."²⁷⁸ Justice

Scalia, writing for the five-person majority, offered hypotheticals about what would constitute inadequacy. He reiterated the phrasing from *Randolph* about a “prohibitively expensive” process and added an example of “a provision in an arbitration agreement forbidding the assertion of certain statutory rights”²⁷⁹ as rendering access “impracticable.”²⁸⁰ But as Justice Kagan’s dissent pointed out, those examples rang hollow because the case appeared to fit them. Italian Colors, a small business, had argued that American Express had “used its monopoly power to force merchants” to accept what was alleged to be a tying arrangement, unlawful under antitrust law.²⁸¹ The same contract included an arbitration provision barring class actions; the “variety of procedural bars that would make pursuit of an antitrust claim a fool’s errand” immunized the company from liability.²⁸² The majority did not disagree about the assessment that the costs of establishing an antitrust violation would be greater than any damages awarded to individual claimants.

Justice Scalia’s majority ruling in *Italian Colors* explained that its outcome was forecast by *AT&T Mobility LLC v. Concepcion*²⁸³ (which “all but resolves this case”²⁸⁴)—thereby anchoring the relationship of the adequacy inquiry the Court undertook in that preemption case and the doctrine of effective vindication. At issue in *Concepcion* was a bar on class actions in courts or arbitration that was imposed in the documents accompanying the purchase of a wireless service. The idea of “class arbitration” had gained currency after 2003, when the Supreme Court ruled in *Green-Tree Financial Corp. v. Bazzle*²⁸⁵ that the question of whether a contract precluded class arbitration was to be determined initially by an arbitrator rather than a judge.²⁸⁶ The marketplace of providers responded by fashioning rules for class arbitrations that incorporated aspects of the federal class action rule, and the AAA database reflected the use of this rule, with more than 280 such actions listed.²⁸⁷

But another sector of the market—potential defendants drafting arbitration clauses—had a different response. Many businesses wrote clauses prohibiting class arbitrations;²⁸⁸ the provision I quoted at the outset offered the symmetry that “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.”²⁸⁹ This clause, like many others, was also accompanied by an “anti-severability provision,” that if a court found the clause unenforceable, the obligation to arbitrate becomes unavailable.²⁹⁰

That prohibition was at the core of the AT&T litigation, which merits discussion because it exemplifies how the Court has taken on the role of making rules for arbitration. Vincent and Lisa Concepcion filed a federal class action “on behalf of all customers who entered into a transaction

“You waive any right to pursue on a class basis any such controversy or claim against us.”

in California wherein they received a cell phone for free or a discount . . . but were charged sales tax” in excess of that “payable as calculated on the actual discounted price.”²⁹¹ The overcharge was \$30.22, and the Concepcions alleged that the providers had violated California’s 1970s consumer protection laws against deceptive and false advertising.²⁹² The Concepcions’ theories were that the provider should either have absorbed the costs of the sales tax or not advertised that the phones were free.²⁹³

California had both a statute and a decision (*Discover Bank v. Superior Court*)²⁹⁴ addressing the procedural hurdles that the Concepcions faced. Under California law, when class waivers were in a “consumer contract of adhesion,” predictably small damage disputes could arise between the parties,²⁹⁵ and the “party with the superior

bargaining power” was alleged to have “carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money,” a waiver would be unenforceable because it functioned to exempt the party from responsibility for the allegedly willful injury inflicted.²⁹⁶

The U.S. Supreme Court held that California’s rule was preempted by the FAA because it stood as “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²⁹⁷ The Court supported its holding on two rationales—predicated on “our cases”²⁹⁸—which the Court ascribed to the FAA: “judicial enforcement of privately made agreements to arbitrate”²⁹⁹ and elimination of “costliness and delays of litigation.”³⁰⁰ Given that consumers cannot negotiate arbitration provisions in cell phone documents (I have tried), the majority focused less on consent and more on what it believed to be the procedural advantages of bilateral arbitration over class arbitrations.³⁰¹

The 1925 text provides no descriptions of the form that arbitrations were to have, and the Court responded with a purposive interpretation, inflected with assessments about the costs and benefits of class actions. The majority extolled the virtues of “bilateral arbitration”—a term introduced into FAA case law in 2010 by Justice Alito when ruling that silence in a contract about the availability of class arbitration cannot be taken by arbitrators as the basis for authorizing a class process.³⁰² A year later, in the *AT&T* decision, bilateral arbitration came to embody “the principal advantage of arbitration—its informality.”³⁰³

[The *AT&T* majority praised] the speed and relatively low cost of bilateral arbitration in contrast with the slow pace of class arbitrations.

The *AT&T Mobility LLC* majority thus assessed the costs and benefits of arbitration—praising the speed and relatively low cost of bilateral arbitration in contrast with the slow

pace of class arbitrations.³⁰⁴ As evidence, the Court drew (ironically, given its preemption of California’s law) on another of that state’s statutes, which mandated reporting by arbitration services.³⁰⁵ Based on information provided by the AAA, the majority concluded that “the average consumer arbitration between January and August 2007 resulted in a disposition on the merits in six months, four months if the arbitration was conducted by documents only.”³⁰⁶ In contrast, of the 283 class arbitrations “opened” by the AAA, the “median time from filing to settlement, withdrawal, or dismissal—not judgment on the merits—was 583 days, and the mean was 630 days.”³⁰⁷

The majority concluded that class arbitrations were “more likely to generate procedural morass than final judgment.”³⁰⁸ In addition, confidentiality and protection of absentees became “more difficult.”³⁰⁹ Data aside, the majority opined that class arbitrations gave plaintiffs too much power, creating the risk of “in terrorem” settlements; defendants had to “bet the company” because class arbitration provided “no effective means of review.”³¹⁰ (In 2007, as discussed below, it was the Court that read the FAA narrowly and refused to permit “effective means of review.”³¹¹)

The distance between the statute’s text and the Court’s analysis can be seen from its holding—that providers can prohibit aggregation, but the FAA itself does not preclude parties from agreeing to use class arbitrations.³¹² Nor have courts concluded that the importation of various procedures from the litigation system is impermissible. Summary judgment motions have become a feature of some employment arbitrations,³¹³ as has discovery. Parties can also shape appellate tiers within arbitration and the time frame for decision-making can

be expansive—rendering arbitration neither “speedy” nor “inexpensive.”³¹⁴ Rather, as illustrated by an AAA handbook, the category “arbitration” is a capacious one with a host of procedural variations, depending on the submarket in which it is used.³¹⁵

The 1925 statute’s silence as to form reflects its historical context, authorizing enforcement when the practice was nascent and leaving ample room for arbitration’s evolution, in use today for a range of disputes from high stakes,

Justice Breyer noted that . . . a single class action was “surely more efficient than thousands of separate proceedings for identical claims.”

heavily-lawyered, expensive commercial conflicts to family dissolutions. Not only was there a lack of evidence that the Act commanded or preferred bilateralism³¹⁶ but also, as Justice Breyer argued in dissent, the FAA was shaped for commercial arbitration between disputants of “roughly equivalent bargaining power.”³¹⁷ That framing rendered aggregate arbitrations consistent with what Congress had in mind for its statute’s users.³¹⁸ Thus, rather than contrasting class and individual arbitrations, the dissent compared class arbitrations to class actions in court. Based on another California study, Justice Breyer noted that “class arbitrations can take considerably less time than in-court proceedings in which class certification is sought.”³¹⁹ Moreover, a single class action was “surely more efficient than thousands of separate proceedings for identical claims.”³²⁰

B. A “Mass” of Arbitration Clauses Without a Mass of Claims

The image of “thousands of separate proceedings” seems like the logical consequence of the massive production of arbitration clauses. To know definitely the numbers of filings would require a database of providers required to make public their systems and usage rates. The federal system imposes no such general requirements,³²¹ but a few states have mandated disclosures from their resident ADR providers of consumer arbitrations, and researchers (including the federally created Financial Services Consumer Bureau) have made forays into submarkets to try to find filings.

Six conclusions emerge from the brief survey of available data that I detail below. First, obtaining the information is labor-intensive, and the results are partial at best. Dispute diffusion uncoupled from obligations of public access closes off systematic information about the volume and nature of the complaints. Second,

Public records indicate that individual consumers use arbitration infrequently.

public records indicate that individual consumers use arbitration infrequently. Third, navigating the sea of arbitration clauses and governing rules requires sophistication. Assistance—such as easily-accessible forms on fee waivers to consumer-friendly user

guides—is hard to find. Fourth, the major ADR providers currently have little capacity to administer a large numbers of arbitrations. Fifth, deciding on the optimal numbers of arbitrations requested or completed is difficult. But, and sixth, if the justification for applying the FAA to consumers is that it opens doors to dispute resolution that were otherwise closed, little evidence comes from the number of claimants using arbitration individually, since the Supreme Court expanded the aegis of the FAA.

Given the centrality of AT&T’s arbitration obligations to the case law, filings involving AT&T were the focus of my efforts to learn about the use of arbitration by individual consumers. Before turning to the filings,

an account of the route to the data is needed. Access is hampered in part by the history of nineteenth-century arbitration as a private system. As Frances Kellor recounted in her 1948 book on the AAA, arbitration belonged to businesses, preferring to have their disputes off screen and obliging arbitrators to keep confidential what they learned and did.

That aura of privacy persists, even as the rule structure about confidentiality is more complex. By authorizing disputants to go to court to confirm or vacate awards,³²² the FAA itself “appears to presume that arbitration materials could become public.”³²³ Lawsuits filed about arbitration are, however, a small fraction of the claims arbitrated. Thus, public access relies primarily on the rules of ADR providers, the text of arbitration clauses, and custom.

As noted, the major providers facilitate closed hearings by authorizing arbitrators to limit access by third parties to hearings. As the AAA explains in its Ethical Principles, an “arbitration proceeding is a private process.”³²⁴ In addition, some arbitration clauses have required confidentiality, such as one imposed in 2002 and since withdrawn by AT&T, instructing that: “Neither you nor [the company] may disclose the existence, content or results of any arbitration or award, except as may be required by law [or] to confirm and enforce an award.”³²⁵

The legality of such rules is a subject of debate. In 2003, the Ninth Circuit held this provision unconscionable under California law,³²⁶ but other circuits (the Second, Third, and Fifth) have not objected to such provisions.³²⁷ Instead, those courts assumed that “confidentiality clauses [were] so common in the arbitration context”³²⁸ that an attack on such provision went to the “character of arbitration itself.”³²⁹ Moreover, although the Court’s case law does not much discuss confidentiality, Justice Alito noted in 2010 that, by contracting for class arbitrations, parties undercut “the presumption of privacy and confidentiality.”³³⁰ Likewise, Justice Scalia commented in *AT&T* that confidentiality “becomes more difficult” with class action arbitrations.³³¹ Yet the 2015 study by the CFPB concluded that in consumer debt, confidentiality provisions are not common, required in seven percent

of the clauses reviewed and in none imposed by the wireless service providers.³³²

Unlike courts, which are required by statutes and constitutions to account for their work, ADR providers are subject to fewer regulations, and many decline to make public the number and kinds of claims with which they deal.

But information about processes and outcomes are not in wide circulation because arbitrators continue to be bound by obligations of non-disclosure; companies do not routinely post decisions and disposition data, and individuals can only learn about filings and

outcomes through networks linking similarly-situated individuals and lawyers. Unlike courts, which are required by statutes and constitutions to account for their work, ADR providers are subject to fewer regulations, and many decline to make public the number and kinds of claims with which they deal, or do so only by way of a special arrangement with selected researchers.³³³ Important exceptions can be found in a few segments of the arbitration market, related to sovereign debt and the financial industries. Transparency is part of 2014 provisions voluntarily adopted under UNCITRAL.³³⁴ Domestically, federal regulation of public companies and rules of the Financial Industry Regulatory Authority (FINRA)³³⁵ require disclosures, and a few states call for ADR providers to publish data on consumer arbitrations in “a computer-searchable format” (to use the term in California’s 2002 statute) on the web.³³⁶

California's mandate has become a key source of data.³³⁷ Under provisions that went into effect in 2003 which govern the data we analyzed, arbitration providers were asked to furnish, for "each consumer arbitration," the name of the "nonconsumer party" (if "a corporation or other business entity"); the "type of dispute" (and for employees, details about their wage brackets); whether an attorney represented the consumer; the time from the demand made to disposition; the mode of disposition ("withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing"); the prevailing party; the amount sought, the amount awarded, and other relief provided; and the arbitrator's name, fee, and the fee's allocation among the parties.³³⁸

Yet information remains spotty. A 2013 study, *Reporting Consumer Arbitration Data in California*, concluded that most providers were not in compliance with the state law;³³⁹ eleven of the twenty-six entities identified as arbitration providers filed any of the required information.³⁴⁰ Not surprisingly, the AAA is a leader in compliance; as it describes on its webpage, "Consumer Arbitration Statistics," that the information is "made available pursuant to state statutes" and "updated on a quarterly basis, as required by law."³⁴¹

The materials are a revolving set; when a new quarter is posted, the older quarter is taken down, such that only five years of data are online. To understand the use of arbitration, we evaluated a lengthy chronicle of claims from across the country that were filed and closed between July of 2009 and July of 2014.³⁴² That list totaled 17,368 individual claims (sometimes related to the same case³⁴³), of which 7,303 (or forty-two percent) fell in the consumer category, excluding real estate and construction.³⁴⁴ The Excel sheets delineated seven categories: three kinds of consumer arbitrations (construction, real estate, and unmodified), "employer promulgated employment," "other industry," residential construction, and residential real estate.³⁴⁵

Reading the entries, one generally learns the names of the business entity³⁴⁶ and of arbitrators and lawyers (if appearing),³⁴⁷ as well as whether the claim closed by settlement or award, the amounts sought, the fees,³⁴⁸ and fee allocations between the disputants.³⁴⁹ Of the 5,224 claims "terminated by an award," about half included a dollar figure.³⁵⁰ The information on prevailing parties comes with the caveat that arbitrators are the source; the AAA has not "reviewed, investigated, or evaluated the accuracy or completeness" of such information.³⁵¹

[Of AT&T's more than 85 million customers], consumers made an average of 27 claims per year against AT&T.

To parse the data, we looked for consumer arbitrations involving AT&T. Within the set of 7,303 consumer claims unrelated to commercial real estate or residential construction, the AAA five-year data spreadsheet listed 1,283 brought against AT&T in any of its corporate forms.³⁵² Because one law firm confirmed the recording that it filed 1,149 individual claims against

AT&T Mobility,³⁵³ a question emerged about whether those claims represented individual use of the system.³⁵⁴ After learning from the firm that it had filed hundreds of arbitration claims (some related to "phantom" data charging and others to oppose a proposed AT&T merger with T-Mobile) in an effort to create two de facto class action suits, we excluded the firm's filings from our count.³⁵⁵

Holding that law firm's filings aside, consumers made 134 claims against AT&T, or an average of 27 per year.³⁵⁶ (AT&T did not initiate any claims against consumers during the five-year period studied but did file a counterclaim in one of the consumer-initiated claims.³⁵⁷) That rate of consumer filings fits the picture provided

in the record of the Concepcions' litigation. Then, AT&T had almost 70 million customers in 2007 and, between 2003 and 2007, some 180 consumers—or about 36 a year—arbitrated under the AAA procedures with AT&T Mobility, AT&T Wireless, or Cingular Wireless.³⁵⁸ (How many used the pre-arbitration processes offered was not clear.)

During much of the period between 2003 and 2014, AT&T and its predecessor companies also noted that customers could use small claims court.³⁵⁹ We sought to learn about those filings between 2009 and 2014 in two jurisdictions, California and Illinois; they were chosen because of California's role in regulating arbitration, the large court-annexed arbitration program of Illinois, the large size of each state, and the capacity to access online some of the small claims courts filings in counties in each state. In California, where accessible databases came from twenty-five of its fifty-eight counties (this set includes less than thirty percent of the state's population), we identified sixty-six cases in fifteen counties in the five years between 2010 and 2014 in which AT&T was a defendant and three in which it was a plaintiff.³⁶⁰ Counties in Illinois had more web-accessible data, and during the same five-year period, we located 140 cases in fourteen counties that involved breach of contract or fraud.³⁶¹

Given uneven access to data on small claims, these very preliminary numbers raise the possibility that more consumers (and AT&T itself) may be using the option of pursuing claims in court than arbitration. On the other hand, the Consumer Financial Protection Bureau found fewer than 870 consumers filing against credit issuers in small claims court in a set of jurisdictions totaling about 85 million people; the CFPB found credit card issuers turning to courts with a higher frequency—80% of 41,000 claims—for debt collection.³⁶² Yet, when looking at federal court filings between 2010 and 2012 in five consumer product markets, the CFPB identified 3,462 individual cases, or more than 1,100 per year, in addition to the 562 consumer class action filings it reviewed.³⁶³

Individuals rarely seek to bring cases, and the capacity to pursue collective relief is key to robust private enforcement.

The variables that could make courts more accessible include fees that are sometimes lower (for example, counties in California charge from

\$30 to \$75 per small claims court filing and counties in Illinois vary, from \$35-\$50 to \$119-\$337 per filing³⁶⁴), knowledge about how to use the system, and the ease of sharing information among claimants—in that all of these courts are open to the public.³⁶⁵ But as the Consumer Financial Protection Bureau's survey results indicate, individuals rarely seek to bring cases, and the capacity to pursue collective relief is key to robust private enforcement.³⁶⁶

Returning to arbitration and shifting the focus to the entire country, the AAA 2009-2014 data reports about 1,500 consumer arbitrations (as it defines them) a year.³⁶⁷ Other researchers have found 4,707 AAA consumer-plaintiff arbitrations between 2009 and 2013 nationwide, or about eighty-seven a month.³⁶⁸ A larger number of filings can be counted by using California's broader definition of consumer arbitration³⁶⁹—putting the figure at about 3,500 per year.³⁷⁰ Expanding the efforts at counting to include the AAA and other providers reporting consumer arbitrations in the California database, filings averaged about 5,000 to 6,000 a year during the period from 2009 to 2014.³⁷¹

Additional numbers—again reflecting the rarity of arbitration—come from the Consumer Financial Protection Bureau, which also identified the AAA as the predominant provider of arbitration services.³⁷² The CFPB’s 2013 Preliminary Results reported millions of consumers subject to arbitration and found an average of 415 individual AAA filings per year from 2010-2012 in four consumer product markets—credit card, checking account, payday loans, and prepaid cards.³⁷³ In its 2015 report, the CFPB added two products, private student loans and auto loans,³⁷⁴ to its analysis—bringing the annual average up to 616.³⁷⁵ About two-thirds were filed by consumers, while the remaining included disputes brought by both parties as well as those filed by companies.³⁷⁶ Figure 3 summarizes the results.

Figure 3

CONSUMER FILINGS WITH THE AAA

Sources	Types	Estimates of Numbers of Consumers	Average Per Year	Total Over Years Analyzed
AAA Data, <i>Provider Organization Report</i> (June 2009-July 2014)	AAA-defined consumer claims		1,460	7,303
	including: AAA claims involving AT&T	85-120 million consumers	27	134*
Consumer Financial Protection Bureau, <i>2015 Arbitration Study</i> (Jan. 2010-Dec. 2012)	AAA claims in credit card, pre-paid card, checking account, payday, private student, and auto loan markets	including: 80 million credit card consumers	616**	1,847

* Consumers filed all 134 of the consumer claims involving AT&T.

** Consumers filed approximately two thirds, and companies about one third, of the 616 claims per year.

Turning to employment, a 2008 study suggested that at least thirty million employees were obliged to use arbitration.³⁷⁷ AAA was (again) the “largest provider” of employment-related arbitration; researchers estimated that about 1 in 10,000 employees used its system.³⁷⁸ Between 2010 and 2013, the AAA reported between 1,349 and 1,599 filings nationwide under employer-promulgated arbitration obligations.³⁷⁹

The low filing rates for consumer arbitrations could reflect a lack of the need to do so. Public enforcement may suffice, or manufacturers and service providers could generally be in compliance with legal obligations and voluntarily remedying the breaches that do occur. For example, in terms of informal resolutions, AT&T

reported that it paid \$1.3 billion in 2007 in “manual credits to resolve customer concerns and complaints.”³⁸⁰ Further, AT&T’s current promise to provide extra payments to consumers who succeed in arbitration creates an incentive for the company to settle claims. Because AT&T does not publish data on its settlements or on when it pays premium awards in arbitration, one is left to speculate on whether AT&T’s responsiveness explains the few claims filed or whether the accommodations made are but a small fraction of consumer claims never pursued.

Concerns about claims not pursued emerge from a series of federal agencies’ complaints asserting that different wireless services imposed illegal overcharges through a practice known as “cramming.” In October of 2014, the Federal Trade Commission (FTC) filed a federal lawsuit alleging that AT&T had billed consumers \$9.99 per month for unauthorized subscriptions for text messages that were not clearly identified in its billing.³⁸¹ According to the complaint, when customers did complain, they either received inadequate refunds or none at all.³⁸² The FTC alleged that AT&T kept between 35-40% of the unauthorized charges and that, as a result, in 2013 AT&T earned more than \$160 million.³⁸³

Four days after the filing, the FTC and AT&T announced a settlement, joined by the Federal Communications Commission (FCC) and several states, to return \$80 million to consumers, to provide \$20 million to the participating states, and to give \$5 million to the U.S. Treasury.³⁸⁴ In December of 2014, the CFPB filed a similar lawsuit against Sprint and alleged “millions of dollars” of unauthorized third-party charges; that complaint estimated \$2 billion dollars were, annually, overcharged consumers.³⁸⁵ Later that month, T-Mobile settled an FTC complaint lodged against it for cramming and agreed to refund \$90 million in unwanted charges, to pay an \$18 million fine to state attorneys general, and to pay \$4.5 million to the FTC.³⁸⁶

Government efforts, such as the cramming litigation, provide a buffer against the dearth of individual claims. Yet the Consumer Financial Protection Bureau found that, to the extent government entities pursued claims overlapping with class actions, the government followed the private filings almost two-thirds of the time.³⁸⁷ Thus, the series of claims against wireless providers highlight, rather than eliminate, the need for private claimants to be able to pursue remedies collectively. The rights to do so stem from statutes that continue to authorize enforcement by public and private actors but have been eviscerated by the Court’s expansion of the FAA. These legislative regimes distribute the power to enforce legal mandates, and they reflect majoritarian

commitments to the entrepreneurialism of private enforcement and the distrust of centralizing too much power in government.³⁸⁸

Dispute Diffusion makes it difficult to locate the rules governing proceedings.

In addition to the challenges of finding claimants, Dispute Diffusion makes it difficult to locate the rules governing proceedings. Just as the

case law contesting arbitration clauses requires lawyer expertise to contest the obligations imposed, reading and deciding which rules apply also entails sophistication.³⁸⁹ Each arbitration clause can specify rules, and certain providers can impose their own constraints. Various rules and specific arbitration clauses offer more of a maze than a roadmap to which rules apply and how much discretion individual arbitrators have in a system that is unbounded by precedent.

The question of costs is one that the AAA describes as a matter left largely to its own judgment, exercised in reference to what courts and other dispute providers do and to the Consumer Due Process Protocol’s

commitment to costs being “reasonable.”³⁹⁰ In 2013, the AAA instituted a filing fee for consumers, pegged it at \$200, and continued it in the 2014 revisions.³⁹¹ Not all consumers have to pay that fee because, in 2002, as part of its packet of arbitration regulations, California required fee waivers for “indigent consumers,” defined as those with incomes of less than “300 percent of the federal poverty guidelines.”³⁹² California instructed providers to give consumers notice of this option and to make forms available so that consumers could sign a sworn declaration that they qualified; providers were not to ask for additional information.³⁹³

Outside of California, robust analogues to court-based, commonplace “in forma pauperis” proceedings are not available in arbitration.

In compliance, the AAA has a form (not available on the web) labeled “Waivers of Fees Notice for Use by California Consumers Only”³⁹⁴ and another document for the rest of the country, entitled an “Affidavit in support of Reduction or Deferral of Filing and Administrative Fees.”³⁹⁵ That form requires consumers outside of California to make detailed disclosures of assets, income, and liabilities but does not indicate the availability of full waivers, even as the AAA in practice has done so when requests are made³⁹⁶ but does not track the numbers or kinds of waivers, deductions, or referrals given.³⁹⁷ Thus, outside of California, robust analogues to court-based, commonplace “in forma pauperis” proceedings are not available in arbitration.³⁹⁸

C. Marketing Judges

Evidence that prospective disputants with resources continue to seek to have court-based judges involved comes from various sources, here exemplified by a 2009 enactment by the Delaware legislature, seeking to maintain the state’s “preeminence” in corporate dispute resolution by redesigning procedures to make its courts competitive with private sector dispute resolution providers.³⁹⁹ The legislature offered an arbitration program run by the Chancery Court’s judges and held in their courthouses.⁴⁰⁰ To be eligible, at least one of the disputants had to be incorporated in Delaware, at least a million dollars had to be at stake, and disputants had to pay \$12,000 in filing fees and \$6,000 daily to the state thereafter.⁴⁰¹ Filings were not to be on the public docketing system, and the public was not permitted to attend hearings.⁴⁰² The decisions were to be enforceable as judgments, subject to review by the Delaware Supreme Court, which had not, as of 2013, provided rules about whether appeals would also be confidential.⁴⁰³

As a federal district judge would later describe it, litigants could purchase what was “essentially a civil trial” conducted by Delaware’s Chancery judges.⁴⁰⁴ The decision finding the procedure unconstitutional came in response to a challenge by the “Delaware Coalition for Open Government,” arguing that Delaware’s legislation violated the public’s First Amendment right to observe court proceedings.⁴⁰⁵ Delaware’s Chancery Court judges appealed and lost again in a split decision in which the Third Circuit concluded that “Delaware’s government-sponsored arbitration” could not constitutionally be held in a courthouse and be closed to the public.⁴⁰⁶

The relevance of the Delaware legislation to the meaning of “effective vindication” comes from its provision that litigants with resources could be provided state-employed judges, authorized to resolve their conflicts—in private. As one amicus supporting a petition for certiorari to overturn the Third Circuit explained, businesses were “weary of private arbitration” and sought “predictability” by turning to the Chancery judges.⁴⁰⁷ These

individuals were “first-rate adjudicator[s],” schooled in its law, well-known for their “efficient case management” and for their rules requiring hearings within three months of filing.⁴⁰⁸ Moreover, when going to court, parties had “to comport themselves civilly, to assess their positions soberly, and to present their cases in a way that respects the other demands on the judge’s time.”⁴⁰⁹

V. The Contingency of Courts

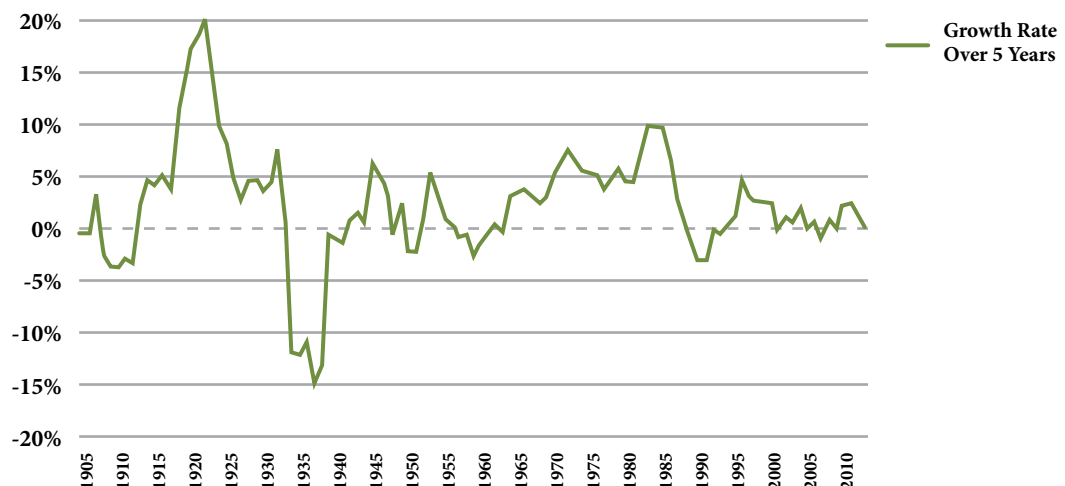
Recall that in 1995, the U.S. Judicial Conference’s long-range planners projected that federal court filings would soar to 610,000 by 2010,⁴¹⁰ producing the “nightmarish scenario” of overwhelming numbers.⁴¹¹ The Long Range Plan raised the spectre that “civil litigants who can afford it will opt out of the court system entirely for private dispute resolution providers.”⁴¹² Further, “the future may make the jury trial—and perhaps the civil bench trial as well—a creature of the past.”⁴¹³ The projected denouement was that the “federal district courts, rather than being forums where the weak and the few have recognized rights that the strong and the many must regard, could become an arena for second-class justice.”⁴¹⁴

With these assumptions, the federal courts would largely “become criminal courts and forums for those who cannot afford private justice.”⁴¹⁵ Therefore, as Chief Justice William Rehnquist explained in his foreword to the 1995 *Long Range Plan*, a “conservation” effort was needed to preserve the “core values of the rule of law,” “equal justice, judicial independence, national courts of limited jurisdiction, excellence, and accountability”—values that were challenged by the “limited financial resources of the federal government.”⁴¹⁶

If the current trend line remains stable, both the rate of filings and the number of civil and criminal cases may decline.

With the advantage of hindsight, we can know that rather than the 610,000 filings anticipated in 1995 for 2010, some 360,000 cases were begun that year. As of 2014, filing data were reported as holding “steady;” in 2014, total “filings for civil cases and criminal defendants” numbered about 376,000.⁴¹⁷ Moreover, a review of filings during the past 110 years—graphed in Figure 4⁴¹⁸—suggests that if the current trend line remains stable, both the rate of filings and the number of civil and criminal cases may decline.

Figure 4 Growth Rate and Fluctuation of Total District Court Filings, 1905-2013



But the aspirations of the federal judiciary’s *Long Range Plan*—that civil trials not be “a creature of the past” and that the federal courts be preserved as “forums where the weak and the few have recognized rights that the strong and the many must regard”⁴¹⁹—are dimming. The moniker of the “vanishing trial” makes that point.⁴²⁰ In the 1960s, trials took place in about ten percent of the civil cases brought to federal courts.⁴²¹ By 2010, trials began in about one out of 100 civil cases filed.⁴²²

In the 1960s, trials took place in about ten percent of the civil cases brought to federal courts. By 2010, trials began in about one out of 100 civil cases filed.

Of course, judges do adjudicatory work other than trials, and hence another metric is relevant: “bench presence.” After reviewing statistics gathered by the Administrative Office of the U.S. Courts, researchers reported a “steady year-over-year decline in total courtroom hours” from 2008-2012 that continued into 2013.⁴²³ Federal 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.”⁴²⁴

In contrast, the market for alternative judges is booming. The AAA’s significant expansion during the last decades can be tracked through its Supreme Court amici filings that, when pieced together, detail the growth. The AAA’s docket grew from 1,750 arbitrations in 1950⁴²⁵ to 13,000 in 1966, of which sixty-four percent were

In contrast, the market for alternative judges is booming.

proceedings against uninsured motorists.⁴²⁶ Within fifteen years, the number of annual proceedings had increased to more than 40,000, of which, the AAA noted, “a number of them were international.”⁴²⁷ By 2000, the AAA was offering long-term tallies. Between 1926 (when it began) and 1999, the AAA had dealt with about 1.7 million cases, “most of [which were] arbitrations.”⁴²⁸ By 2007, the total was over two million cases,⁴²⁹ and by 2012, the figure was close to 3.7 million.⁴³⁰ By then, the AAA had entered into cooperative agreements with 66 organizations in 46 countries.⁴³¹ In terms of its annual docket, filings are up from 150,000 a year in 2007 to about 200,000 per year.⁴³²

As public judges move to the periphery of dispute resolution and shift their own procedures to privatize much of their interaction with disputants, another effect of Dispute Diffusion and its Alternative Civil Procedure Rules emerges: its impact on the public’s right to observe court processes. Above I argued that the cumulative impact of the Court’s FAA expansion works an unconstitutional deprivation of litigants’ property and court access rights. I close by expanding the analysis of how this outsourcing, coupled with the privatization of judicial processes in courts, puts at risk the other kind of access-to-court right, that of the public’s authority to observe and, with it, the rationales for robust public support of court services.

Another effect of Dispute Diffusion and its Alternative Civil Procedure Rules [is] its impact on the public’s right to observe court processes.

To do so, I return to the constitutional challenge to Delaware’s “arbitration” program, which I used as an example of resourced parties seeking to rely on publicly-appointed judges to resolve their disputes, albeit in private. When ruling that Delaware could not constitutionally hold closed arbitrations in its courthouses, the Third Circuit drew on Supreme Court decisions in criminal cases, described as applying a test of “experience”

and “logic.”⁴³³ The Court has held that the First Amendment protects public access to criminal proceedings, if they were traditionally accessible (the “experience” prong), as long as access “plays a significant positive role in the functioning of the particular process in question” (the “logic” of the test).⁴³⁴ The Third Circuit’s majority explained that “Delaware proceedings are conducted by Chancery Court judges in Chancery Court during ordinary court hours, and yield judgments that are enforceable in the same way as judgments resulting from ordinary Chancery Court proceedings. Delaware’s proceedings derived a great deal of legitimacy and authority from the state.”⁴³⁵ As the concurring opinion by Judge Fuentes put it, “the air of [an] official State-run proceeding” made the limit on public access unconstitutional.⁴³⁶

Experiences in courts are changing and, with them, the logic supporting open processes.

But as I have detailed, experiences in courts are changing and, with them, the logic supporting open processes. Dispute Diffusion values speed, finality, deregulated variability, and confidentiality. As these values come to dominate in and out of courts, the “positive significance” of openness diminishes, reflexively (to again borrow Bourdieu’s sociological account). As judges turn

themselves into just another set of actors in the dispute resolution market providing conciliation services, rationales for constitutionally-obligatory openness erode, as do arguments for substantial public support and structural independence.

The debate between the majority and dissent in the Delaware litigation illustrates this conflict of values. The majority underscored the benefits to the public of knowing how “Delaware resolves major business disputes”⁴³⁷ and discounted arguments about the harms that public access would cause.⁴³⁸ In the end, public “faith in the Delaware judicial system” was the more weighty consideration when finding a “First Amendment right of access to Delaware’s government-sponsored arbitrations.”⁴³⁹

In contrast, the dissent in *Strine* focused on the centrality of privacy, the importance of insulating both the process and the outcomes of arbitrations from public scrutiny, the needs of the state to stay competitive, and the role of parties’ consent.⁴⁴⁰ In this account, offering confidentiality (“one of the primary reasons why litigants choose arbitration”⁴⁴¹) facilitated resolution by assuring parties that sensitive information would not be made public.⁴⁴² Further, Delaware sponsored this form of arbitration “as a part of its efforts to preserve its position as the leading state for incorporations in the U.S.”⁴⁴³ Given that parties volunteered for the program, the exercise of judicial power derived from their authority, rather than that the state.⁴⁴⁴ Thus, a mix of empirical claims about what prospective users would do (“go elsewhere” if Delaware’s proceedings were not closed) and normative views of the importance of state-based procedures successfully competing in the marketplace of dispute resolution rendered openness the lesser value.⁴⁴⁵

This disagreement among the appellate judges illuminates the doctrinal weakness of the current First Amendment test of access rights. The logic prong lacks a normative compass, putting it at risk of collapsing into the “judgment of experience” as new procedures come to the fore. Alternatively, the experience prong is irrelevant because openness may have value regardless of past practices. Indeed, in searching for footings, judges engage with what Jeremy Bentham termed “publicity,” and they proffer, albeit often without citation, variations on his themes⁴⁴⁶: that openness forwards informed discussions of government, fosters perceptions of fairness, checks corruption, enhances performance, discourages fraud, and permits communities to vent emotions in the criminal context.⁴⁴⁷

As the Delaware litigation also illustrates, the case law on public access focuses on whether proceedings in court are trial-like or predicates to trials. What the doctrine has yet to take into account is that being “trial-like”—in the absence of trials and “bench presence”—ought not to be the measure of constitutional obligations of openness to dispute resolution. When judges take on the role of “neutrals” or authorize others to do so with “quasi-judicial” status, and when judges outsource their authority to the private sector, these “quasi-judicial” acts need to be subjected to public scrutiny. The difficulties of producing fair and binding outcomes for the millions of individuals who are now rights-holders are enormous and require public debates about what kinds of injuries ought to be redressable and, if so, how.

In a 1976 article analyzing an earlier wave of Supreme Court constitutional analyses of the parameters of legitimate adjudication, Jerry Mashaw insisted that the “search” for “value” in due process law did not necessarily end in trial-like proceedings akin to those then associated with courts.⁴⁴⁸ What was required were public mechanisms to evaluate the quality of decision-making to ensure its accuracy, its provision of dignity to disputants, and its equal treatment of claimants.⁴⁴⁹ The measures he proposed—administrative oversight, transparency, accounting, and judicial review⁴⁵⁰—could all come into play to implement what the Supreme Court has come to call the “effective vindication” of rights, and publicity could enable outsiders to debate the shape of the procedures developed.

The Supreme Court was right to invoke the idea of “effective vindication of rights,” but wrong not to require oversight to accomplish that aim.

In sum, the Supreme Court was right to invoke the idea of “effective vindication of rights,” but wrong not to require oversight to accomplish that aim. The constitutional predicates of legitimate coercion are at stake, as are the property and political rights of citizens. Moreover, while “transparency” captures some of the functions and purposes of open courts, that term does not fully account for the political obligations that adjudication is subject to in democracies. Whether conducted by state-paid or by privately financed entities, dispute resolution charged with vindicating legal obligations has to be regulated to ensure equality of access through mandating fee waivers for indigency and overseeing the quality of decision-makers. The alternatives must be publicly available and accountable so as to permit debate about whether their processes and results constitute either law or justice. In courts or their alternatives, constitutional democracies require public engagement with the substantive and procedural rules that are the predicates for the power to render enforceable judgments.

Notes

¹ Arthur Liman Professor of Law, Yale Law School. All rights reserved. © Thanks to the Pound Institute for asking me to join this Conference and to James Rooks for his thoughtful engagement in suggesting themes from my work that would be of interest for the exchanges. This essay, prepared for the Pound Institute's July 2015 Judges Forum, builds on a series of essays and most directly derives from work originally published in the Yale Law Journal—*Diffusing Disputes: the Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L. J. 2804 (2015), from which segments have been excerpted; as well as from *The Privatization of Process: Celebration and Requiem for the Federal Rules of Civil Procedure* at 75, 162 U. Pa. L. Rev. 1793 (2014); and *The Contingency of Openness in Court: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, published in 15 Nevada L. Rev. 1631(2015) as part of a symposium in honor of Professor Stephen Subrin.

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² *Civil Cases*, <http://www.uscourts.gov/about-federal-courts/types-cases/civil-cases> [<http://perma.cc/BR9L-4WGC>].

³ Wireless Cellular Phone Document, 2002 (on file with author). The AT&T 2014 service documents state that “you and AT&T are each waiving the right to a trial by jury or to participate in a class action.” Further, the form states that it “evidences a transaction in interstate commerce, and thus the Federal Arbitration Act governs.” *Wireless Customer Agreement*, AT&T, <http://www.att.com/legal/terms.wirelessCustomerAgreement.html#arbAgreement> [<http://perma.cc/E6RA-3P7A>] (last updated Jan. 20, 2015).

⁴ The quote comes from *Wireless Customer Agreement*, AT&T § 1.3, <http://www.att.com/legal/terms.wirelessCustomerAgreement-list.html> [<http://perma.cc/9XA6-E956>] [hereinafter AT&T Wireless Customer Agreement]. Similar provisions can be found in other wireless service providers. See, e.g., General Terms and Conditions of Service, Sprint, http://shop2.sprint.com/en/legal/legal_terms_privacy_popup.shtml?id16=terms_and_conditions: [bolded in original] (“We may change any part of the Agreement at any time, including, but not limited to, rates, charges, how we calculate charges, discount, coverages, technologies used to provide services, or your terms of Service”).

⁵ See UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, UNCITRAL (Jan. 2014), <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> [<http://perma.cc/ZK2A-UXNU>]. The U.N. General Assembly recommended the use of these rules in all investment disputes. See G.A. Res. 68/109, ¶ 3, U.N. Doc. A/RES/68/109 (Dec. 16, 2013). As the press release explained, while “confidentiality is often a valued feature of commercial arbitration,” the public interest in arbitrations involving the state prompted the need to make such arbitrations more transparent and accessible. See Press Release, United Nations Commission on International Trade Law, General Assembly Adopts the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, U.N. Press Release UNIS/L/210 (Dec. 11, 2014), www.unis.unvienna.org/unis/en/pressrels/2014/unis1210.html [<http://perma.cc/9YPE-M68C>].

⁶ See, e.g., THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION (Tania Sourdin & Archie Zariski, eds. 2013).

⁷ See, e.g., HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW 148-66 (1999); Mauro Cappelletti, *Alternative Dispute Resolution Processes Within the Framework of the World-Wide Access-to-Justice Movement*, 56 MOD. L. REV. 282 (1993).

⁸ See, e.g., Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L. J. 2663 (1995).

⁹ See Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values*, 59 BROOK. L. REV. 931, 950-53 (1993).

¹⁰ For example, advertising campaigns focus on the misuse of litigation, while defenders of court-based processes argue that critics have exaggerated the harms and undervalued the legitimacy of the injuries. See, e.g., Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 732 (1998) (discussing how a lawsuit against a fast food restaurant, which had served scalding coffee that caused serious injuries, became a “poster case” for the misuse of adjudication); Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. 1097 (2008) (detailing anti-litigation organizations targeting jurisdictions for being insufficiently protective of business interests).

¹¹ *Goldberg v. Kelly*, 397 U.S. 254 (1970), is the iconic statement of the obligations that follow such adjudicators.

¹² *Mathews v. Eldridge*, 424 U.S. 319 (1976), provides the oft-stated test evaluating the private and public interests at stake and the risks of error of not providing certain forms of process.

¹³ J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L. J. 3052 (2015).

¹⁴ See PETER B. RUTLEDGE, ARBITRATION AND THE CONSTITUTION 15-53 (2012); Roger J. Perlstadt, *Article III Judicial Power and the Federal Arbitration Act*, 62 AM. U. L. REV. 201 (2012).

¹⁵ See Burt Neuborne, *Ending Lochner Lite*, 50 HARV. C.R.-C.L. L. REV. (forthcoming 2015).

¹⁶ Myriam E. Gilles, *The End of Doctrine: Private Arbitration, Public Law and the Anti-Lawsuit Movement*, (Benjamin N. Cardozo Sch. of Law, Jacob Burns Inst. for Advanced Legal Studies, Faculty Research Paper No. 436, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2488575 [<http://perma.cc/TUZ9-39SY>]; 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, 118-133 (2011).

¹⁷ For example, Justice Scalia, writing for the majority to require single-file arbitrations despite evidence of the resource challenges imposed by that format (see, *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), and *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013)), has questioned the extent to which the Constitution requires the state to assist individuals seeking access to courts. See *Lewis v. Casey*, 518 U.S. 343, 349-350 (1996). Justice Thomas has also done so. *Turner v. Rogers*, 131 S.Ct. 2507, 2521 (2011) (Thomas, J., dissenting); *M.L.B. v. S.L.J. ex rel. M.L.J.*, 519 U.S. 102, 130 (1996) (Thomas, J., dissenting). Both justices also joined in imposing limits on class actions. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

¹⁸ Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71 (2014). Colvin argued that mandated arbitration gives control over process to employers, lowers the bargaining capacity of employees, and limits access to counsel.

¹⁹ See MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013); OREN BAR-GILL, *SEDUCTION BY CONTRACT* 185, 196-97 (2012); THOMAS E. CARBONNEAU, *TOWARD A NEW FEDERAL LAW ON ARBITRATION* (2014); Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ON ARB. & MED. 56, 71-72 (2014). Some studies also raise the concern that consumers signing such provisions are generally unaware of the clauses, often had poor “readability scores,” and if reading them, “wrongly believe” the clauses would not preclude class actions. See CONSUMER FINANCIAL PROTECTION BUREAU, *ARBITRATION STUDY: REPORT TO CONGRESS PURSUANT TO DODD-FRANK WALL STREET AND CONSUMER PROTECTION ACT, SECTION 102.8(A)*, at § 1, 11, §2, 27-28 (2015) [hereinafter CFPB 2015 ARBITRATION STUDY]; Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, and Yuxiang Liu, “Whimsy Little Contracts” with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, SRNN abstract 2516432 (2015).

²⁰ *Wireless Customer Agreement*, *supra* note 4, at § 1.3.

²¹ *Id.* at §§ 2.1-2.2.

²² Radin terms the decision to count such obligations as contracts to be a normative “degradation” of contract that erodes the moral foundations of contracts. RADIN, *BOILERPLATE*, *supra* note 19, at 19-28.

²³ See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 240-42 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

²⁴ “An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.” *Scherer v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). See also *Mitsubishi Motors*, 473 U.S. at 628, 630-31. This “forum selection” analogy has been repeatedly invoked by the Court. See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 698 (2010); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295-96 (2002); *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 199-201 (2000); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533-34 (1995); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 289 (1995) (Thomas, J., dissenting); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 482-83 (1989); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 36-37 (1988) (Scalia, J., dissenting); *McMahon*, 482 U.S. at 255.

²⁵ The phrase is becoming part of debates on the FAA case law. See generally David Horton, *Mass Arbitrations and Democratic Legitimacy*, 85 U. COLO. L. REV. 459 (2014).

²⁶ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

²⁷ The American Arbitration Association provides quarterly reports on consumer arbitration pursuant to the laws of various jurisdictions in which it operates. *Consumer Arbitration Statistics*, AM. ARB. ASS’N (2015), <https://www.adr.org/aaa/faces/aoe/gc/consumer/consumerarbitstat> [<https://perma.cc/8ZBZ-FX5T?type=image>] (select “Provider Organization Report”). We downloaded the file documenting five years of arbitrations from July of 2009 through June (the second quarter) of 2014 and filtered by claims against AT&T. Because the AAA takes off data each quarter, the materials on the web as of the spring of 2015 no longer included some of 2009, and added materials through the end of 2014. The data I discuss were therefore downloaded and preserved (on file with the Law Journal); they begin in July 2009 and continue through June 2014 and are hereinafter referenced as *AAA Data, July 2009-June 2014, Provider Organization Report*.

A word on methodology is in order. After downloading the five-year period detailed above, we then removed all claims filed by the law firm of Bursor & Fisher (under “Consumer Attorney Firm”) after learning that this firm had filed the 1,149 claims listed as those on which it served as counsel, primarily within a period of two months, in an effort to create de facto class actions, and accompanying text. Thus, we identified 134 individual claims. *AAA Data, July 2009-June 2014 Provider Organization Report*. The record in the AT&T litigation, focused on 2003-2007, has parallel numbers, with under 200 reported arbitrations during that time period. See Brief of Civil Procedure and Complex Litigation Professors as Amici Curiae in Support of Respondents at 20, *Concepcion*, 131 S. Ct. 1740 (No. 09-893), 2010 WL 3934621 (citing Decl. of Bruce L. Simon in Support of Plaintiffs’ Opposition to Defendants’ Amended Motion to Compel Arbitration, ¶¶ 8-9, *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 124 (W.D. Wash., 2009) (No. 06-944)).

²⁸ See, e.g., Complaint for Permanent Injunction and Other Equitable Relief at 3-4, *FTC v. AT&T Mobility, LLC*, No. 1:14-cv-3227 (N.D. Ga. filed Oct. 8, 2014), <http://www.ftc.gov/es/system/files/documents/cases/141008attcmpt1.pdf> [<http://perma.cc/FK95-6AEX>]; Stipulated Order for Permanent Injunction and Monetary Relief at 16, *FTC v. AT&T Mobility, LLC*, No. 1:14-cv-3227 (N.D. Ga. filed Oct. 8, 2014), <https://www.ftc.gov/system/files/documents/cases/141008attstip2.pdf> [<http://perma.cc/Z4D3-JQTB>].

²⁹ *AAA July 2009-June 2014 Provider Organization Report*, *supra* note 27 (7,303 claims labeled consumer arbitrations, excluding construction, real estate, and employment categories); *Analysis of the American Arbitration Association’s Consumer Arbitration Caseload: Based on Consumer Cases Awarded Between January and August 2007*, AM. ARB. ASS’N, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004325 [<https://perma.cc/LPG6-S6F9>] (“Each year, the AAA administers approximately 1,500 consumer cases . . .”). The analyses were informed by materials provided by and through a series of exchanges by email and telephone in February, March, and April of 2015 with Ryan Boyle, Vice President, Statistics and In-House Research, American Arbitration Association, referenced hereafter as Boyle materials.

³⁰ *Statement of Ethical Principles for the American Arbitration Association, An ADR Provider Organization*, AM. ARB. ASS’N, <http://www.adr.org/aaa/faces/s/about/mission/ethicalprinciples> [<https://perma.cc/SE3Y-RUX2?type=pdf>] (last visited Mar. 18, 2015) (describing the AAA as administering “approximately 150,000 cases” each year) [hereinafter *AAA Ethical Principles*]. The AAA provided us more recent data, indicating that annual filings (not limited to arbitration) were “203,084 in 2013 and 223,751 in 2014.” Boyle Materials, *supra* note 29.

³¹ The number of subscribers comes from Oren Bar-Gill’s *SEDUCTION BY CONTRACT*, *supra* note 19, at 187, 196-97.

³² CFPB 2015 ARBITRATION STUDY, *supra* note 19 at § 2, 26, and Table 1, at §2, 8. Most include a small claims court option, *id.* at § 1, 15.

³³ CFPB 2015 ARBITRATION STUDY, *supra* note 19, AT EXECUTIVE SUMMARY, 2, 10. See also CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: PRELIMINARY RESULTS: SECTION 1028(A) STUDY RESULTS TO DATE, AT 22 (2013), http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf [<http://perma.cc/LS7Q-HTFZ>] [hereinafter CFPB 2013 PRELIMINARY RESULTS]. The CFPB noted that a class action antitrust settlement limited the use of arbitration clauses for certain issuers for some four years, beginning in 2010. “If those issues still included such clauses, some 94% of credit card loans outstanding would now be subject to arbitration.” CFPB 2015 ARBITRATION STUDY AT 9, §2, 9-11.

³⁴ Alexander J.S. Colvin & Mark Gough, *Individual Employment Rights in the U.S.: Actors and Outcomes*, 68 I.L.R. REV. (forthcoming 2015) (manuscript at 2) (on file with author) [hereinafter Colvin & Gough, *Individual Employment Rights*].

³⁵ CFPB 2015 ARBITRATION STUDY, *supra* note 19, AT EXECUTIVE SUMMARY, 10.

³⁶ See *Hall St. Assocs., v. Mattel, Inc.*, 552 U.S. 576, 579-80 (2008); see also *Delaware Coalition for Open Government, Inc. v. Strine*, 733 F.3d 510, 512-13 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).

³⁷ See *Hall Street*, 552 U.S. at 587-88.

³⁸ See, e.g., Andrea Cann Chandrasekher & David Horton, *After the Revolution: An Empirical Study of Consumer Arbitration* 103 GEO. L.J. (forthcoming 2015) (manuscript at 1) (on file with author); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 843-44 (2010); Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J. L. REFORM 813, 813-16 (2008); Report by Alexander J.S. Colvin and Mark D. Gough to the Am. Ass’n for Just., *Comparing Mandatory Arbitration and Litigation: Access, Process, and Outcomes* (Apr. 2, 2014) (on file with author); *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, MAYER BROWN LLP 1-2 (Dec. 2013), <http://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf> [<http://perma.cc/DT6J-T2YE>]; SEARLE CIVIL JUSTICE INSTITUTE, CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION, PRELIMINARY REPORT, 2009.

In 2015, the Consumer Financial Protection Bureau added its view based on studying 422 federal consumer financial class settlements approved between 2008 and 2012, and identify the sizes of classes in about three-quarters of those cases and the amounts received; the study concluded that consumer class action settlements during those years had benefitted at least 160 million consumers by providing \$2.7 billion in damages or in-kind relief. On average, settlements were \$540 million, and lawyers’ fees ranged from 16-24 percent. See CFPB 2015 ARBITRATION STUDY, *supra* note 19, at §1, 16-17.

³⁹ See 28 U.S.C. §§ 654-58 (as revised 1998). The 1998 revisions authorized the ten districts originally permitted to create mandatory court-annexed arbitration programs for a circumscribed set of cases to continue to do so; as of 2014, three of those districts, which were the ones with the highest volume of court-annexed arbitrations in the federal system, did so. Estimates were that about 2,000 cases went to court-annexed arbitration in 2014. Telephone interview with Donna Stienstra of the Federal Judicial Center, June, 2015.

⁴⁰ See HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW 148-66 (1999); Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, DAEDALUS, Summer 2014, at 83.

⁴¹ Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179 (2014). Ninety-eight percent of the defaulting debtors lacked counsel. *Id.* at 208-09.

⁴² *Investigation of the Ferguson Police Department*, U.S. DEP’T OF JUSTICE, Civil Rights Div. 42-62 (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

⁴³ *Id.* at 42, 68-69.

⁴⁴ The breaches in Ferguson included its failure to make public all it was required to do. *Id.* at 97-98.

⁴⁵ See, e.g., *Strine*, 733 F.3d at 515.

⁴⁶ *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8 (1986).

⁴⁷ See JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827), in 6 THE WORKS OF JEREMY BENTHAM 355 (John Bowring ed., 1843).

⁴⁸ See MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 32-120 (Alan Sheridan trans., 2d ed. Vintage Books, 1995).

⁴⁹ BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827), *supra* note 47, at 355.

⁵⁰ JEREMY BENTHAM, BENTHAM’S DRAUGHT FOR THE ORGANIZATION OF JUDICIAL ESTABLISHMENTS, COMPARED WITH THAT OF THE NATIONAL ASSEMBLY, WITH A COMMENTARY ON THE SAME, in 4 THE WORKS OF JEREMY BENTHAM 316 (John Bowring ed., 1843).

⁵¹ David Lemmings, *The Independence of the Judiciary in Eighteenth-Century England*, in THE LIFE OF THE LAW: PROCEEDINGS OF THE TENTH BRITISH LEGAL HISTORY CONFERENCE 125, 125-130 (Peter Birks ed., 1993).

⁵² BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827), *supra* note 47, at 356.

⁵³ DEL. DECLARATION OF RIGHTS of 1776, art. 12.

⁵⁴ DEL. CONST. of 1792, art. I, § 9, reprinted in BEN PERLEY POORE, 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 278, 279 (1878); see also KY. CONST. of 1792, art. XII, § 13, reprinted in POORE, *supra*, at 655; VT. CONST. of 1777, ch. II, § XXIII.

⁵⁵ MD. CONST. of 1776, Declaration of Rights, art. XVII (“That every freeman, for any injury done him in his person or property, ought to have remedy, by the course of the law of the land, and ought to have justice and right freely without sale, fully without any denial, and speedily without delay, according to the law of the land.”); MASS. CONST. of 1780, pt. 1, art. XI (“Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.”); N.H. CONST. of 1784, art. I, § 14 (“Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property or character, to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws.”).

⁵⁶ PA. CONST. of 1776, § 26. Pennsylvania’s current constitutional provision is similar: “All courts shall be open; and every man 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.” PA. CONST. art. I, § 11.

⁵⁷ ALA. CONST. of 1819, art. I, § 14 (providing that “[a]ll courts shall be open” and that “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”); CONN. CONST. of 1818, art. I, § 12 (“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”).

⁵⁸ See JENNIFER FRIESEN, 1 STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 6-91 to 6-92 (4th ed. 2006).

⁵⁹ A summary is provided 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, 1038-58 (2012).

⁶⁰ See Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2179-84 (2014). State constitutions protected civil juries, and the Seventh Amendment ensured preservation of civil jury trial rights in the federal system. See U.S. Const. amend VII.

⁶¹ See, e.g., Louisiana Const. section 25 [1974] (providing victims the right to be “present and heard at all critical stages of preconviction and postconviction proceedings” or to decline to participate). See also *Issues: Constitutional Amendments*, NAT’L CTR. FOR VICTIMS OF CRIME, <http://www.victimsofcrime.org/our-programs/public-policy/amendments> [<http://perma.cc/D84C-8SAP>] (last visited Mar. 4, 2015).

⁶² During ratification, Virginia, North Carolina, and Rhode Island suggested the addition of a right-to-remedy clause and proffered language reminiscent of the provisions quoted above. North Carolina and Virginia proposed that the amendment read:

That every freeman ought to find a certain remedy, by recourse to the laws for all injuries and wrongs he may receive in his person, property, or character. He ought to obtain right and justice freely without sale, completely and without denial, promptly and without delay, and that all establishments, or regulations contravening these rights, are oppressive and unjust.

A DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA: 1787-1870, at 268, 379 (Fred B. Rothman & Co. 1998) (1894). That and other proposals were not adopted, nor did such terms (again under consideration after ratification) become a part of the 1791 Bill of Rights. William C. Koch, Jr., *Reopening Tennessee’s Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEMPHIS L. REV. 333, 372-75 (1997).

⁶³ U.S. CONST. art. III, § 3, cl. 1 (limiting treason convictions to those based either on the “Testimony of two Witnesses” or a “Confession in open Court”).

⁶⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

⁶⁵ See, e.g., *Douglas v. Indep. Living Ctr. of S. California, Inc.*, 132 S. Ct. 1204 (2012); *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S.Ct. 1378 (2015).

⁶⁶ A list of examples comes from the appendix to the brief in *Douglas v. Independent Living Center of Southern California*, detailing sixty-one cases in which preemption of state provisions was not based on claims filed under 42 U.S.C. § 1983. Brief for Dominguez Respondents at app. 1a-11a, *Douglas v. Independent Living Center of Southern California, Inc.*, 132 S. Ct. 1204 (2012) (Nos. 09-958, 09-1158, 10-283), 2011 WL 3319552.

⁶⁷ One famous example is *Ex Parte Young*, 209 U.S. 123 (1908), welcoming railroad stockholders to contest rate regulation as confiscatory, in violation of the Fourteenth Amendment and of the Commerce Clause. Despite arguments that the suit was barred by sovereign immunity, the Court shaped a functional exception and explained that federal courts, like state courts, “should, at all times, be opened” to claimants “for the purpose of protecting their property and their legal rights.” *Id.* at 165. See generally Barry Friedman, *The Story of Ex parte Young: Once Controversial, Now Canon*, in *FEDERAL COURTS STORIES* 247-299 (Vicki C. Jackson & Judith Resnik, eds. 2010).

⁶⁸ U.S. CONST. amend. I.

⁶⁹ James Madison proposed specifying access to the “legislature.” See 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834).

⁷⁰ For example, in 1770, the Connecticut General Assembly acted akin to a court in responding to “150 causes, in law and equity, brought by petitioners.” Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 144-146 (1986).

⁷¹ See *NAACP v. Button*, 371 U.S. 415, 429-30, 452 (1963); see also *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

⁷² *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2499-2500 (2011).

⁷³ The ruling narrowed the grounds on which Petition Clause claims by public employees arguing retaliation can be made. *Borough of Duryea*, 131 S. Ct. at 2498-99.

⁷⁴ U.S. CONST. amend. V. See generally Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, in 18 NOMOS: DUE PROCESS 3 (J. Roland Pennock & John W. Chapman eds., 1977).

⁷⁵ See *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269 (2008); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Mullane v. Cent. Hanover Bank and Trust Co.*, 339 U.S. 306 (1950).

⁷⁶ For discussion of the parameters of the Court’s Eleventh Amendment jurisprudence, see Vicki C. Jackson & Judith Resnik, *Sovereignties—Federal, State, and Tribal: The Story of Seminole Tribe of Florida v. Florida* in *FEDERAL COURTS STORIES* 329, 329-358 (Vicki C. Jackson & Judith Resnik, eds., 2010).

⁷⁷ U.S. CONST. amend. VI.

⁷⁸ See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505-10 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-73, 575-76 (1980) (plurality opinion); Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987). Defendants’ Sixth Amendment public trial rights may also produce a right or the “freedom” of the public to “listen.” See *Richmond Newspapers*, 448 U.S. at 576-77.

⁷⁹ *Waller v. Georgia*, 467 U.S. 39 (1984).

⁸⁰ *Presley v. Georgia*, 558 U.S. 209 (2010).

⁸¹ A list of the circuits concluding that rights to civil trials were protected is provided in *Delaware Coalition for Open Government, Inc. v. Strine*, 733 F.3d 510, 514 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014). See also *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786, 793 (9th Cir. 2014) (remanding for consideration of the scope of access to civil proceedings); *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 305 (2d Cir. 2011) (holding that the quasi-criminal administrative hearings held by the Transit authority imposing sanctions were unconstitutionally closed). Access to documents—at least those deemed “judicial” documents filed in civil cases as part of lawsuits—has likewise received protection. See *U.S. v. Erie County*, 763 F.3d 235 (2d Cir. 2014); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004).

- ⁸² See, e.g., *Strine*, 733 F.3d at 515.
- ⁸³ *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8 (1986).
- ⁸⁴ See Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 634-38 (2010).
- ⁸⁵ 372 U.S. 335 (1963).
- ⁸⁶ 351 U.S. 12 (1956).
- ⁸⁷ 372 U.S. 353 (1963).
- ⁸⁸ 384 U.S. 436, 472-74 (1966).
- ⁸⁹ *Boddie v. Connecticut*, 401 U.S. 371, 372 (1971).
- ⁹⁰ *Id.* at 374. See generally Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights – Part I*, 1973 DUKE L.J. 1153.
- ⁹¹ *Boddie*, 401 U.S. at 385-86 (Douglas, J., concurring in result).
- ⁹² *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18-29 (1973).
- ⁹³ *Boddie*, 401 U.S. at 386-88 (Brennan, J., concurring in part). The sole dissenter, Justice Black (who had authored the 1956 *Griffin* decision requiring states to subsidize transcripts for appeals for criminal defendants) argued that the Court had invaded state prerogatives by imposing rules for civil litigants. *Boddie*, 401 U.S. at 389, 393-94 (Black, J., dissenting).
- ⁹⁴ See, e.g., *United States v. Kras*, 409 U.S. 434 (1973); Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2133 (2000).
- ⁹⁵ *Little v. Streater*, 452 U.S. 1 (1981).
- ⁹⁶ *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).
- ⁹⁷ *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 18 (1981).
- ⁹⁸ *Turner v. Rogers*, 131 S. Ct. 2507, 2512 (2011). The Court specifically reserved the question of whether lawyers would have to be appointed if the state were the opponent. *Id.* at 2520.
- ⁹⁹ See Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS 952, 952 (1996).
- ¹⁰⁰ *Id.* at 953.
- ¹⁰¹ See *id.* at 980-85. Issues of inclusiveness and diversity are in discussion in arbitration. See, e.g., Thomas J. Stipanowich & Zachary P. Ulrich, *Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators* 8 (Pepperdine Univ. Legal Studies Research Paper Series, Paper No. 2014/30 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2519196 [<http://perma.cc/YX6D-2H5Q>] (finding that of the 123 arbitrators responding to a survey, about eighty-five percent were men).
- ¹⁰² RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 201 (2008).
- ¹⁰³ See PETER G. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 91-95 (1973); David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 97 (1981).
- ¹⁰⁴ See 28 U.S.C. §§ 601-20 (2012). The Director of the Administrative Office files reports annually. See, e.g., *Judicial Business of the United States Courts: Annual Report of the Director, 2013*, UNITED STATES COURTS, [HTTP://WWW.USCOURTS.GOV/STATISTICS/JUDICIALBUSINESS/2013.ASPX](http://www.uscourts.gov/Statistics/JUDICIALBUSINESS/2013.ASPX) [<http://perma.cc/8J9U-8AWZ>] (last visited Feb. 20, 2015). The history and its reports, and their use by the Judicial Conference of the United States, are examined in Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 Harv. L. Rev. 924, 937-38 (2000).
- ¹⁰⁵ See PACER: Public Access to Court Electronic Records, U.S. CTS., <https://www.pacer.gov/> [<http://perma.cc/94AA-3GCV>] (last visited Mar. 2, 2015). Certain forms of personal information (such as social security numbers) are protected, and current federal appellate rules limit remote electronic access to documents in immigration cases. See FED. R. CIV. P. 5.2(a)-(c); FED. R. APP. P. 25(a)(5).
- ¹⁰⁶ See, e.g., *Judicial Business of the United States: Annual Report of the Director*, ADMIN. OFFICE OF THE U.S. CTS., <http://www.uscourts.gov/Statistics/JudicialBusiness/2014.aspx> (last visited Mar. 16, 2015).
- ¹⁰⁷ See Hon. John G. Roberts, *2014 Year-End Report on the Federal Judiciary*, SUP. CT. U.S. 7-9, <http://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf> [<http://perma.cc/HFS5-5AZ7>].
- ¹⁰⁸ Robert C. LaFountain, Richard Y. Schauffer, Shauna M. Strickland & Kathryn A. Holt, *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads*, NAT'L CENTER FOR STATE CTS. 1 (2012), http://www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx; *State Court Guide to Statistical Reporting, Version 2.0*, NAT'L CENTER FOR STATE CTS. (Mar. 2014) <http://www.courtstatistics.org/~media/Microsites/Files/CSP/State%20Court%20Guide%20to%20Statistical%20Reporting%20v%202.ashx>; *Reporting Excellence Awards, 2014*, NAT'L CENTER FOR STATE CTS., <http://www.courtstatistics.org/Other-Pages/Awards.aspx> [<http://perma.cc/5VB9-48UH>] (last visited Mar. 2, 2015).
- ¹⁰⁹ See generally Stephen C. Yeazell, *Courting Ignorance: Why We Know So Little About Our Most Important Courts*, DAEDALUS, Summer 2014, at 129.
- ¹¹⁰ 70 ILL. COMP. STAT. ANN. 125/1 (West 2014). The Administrative Office of Illinois Courts (AOIC)—like its counterparts across the country—issues annual reports containing caseload statistics, disposition information, and more. See, e.g., ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY - 2013, ADMIN. OFF. OF THE ILL. CTS.
- ¹¹¹ COURT-ANNEXED MANDATORY ARBITRATION: ANNUAL REPORT OF THE SUPREME COURT OF ILLINOIS TO THE ILLINOIS GENERAL ASSEMBLY FOR STATE FISCAL YEAR 2011, ADMIN. OFF. ILL. CTS. 1; see 735 ILL. COMP. STAT. ANN. 5/2-1001A (West 2014).
- ¹¹² See Michael J. Gaetz, *Trusting the Courts: Redressing the State Court Funding Crisis*, DAEDALUS, Summer 2014, at 96.
- ¹¹³ Russell R. Wheeler, *Chief Justice Rehnquist as Third Branch Leader*, 89 JUDICATURE, Nov.-Dec. 2005, at 116, 120.
- ¹¹⁴ *Id.*

¹¹⁵ The Chief Justice provided the data in his year-end report. See Roberts, *supra* note 107, appendix.

¹¹⁶ The sum of \$6.7 billion was appropriated in discretionary funds to the Judiciary for the Fiscal Year 2015, *Judiciary's FY 2015 Funding Meets Needs*, U.S. CTS. (Dec. 15, 2014), <http://news.uscourts.gov/judiciarys-fy-2015-funding-meets-needs> [<http://perma.cc/28QQ-K6L8>], an increase of \$182 million (+2.8%) over the \$6.5 billion appropriated for 2014. *Fiscal Year 2014: No Budget and a Government Shutdown*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport/annual-report-2013/judiciary-funding/fy2014-no-budget-and-a-government-shutdown.aspx> [<http://perma.cc/4PT2-QZ8D>] (last visited Mar. 2, 2015).

¹¹⁷ See William H. Simon, *Courthouse Iconography and Chayesian Judicial Practice*, 24 YALE J. L. & HUMAN. 419 (2012).

¹¹⁸ The sources for Figure 1 (Comparing the Volume of Filings) come from, on the federal side, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2010, U.S. COURTS tbls.C-1, D-1 & F (2010), <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx> [<http://perma.cc/X7DU-XPkd>] (last visited Mar. 2, 2015). Data on state filings come from the Court Statistics Project, *State Court Caseload Statistics: 2010*, NAT'L CTR. FOR STATE COURTS, <http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx> [<http://perma.cc/Q35C-7K59>] (last visited Mar. 2, 2015). The number of state filings is an estimate, as states do not uniformly report data on all categories.

¹¹⁹ Data for Figure 2 (State Trial Court Filings) were collected by Ruth Anne French-Hodson, Yale Law School, Class of 2012, and Jason Glick, Yale Law School, Class of 2012, with assistance from David Rottman of the National Center for State Courts. The data derive from annual reports of caseload statistics published by the National Center for State Courts. See NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 45 tbl.1, 64-68 tbl.5 (2010); NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 38, 51, 56 (2010); NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATICS: ANNUAL REPORT 1992 28, 43 fig. 1.60, 100 tbl.8 (1994); NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATICS: ANNUAL REPORT 1976 60 tbl.16 (1980). These statistics are estimates, as not all states report data in the same manner and in all categories.

¹²⁰ In 2011, New York reported 2.3 million people in civil litigation without lawyers; in 2009, California counted 4.3 million litigants without lawyers that year as well. See Jonathan Lippman, *Equal Justice at Risk: Confronting the Crisis in Civil Legal Services*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 247 (2012); Jonathan Lippmann, *State Courts: Enabling Access*, DAEDALUS, Summer 2014, 28. California data are provided in the report related to a statute creating a pilot program—named after Sargent Shriver—for civil legal assistance. See Assemb. B. No. 590, 2009-2010 Leg., Reg. Sess. (Cal. 2009).

¹²¹ *Investigation of the Ferguson Police Department*, U.S. DEP'T OF JUSTICE, *supra* note 42, at 45 (emphasis in the original).

¹²² *Id.* at 42-60; 68-69.

¹²³ More than sixty reports were published by court systems as of the mid-1990s. See Resnik, *Asking About Gender in Courts*, *supra* note 99.

¹²⁴ *Investigation of the Ferguson Police Department*, *supra* note 42 at 69-78.

¹²⁵ Order Transferring The Honorable Roy L. Richter, Eastern District, Missouri Court of Appeals, to the 21st Judicial Circuit (St. Louis County) (S.Ct. Mo. en banc Mar. 9, 2015) (citing the authority under the Missouri Constitution to order temporary transfers “as the administration of justice requires”).

¹²⁶ *Investigation of the Ferguson Police Department*, *supra* note 42, at 97.

¹²⁷ The constitutions of Arizona, California, and Michigan provide that opinions “shall be free for publication by any person.” ARIZ. CONST. of 1910, art. VI, § 8 (1960); CAL. CONST. of 1849, art. VI, § 12 (superseded by the California Constitution of 1879, amended to provide that Supreme Court opinions “shall be available for publication by any person,” CAL. CONST. of 1879, art. VI, § 16 (1966)); MICH. CONST. of 1963, art. IV, § 35. Michigan also directs that “Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.” MICH. CONST. of 1963, art. VI, § 6; see also KY. CONST. of 1792, art. V, § 4 (imposing the “duty of each judge of the Supreme Court, present at the hearing of such cause, and differing from a majority of the court, to deliver his opinion in writing. . .”).

¹²⁸ For example, in 2013, the U.S. was a party as a plaintiff in 7,694 civil cases and a defendant in 40,545 civil cases, resulting in the U.S. being a party in 16.95% of the 284,604 civil cases filed in federal court. See U.S. District Courts, U.S. COURTS tbl.4, <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-district-courts.aspx> (last visited Mar. 2, 2015).

¹²⁹ *EEOC v. Waffle House*, 534 U.S. 279, 314 (2002) (Thomas, J., dissenting). In 1987, and again in 1991, Justice Stevens discussed how the Court had “effectively rewritten the statute” by applying the FAA to statutory claims and to employees. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 43 (1991) (Stevens, J., dissenting) (quoting his discussion in *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting)). In 1995, Justice O'Connor described the Court's decisions as “building . . . , case by case, an edifice of its own creation.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

¹³⁰ Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925), codified as amended at 9 U.S.C. §§ 2-14 (2013).

¹³¹ See Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L.J. 2942 (2015).

¹³² This point was stressed to the Supreme Court by both the Chamber of Commerce and the AAA. See, e.g., Brief for the Chamber of Commerce of the State of New York and the American Association, Inc., as Amici Curiae Supporting Respondent, *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932) (No. 172), 1931 WL 32404, at *14-15 [hereinafter Chamber/AAA Amici Brief, *Marine Transit*]. Several justices have likewise focused on Article III as the source of congressional power to enact the FAA. See also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 418 (1967) (Black, J., dissenting) (“[I]t is clear that Congress in passing the Act relied primarily on its power to create general federal rules to govern federal courts.”); see also *Southland Corp. v. Keating*, 465 U.S. 1, 22, 25, 35 (1984) (O'Connor, J., dissenting) (calling the Court's application of the FAA a “newly discovered federal right” in conflict with the “unambiguous” legislative history, which made plain that Congress had relied on its power “to control the jurisdiction of the federal courts”). Thus, arbitration obligations would be enforced in cases filed under Article III courts' jurisdiction over admiralty, diversity, federal question and the like.

¹³³ See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-60 (1974).

¹³⁴ *McDonald v. City of West Branch*, 466 U.S. 284, 289, 292 (1984).

¹³⁵ See, e.g., *Gardner-Denver*, 415 U.S. at 57.

¹³⁶ *Gardner-Denver*, 415 U.S. at 53; *McDonald*, 466 U.S. at 290.

¹³⁷ See, e.g., *Wilko v. Swan*, 346 U.S. 427, 437 (1953).

- ¹³⁸ *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 747 (1981) (Burger, C.J., dissenting).
- ¹³⁹ See *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 203 (1956); *Wilko v. Swan*, 346 U.S. 427, 435-36 (1953).
- ¹⁴⁰ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting) (noting that members of Congress “expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power.”). The Court later rejected dissenters’ arguments that such inequality ought to constrain enforcement of arbitration clauses. See, e.g., *Circuit City Stores, Inc. v. Adam*, 532 U.S. 105, 132-33 (Stevens, J., dissenting) (the “potential disparity in bargaining power” between “large employers” and their employees ought to be one reason to exempt all “contracts of employment from mandatory arbitration”).
- ¹⁴¹ Even when requiring arbitration, the Court noted that “overwhelming” or “excessive economic power” would be grounds for pause. See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985).
- ¹⁴² *Mitsubishi*, 473 U.S. at 666 (Stevens, J., dissenting).
- ¹⁴³ See *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).
- ¹⁴⁴ See *AT&T v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (citations omitted). See also *Shearson*, 482 U.S. at 226; *Mitsubishi*, 473 U.S. at 625.
- ¹⁴⁵ *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987).
- ¹⁴⁶ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).
- ¹⁴⁷ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).
- ¹⁴⁸ *Concepcion*, 131 S. Ct. 1740.
- ¹⁴⁹ *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *Mitsubishi Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).
- ¹⁵⁰ *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam). On remand, the West Virginia Supreme Court sent the consolidated cases to the trial court for discovery and to “develop the evidence” on whether, aside from the reversed state “public policy” grounds, waivers of court access for those entering nursing homes were unenforceable under “state common law principles.” *Brown v. Genesis Healthcare Corp.*, 729 S.E.2d 217, 230 (W. Va. 2012). Congress had specifically considered the requirement to arbitrate claims against nursing homes but has not enacted legislation on the practice. See *Fairness in Nursing Home Arbitration Act of 2012*, H.R. 6351, 112th Cong. (2d Sess. 2012); *Fairness in Nursing Home Arbitration Act of 2009*, H.R. 1237, 111th Cong. (1st Sess. 2009); *Fairness in Nursing Home Arbitration Act*, S. 512, 111th Cong. (1st Sess. 2009); *Mandatory Binding Arbitration: Is it Fair and Voluntary?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 1 (2009) (statement of Alison E. Hirschel, National Consumer Voice for Quality Long-Term Care).
- ¹⁵¹ *Wireless Customer Agreement*, *supra* note 4, at § 1.3; see generally Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 S. CAL. L. REV. 1, 8-17 (2010) (discussing and documenting the “unilateral modification reality”).
- ¹⁵² *AT&T v. Concepcion*, 131 S. Ct. 1740, 1745 (2011); *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).
- ¹⁵³ *Barrentine v. Arkansas-Best Freight System*, 450 U.S. at 748 (Burger, C.J., dissenting).
- ¹⁵⁴ *Concepcion*, 131 S. Ct. at 1748.
- ¹⁵⁵ See *Soler Chrysler-Plymouth*, 473 U.S. 614.
- ¹⁵⁶ Lower courts have upon occasion found arbitration provisions unenforceable and used a variety of explanations, some tied to effective vindication or burdensomeness or unconscionability.
- ¹⁵⁷ Lower courts have addressed whether an agency’s decision not to seek conciliation is judicially reviewable. See, e.g., *EEOC v. Mach Mining, LLC.*, 738 F.3d 171 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2872 (2014). At issue is whether statutory mandates that the EEOC “endeavor to eliminate” unlawful employment practices “by informal methods of conference, conciliation, and persuasion” and that the EEOC may sue only if “unable to secure . . . a conciliation agreement acceptable to the commission,” 42 U.S.C. §§ 2000e-5(b); (f)(1), can be the basis for defendants asserting the EEOC’s decision not to settle as an affirmative defense.
- ¹⁵⁸ See Judith Resnik, *Globalization(s), Privatization(s), Constitutional-ization, and Stat-ization: Icons and experiences of Sovereignty in the 21st Century*, 11 INT’L J. CONST. L. 1, 162 (2013); Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, 6 INT’L J. CONST. L. 373 (2008).
- ¹⁵⁹ *Permanent Court of Arbitration: About Us*, PERMANENT COURT ARB., [HTTP://WWW.PCA-CPA.ORG/SHOWPAGE.ASP?PAG_ID=1027](http://www.pca-cpa.org/showpage.asp?pag_id=1027) [<http://perma.cc/9X6D-HNQR>] (last visited Mar. 5, 2015).
- ¹⁶⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. XII, *opened for signature* Jun. 10, 1958, 330 U.N.T.S. 38 (entered into force Jun. 7, 1959). As of the beginning of 2015 the “New York Convention” had 154 State Parties. See *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html [<http://perma.cc/PWH5-E5YN>] (last visited Mar. 5, 2015).
- ¹⁶¹ 21 U.S.T. 2517, T.I.A.S. 6997.
- ¹⁶² Under the Convention, state parties can decline enforcement of awards on public policy grounds and may also condition enforcement on certain forms of reciprocity. See Pierre Mayer & Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 ARB. INT’L 249 (2003); Alan Scott Rau, *The New York Convention in American Courts*, 7 AM. REV. INT’L ARB. 213 (1996).
- ¹⁶³ *American Arbitration Association Elects New Directors*, AM. ARB. ASS’N (May 15, 2014), <https://www.adr.org/aaa/ShowPDF?sessionid=MYLjT7WG9h-qmWcRnkdpvyQ2x3JGmG2yTQ8fwSGnzgC4L66htj90V1-5119463?doc=ADRSTAGE2020833> [<https://perma.cc/6L5C-SRWN>].
- ¹⁶⁴ *Mass Claims ADR Programs and Federal ADR Programs*, AM. ARB. ASS’N 1, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004209 [<https://perma.cc/H949-ADUR>] (last visited Mar. 5, 2015).
- ¹⁶⁵ The annual number of cases administered by the AAA has been reported to be more than 150,000 by various sources. See AAA *Ethical Principles*, *supra* note; MARTIN F. GUSY, JAMES M. HOSKING & FRANZ T. SCHWARZ, A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES 13 (2011) (reporting that the AAA “provides dispute resolution services in more than 150,000 cases annually . . . including arbitrations (of any sort), mediations, and other ADR processes”). More recent information from the AAA indicated that, in 2013 and 2014, it received more than 200,000 filings. Boyle Materials, *supra* note 29.

Several federal agencies and many state programs, such as those for uninsured drivers and no-fault automobile insurance claims, rely on the AAA. See Brief Amicus Curiae of the American Arbitration Association, *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) (No. 99-1235), 2000 WL 744161, at *2; Brief of the Am. Arbitration Ass'n as Amicus Curiae in Support of Respondent, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 1967 WL 113919 at *15 n.9. The AAA is also the largest provider of arbitration services for employment. Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System Has Developed?*, 29 OHIO ST. J. ON DISP. RESOL. 59, 62 (2014). The for-profit provider JAMS, founded in 1979 by a former state-court judge, calls itself the “largest private alternative dispute resolution (ADR) provider in the world,” dealing with about 12,000 cases a year and employing nearly 300 full-time neutrals in “mediating and arbitrating complex, multi-party business/commercial cases.” JAMS Fact Sheet, JAMS, <http://www.jamsadr.com/files/Uploads/Documents/Corporate-Fact-Sheet.pdf> [<http://perma.cc/PQ76-VFBW>] (last updated Feb. 2015).

¹⁶⁶ See Brief of Amicus Curiae the American Arbitration Association in Support of Petitioner at 1, *BG Grp. PLC v. Republic of Arg.*, 134 S. Ct. 1198 (2014) (No. 12-138), 2013 WL 4781545, at *2.

¹⁶⁷ See, e.g., SABINO CASSESE, *THE GLOBAL POLITY: GLOBAL DIMENSIONS OF DEMOCRACY AND THE RULE OF LAW* (2012).

¹⁶⁸ See, e.g., SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (2006).

¹⁶⁹ See RT. HON. LORD WOOLF, *ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM OF ENGLAND AND WALES* (1996). Criticism of this approach comes from HAZEL GENN, *WHAT IS CIVIL JUSTICE FOR?* (2011).

¹⁷⁰ See generally TREVOR C.W. FARROW, *CIVIL JUSTICE, PRIVATIZATION, AND DEMOCRACY* (2014); SARAH MURRAY, *THE REMAKING OF THE COURTS: LESS-ADVERSARIAL PRACTICES AND THE CONSTITUTIONAL RULE OF THE JUDICIARY IN AUSTRALIA* (2014); THE MULTI-TASKING JUDGE, *supra* note 4.

¹⁷¹ *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 753 (1981) (Burger, C.J., dissenting). At issue there was a Fair Labor Standards Act claim, which the Chief Justice argued, stemmed from an “entirely different historical and legal context,” making arbitration appropriate. *Id.* at 750.

¹⁷² *Id.* at 746.

¹⁷³ *Id.* at 748; see also Warren Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982).

¹⁷⁴ *Barrentine*, 450 U.S. at 748 (Burger, C.J., dissenting).

¹⁷⁵ See *Long Range Plan for the Federal Courts*, JUD. CONF. U.S. 18 (Dec. 1995), <http://www.uscourts.gov/uscourts/FederalCourts/Publications/Federal-CourtsLongRangePlan.pdf> [<http://perma.cc/WEY3-9UQ9>] [hereinafter 1995 LONG RANGE PLAN]. Some aspects of this report have been superseded by the *Strategic Plan for the Federal Judiciary*, JUD. CONF. U.S. (Sept. 2010), <http://www.uscourts.gov/uscourts/FederalCourts/Publications/StrategicPlan2010.pdf> [<http://perma.cc/5NBF-SG9C>].

¹⁷⁶ 1995 LONG RANGE PLAN, *supra* note 175, at 15.

¹⁷⁷ *Id.* at 23-39 (Recommendations 1-15); 70-71 (Recommendations 38-39).

¹⁷⁸ See FED. R. CIV. P. 16(c) (1983) (amended 1993); *Barrentine*, 450 U.S. at 748 (Burger, C.J., dissenting).

¹⁷⁹ See Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651-58 (2012)); Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified at 28 U.S.C. §§ 471-82 (2012)).

¹⁸⁰ See FED. R. CIV. P. 16(c)(1)-(2), (f) (requiring attendance or availability of parties at pretrial conferences; authorizing the court to take action on matters including “settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule,” and authorizing sanctions for those failing to participate in good faith); see also Judith Resnik, *The Privatization of Process: Celebration and Requiem for the Federal Rules of Civil Procedure* at 75, 162 U. PA. L. REV. 1793, 1802-1806 (2014); see generally Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).

¹⁸¹ See generally Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 WASH. & LEE L. REV. 2181 (2014).

¹⁸² Symposium, *Secrecy in Litigation*, 81 CHI.-KENT L. REV. 301-590 (2006).

¹⁸³ See generally Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014).

¹⁸⁴ Act of Sept. 30, 1978, Pub. L. No. 95-396, 92 Stat. 819 (codified as amended at 7 U.S.C. § 136a (2012)).

¹⁸⁵ Amateur Sports Act of 1978, Pub. L. No. 95-606, § 205(c)(1), 92 Stat. 3045 (codified as amended at 36 U.S.C. § 220529 (2012)).

¹⁸⁶ Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 4221(a)(1), 94 Stat. 1208 (codified as amended at 29 U.S.C. § 1401 (2012)).

¹⁸⁷ Federal Land Exchange Facilitation Act of 1988, Pub. L. No. 100-409, § 3(a), 102 Stat. 1086, 1087 (codified as amended at 43 U.S.C. § 1716(d)(2) (2012)).

¹⁸⁸ Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (codified at 5 U.S.C. § 571 et seq. (2012)).

¹⁸⁹ In 1990, the Department of Housing and Urban Development enacted regulations demanding that specified insurance plans “provide for binding arbitration proceedings arranged through a nationally recognized dispute settlement organization.” 55 Fed. Reg. 41021 (Oct. 5, 1990) (codified at 24 C.F.R. § 203.204(g) (2014)).

¹⁹⁰ In 2001, acting pursuant to the National Parks Omnibus Management Act of 1998, the National Park Service authorized concessioners to use arbitration in conflicts about the value of leasehold surrender interests, if contracts are terminated. See 66 Fed. Reg. 35082 (July 3, 2001). The method for selecting arbitrators is detailed in 36 C.F.R. § 51.51 (2014).

¹⁹¹ In 2004, the Patent and Trademark Office permitted binding arbitration “to determine any issue in a contested case” before the Patent Trial and Appeal Board. 69 Fed. Reg. 50003, 50016 (Aug. 12, 2004); 37 C.F.R. § 41.126(a) (2014). Both parties must agree in writing and specify which issues are to be arbitrated. See 37 C.F.R. § 41.126(b), (e) (2014). In 2012, in response to the Leahy-Smith America Invents Act, the Patent and Trademark Office expanded the availability of binding arbitration to patent derivation proceedings. See 37 C.F.R. § 42.410 (2014).

- ¹⁹² The Federal Emergency Management Agency (FEMA) provides for arbitrations in certain contexts under the aegis of FEMA's Alternative Dispute Resolution Office. 44 C.F.R. § 295.42 (2012). In 2009, under the American Recovery and Reinvestment Act, 74 Fed. Reg. 44767, 44767 (Aug. 31, 2009), FEMA made final and binding arbitration available to resolve disputed Public Assistance applications related to hurricanes Katrina and Rita in projects worth more than \$500,000. 44 C.F.R. § 206.209 (2014).
- ¹⁹³ The Federal Communications Commission (FCC) makes arbitration available related to home run wiring ownership in multiple dwelling unit buildings. 47 C.F.R. § 76.804(a)(2) (2014), (b)(2); 62 Fed. Reg. 61016, 61017-20 (Nov. 14, 1997).
- ¹⁹⁴ These access to justice efforts ("AtJ") are summarized at *Resource Center for Access to Justice Initiatives*, AM. BAR ASS'N, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html [<http://perma.cc/95J9-HBV3>] (last visited Mar. 5, 2015).
- ¹⁹⁵ See, e.g., HAZEL GENN, *PATHS TO JUSTICE* (1999).
- ¹⁹⁶ See 28 U.S.C. §§ 654-658 (2012).
- ¹⁹⁷ See Directive 2013/11, of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes, 2013 O.J. (L 165/63) [hereinafter CADR 2013 Directive]. As of 2008, researchers reported that systems in place for consumer ADR in Europe responded to about half a million claims annually, and many of the processes were free of charge. See CHRISTOPHER HODGES, IRIS BENÖHR & NAOMI CRUETZFELDT-BANDA, *CONSUMER ADR IN EUROPE* 368, 380 (2012).
- ¹⁹⁸ CADR 2013 Directive, *supra* note 10, at para. 45.
- ¹⁹⁹ Commission Recommendation (EU) No. 2013/396 of 11 Jun. 2013, on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States, 2013 O.J. (L 201/60). See also *UK Consumer Rights Bill and Private Enforcement of Competition Law*, OLSWANG (Dec. 5, 2014), <http://www.olswang.com/articles/2014/12/the-uk-consumer-rights-bill-and-private-enforcement-of-competition-law/> [<http://perma.cc/QLN3-ELHN>] [hereinafter Commission Recommendation on Collective Redress]; S.I. Strong, *Regulatory Litigation in the European Union: Does the U.S. Class Action Have a New Analogue?* 88 NOTRE DAME L. REV. 899 (2012).
- ²⁰⁰ As Benjamin Kaplan, the Reporter for the 1960s revisions to the Federal Rules of Civil Procedure, commented in 1988, the Rules "have worked to considerable (if not universal) satisfaction to support revolutions of the substantive law. The much-criticized discovery function and class action remain together the scourge of corporate and governmental malefactors." Benjamin Kaplan, *A Toast* (Symposium, the 50th Anniversary of the Federal Rules of Civil Procedure, 1938-1988), 137 U. PA. L. REV. 1879, 1881 (1989).
- ²⁰¹ See, e.g., *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989).
- ²⁰² *Civil Cases*, *supra* note 2.
- ²⁰³ *Id.*
- ²⁰⁴ See F.R.Civ.Pro. 16, as amended in 1983 and 1993.
- ²⁰⁵ Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 816 (1987).
- ²⁰⁶ See Hazel Genn, *What is Civil Justice For? Reform, ADR and Access to Justice*, 24 YALE J. L. & HUM. 397 (2012). Genn detailed how the U.K., once a leader in providing legal aid and administrative tribunal redress, adopted a policy aiming for civil litigants to internalize the costs of litigation (aside from courthouse infrastructure expenses) under a fee-for-service model. In the United States, the Judicial Conference has authorized the closing of several federal courthouses, and its Facilities and Space Committee announced in 2013 that it had reduced the square footage of the courts by 3 percent. 31 *Court Facilities to be Downsized in First Year of Cost-Cutting Project*, THIRD BRANCH NEWS (Oct. 15, 2013), <http://news.uscourts.gov/31-court-facilities-be-downsized-first-year-cost-cutting-project> [<http://perma.cc/RN4G-95BN>].
- ²⁰⁷ In 2011, the Federal Judicial Center published an overview to provide an "initial report" on ADR practices in the federal district courts. See Donna Stienstra, *ADR in the Federal District Courts: An Initial Report*, FED. JUD. CTR. (Nov. 16, 2011), [http://www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/\\$-file/adr2011.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/$-file/adr2011.pdf) [<http://perma.cc/W7F3-XPA9>]. In addition, an entity called Resolution Systems Institute (RSI), supported in part by the private ADR provider JAMS (derived from the acronym for its former name—Judicial, Arbitration, Mediation Services), has created a database to provide a "state-by-state guide" with search tools to court-based ADR; the guide also includes references to federal local rules. *Court ADR Across the U.S.*, RESOLUTION SYS. INST., [HTTP://COURTADR.ORG/COURT-ADR-ACROSS-THE-US/SEARCH.PHP](http://COURTADR.ORG/COURT-ADR-ACROSS-THE-US/SEARCH.PHP) [<http://perma.cc/MA84-ZYYM>].
- ²⁰⁸ See generally ROBERT M. COVER AND OWEN M. FISS, *THE STRUCTURE OF PROCEDURE* (1979).
- ²⁰⁹ See, e.g., Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1131-63 (1982); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 494-98, 502-15 (1986); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1972-77 (1989).
- ²¹⁰ See Theodore Eisenberg and Stephen Yeazell, *The Ordinary and the Extraordinary in Public Law Litigation*, 93 HARV. L. REV. 465.
- ²¹¹ See, e.g., Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988; The Legal Services Corporations Act of 1974, 42 U.S.C. § 2996.
- ²¹² The Rules Enabling Act, 28 U.S.C. §§ 2071(a), 2072(b), instructs that the rules of "practice and procedure" promulgated pursuant to its processes shall not "abridge, enlarge, or modify any substantive right."
- ²¹³ See 28 U.S.C. §§ 2073, 2074. An overview of the debate and the changes is provided in Owen M. Fiss & Judith Resnik, *Making and Reading Rules*, in *Adjudication and Its Alternatives* 1162-1194 (2003).
- ²¹⁴ See CAL. CIV. PROC. CODE § 1284.3.
- ²¹⁵ The AAA convened a National Consumer Disputes Advisory Committee in 1997 and the result were a protocol first issued in 1998. See *Consumer Due Process Protocol: Statement of Principles of the National Consumer Disputes Advisory Committee*, AM. ARB. ASS'N (2007), http://www.adr.org/aaa/ShowPDF-E?doc=ADRSTG_005014 [<https://perma.cc/T2AQ-NYNE>] [hereinafter *Consumer Due Process Protocol*]. See generally Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369 (2003).
- ²¹⁶ The background of the AAA Advisory Committee on Consumer Disputes is discussed in Brief Amicus Curiae of the American Arbitration Association, *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) (No. 99-1235), 2000 WL 744161, at *3. The AAA explained that it had decided

“as a matter of internal policy,” that consumer disputes with an amount in controversy under \$10,000 would be processed under the rules of this Protocol, “regardless of the rules, terms and conditions reflected in a pre-dispute clause.” *Id.* at *4.

²¹⁷ AAA *Ethical Principles*, *supra* note 30.

²¹⁸ For example, JAMS, “a leading for-profit provider in the U.S., does not publish data on its arbitration caseload.” Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals* 6 (Pepperdine U. Sch. of Law Legal Studies Research Paper Series, Paper No. 2014/29), <http://ssrn.com/abstract=2519084> [<http://perma.cc/X6TX-H683>]. Stipanowich has noted the proliferation of “soft guidelines” through initiatives from providers including the International Bar Association (IBA) and the International Institute for Conflict Prevention & Resolution (CPR). *Id.* at 10-11. Other researchers have offered specific accounts. See, e.g., Erin O’Hara O’Connor & Peter B. Rutledge, *Arbitration, the Law Market, and the Law of Lawyering*, 38 INT’L REV. L. & ECON. 87 (2014). The task is daunting; in 2010, more than 750 ADR systems were available across EU. See HODGES, BENÖHR, & CRUETZFELDT-BANDA, *supra* note 197, at 389.

²¹⁹ The information gathered is, nonetheless, far from complete. See Yeazell, *Courting Ignorance*, *supra* note 109. Moreover, procedural reforms, discussed here and by others, are making access to court-based information more difficult. See generally CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM (Joseph W. Doherty, Robert T. Reville, & Laura Zakaras eds., 2012). Further, when arbitration providers are required to give data, their records may have more information than those filed in courts, as the CFPB noted when analyzing the outcomes of class actions. CFPB 2015 ARBITRATION STUDY, *supra* note 19, at § 6, 3.

²²⁰ Having a complete account would be difficult in that the AAA may not be aware that it is named in particular contracts as an arbitration administrator; apparently the AAA does not keep an internal list of all the government regulations or major manufacturers and employers that name it to be the administrator of arbitrations. Telephone Boyle Materials, *supra* note 29. According to the CFPB 2015 ARBITRATION STUDY, *supra* note 19, at section 2, 34-35, the AAA was listed in 83 percent of the credit card arbitration clauses reviewed and in 86 percent of the mobile wireless arbitration clauses.

²²¹ Boyle Materials, *supra* note 29. Public access to information about AAA arbitrators is available when seeking to selection arbitrators. See Arbitrator and Mediator Selection, AM. ARBITRATION ASS’N (2015), <https://www.adr.org/aaa/faces/arbitratorsmediators/arbitratormediatorselection>; Introducing AAA Arbitrator Select, AM. ARBITRATION ASS’N (2015) (click on “Arbitrator Select” link to download the pdf, Introducing AAA Arbitrator Select).

²²² AAA *Ethical Principles*, *supra* note 30.

²²³ See, e.g., *Consumer Due Process Protocol*, *supra* note 215, at Principle 12(2); JAMS *Comprehensive Arbitration Rules & Procedures*, JAMS (Jul. 1, 2014), <http://www.jamsadr.com/rules-comprehensive-arbitration/#Rule%2026> [<http://perma.cc/45KY-C2PZ>] (limiting public access to proceedings before the Judicial Arbitration and Management Services); *Rules of Conditionally Binding Arbitration*, BETTER BUS. BUREAU, [<http://perma.cc/S386-Z69L>] (last visited Mar. 2, 2015) (“It is our policy that records of the dispute resolution process are private and confidential.”). But see *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 996-1002 (9th Cir. 2010) (finding unenforceable ADR provisions, including those requiring confidentiality, where they created one-sided advantages). Arbitrators working under the AAA also adhere to its code of ethics, which states that the “arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.” *The Code of Ethics for Arbitrators in Commercial Disputes*, AM. ARB. ASS’N 7 (Mar. 1, 2004), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_003867 [<https://perma.cc/24B4-LVNX>].

²²⁴ CFPB 2015 ARBITRATION STUDY, *supra* note 19, at § 2, 50-51. In six product markets, the study reported that in checking accounts, about 28 percent of the market had confidentiality clauses, while none existed in wireless providers’ clauses. *Id.* at Table 10, 52-53.

²²⁵ The AAA takes “no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves.” AAA *Ethical Principles*, *supra* note 30.

²²⁶ Boyle Materials, *supra* note 29. Westlaw and Lexis also offer some capacity for searching arbitral awards by using Lexis Advance and typing “AAA Employment Arbitration Awards and AAA Labor Arbitration Awards” to access those collections. See also AAA Consumer Rules, Rule 4-43(c) (The AAA may choose to publish an award rendered under these Rules; however, the names of the parties and witnesses will be removed from awards that are published, unless a party agrees in writing to have its name included in the award.”).

²²⁷ CFPB 2015 ARBITRATION STUDY, *supra* note 19, at § 4, 22.

²²⁸ See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582-84 (2008).

²²⁹ See Brief for the American Arbitration Association as Amicus Curiae in Support of Affirmance, *Hall Street*, 552 U.S. 576 (No. 06-989), 2007 WL 2707884, at *3.

²³⁰ See *Hall Street*, 552 U.S. at 580-81.

²³¹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

²³² The 2015 CFPB study did not find any “statistically significant evidence of an increase in prices among those companies that eliminated arbitration clauses and thus increase their exposure to class action litigation risk.” CFPB 2015 ARBITRATION STUDY, *supra* note 19 at §, 18; §10, 15-19. Nor did it identify reductions in the provision of credit. *Id.* The issue of whether permitting shopping for rights is addressed by Radin, who argued that law ought not license one party to “take” another’s rights, as a kind of “private eminent domain.” RADIN, *BOILERPLATE*, *supra* note 19, at 15.

²³³ 9 U.S.C. § 1 (2012) (“nothing herein contained 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. § 2 (2012) (stating that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”).

²³⁴ For example, one analysis from the 1980s concluded that of 100 injuries where the stakes exceed \$1,000, fewer than ten result in pursuit of court remedies. David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 86 (1983).

²³⁵ See William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 L. SOC’Y REV. 631 (1980).

²³⁶ For example, a survey of more than 1,000 credit card holders reported that most believing they were wronged would cancel cards, less than ten percent would report a problem to a government agency, and 1.4% thought they would contact a lawyer or bring suits. CFPB 2015 ARBITRATION STUDY, *supra* note 19, at § 3, 16-18.

²³⁷ PAUL C. WEILER, HOWARD HIATT, JOSEPH P. NEWHOUSE, WILLIAM G. JOHNSON, TROYEN BRENNAN, AND LUCIAN LEAPE, A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION (1993).

²³⁸ Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, DUKE L. CTR. FOR JUD. STUD. (2014), http://law.duke.edu/sites/default/files/centers/judicialstudies/v_gelbach_kobayashi_duke_idps_2014.pdf [<http://perma.cc/N3NU-PH25>].

²³⁹ See Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3096 (2015).

²⁴⁰ See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-92-74, SECURITIES ARBITRATION: HOW INVESTORS FARE 35-40 (1992) [hereinafter GAO, 1992, HOW INVESTORS FARE].

²⁴¹ See, e.g., Chandrasekher & Horton, *supra* note 38, Drahozal & Zyontz, *supra* note 38; Drahozal, *Arbitration Costs and Forum Accessibility*, *supra* note 38; Report by Alexander J.S. Colvin and Mark D. Gough to the Am. Ass'n for Just., *Comparing Mandatory Arbitration and Litigation: Access, Process, and Outcomes* (Apr. 2, 2014) (on file with author); *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, MAYER BROWN LLP 1-2 (Dec. 2013), <http://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf> [<http://perma.cc/DT6J-T2YE>].

²⁴² Originally framed in terms of protection of fundamental human rights, the right to an effective remedy gained confirmation in Article 47 of the European Charter. See *Rights to Effective Remedies*, in THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 1211-1228 (Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward eds., 2014).

²⁴³ HODGES, BENÖHR, & CRUETZFELDT-BANDA, *supra* note 197, at 13-18. Interest in developing consumer ADR came from concerns that judicial redress was “not always practical or cost efficient for consumers or businesses.” See *Commission Staff Working Paper Impact Assessment Accompanying the Directive on Consumer ADR and the Regulation on Consumer ODR*, SEC (2011) 1408 (Nov. 29, 2011). Further, some interest came from industries viewing CADR as a way to diffuse problems. HODGES, BENÖHR, & CRUETZFELDT-BANDA, *supra*, at 396-97. Further, the directives fell within the portfolios of ministers of business and finance rather than justice.

²⁴⁴ See Myriam E. Gilles, *Individualized Injunctions and No-Modification Terms: Challenging “Anti-Reform” Provisions in Arbitration Clauses*, (Cardozo Research Paper No. 437, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2488186 [<http://perma.cc/8D4Y-SQLZ>].

²⁴⁵ Regulatory options, for example, provide other routes. See, e.g., Geoffrey P. Miller, *An Economic Analysis of Effective Compliance Programs* (NYU Law & Econ. Research Paper No. 14-39, 2014), <http://ssrn.com/abstract=2533661> [<http://perma.cc/JAP4-9YA6>].

²⁴⁶ AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1760 (2011) (Breyer, J., quoting *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 855, 856 (9th Cir. 2009)).

²⁴⁷ *Id.* at 1761 (Breyer, J., dissenting, quoting Judge Posner’s comment in *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

²⁴⁸ *Id.* at 1752. The lack of review stemmed from the Court’s holding in *Hall Street, Inc.*

²⁴⁹ AT&T Mobility LLC v. Concepcion, 131 S. Ct. at 1749.

²⁵⁰ See Motor Vehicle Franchise Contract Arbitration Fairness Act, S. Rep. No. 107-266, at 1-2 (2002) (describing dealers as “virtual economic captives of automobile manufacturers” who proffer contracts on a “take it or leave it” basis) (codified at 15 U.S.C. § 1226 (2006)); Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 11005, 122 Stat. 1651, 1653 (codified as amended at 7 U.S.C. § 197c (2006 & Supp. IV 2010)). See also Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, § 8116(a)(1), 123 Stat. 3409, 3454 (2009) (exempting Title VII claims related to military contractors).

²⁵¹ Proposals to do more have been made, both in draft legislation and in commentary. See, e.g., Arbitration Fairness Act of 2015, S. 1133, 114th Cong. (2015); Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. (1st Sess. 2013); Arbitration Fairness Act of 2013, S. 878, 113th Cong. (1st Sess. 2013); Fairness in Nursing Home Arbitration Act of 2012, H.R. 6351, 112th Cong. (2d Sess. 2012); Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Cong. (1st Sess. 2009); Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (1st Sess. 2009). Members of Congress have also called on the Consumer Financial Protection Bureau to limit “forced arbitration” for consumers in the financial sectors that entity has the power to regulate. See Press Release, Sen. Al Franken, Members of Congress Call on the Consumer Financial Protection Bureau to Issue a Strong Rule to Prohibit Use of Forced Arbitration (May 21, 2015), http://www.franken.senate.gov/?p=press_release&id=3152.

²⁵² This is Justice Scalia’s description. See *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

²⁵³ 473 U.S. 614 (1985).

²⁵⁴ *Id.* at 616.

²⁵⁵ *Id.* at 640 (Stevens, J., dissenting). Justice Stevens argued that the arbitration clause was part of the agreement between Soler and Mitsubishi and therefore did not bar the antitrust counter-claim that entailed a trilateral dispute, nor did the clause apply to claims outside the contract provisions relating to failure to perform. *Id.* at 643-45.

²⁵⁶ *Id.* at 616-618.

²⁵⁷ The Court used “freely negotiated contractual choice of forum provisions” as the relevant benchmarks. See *id.* at 631.

²⁵⁸ *Id.* at 666 (Stevens, J., dissenting).

²⁵⁹ *Mitsubishi Motors Corp.*, 473 U.S. at 629.

²⁶⁰ *Id.* at 629.

²⁶¹ *Id.* at 636-37.

²⁶² *Id.* at 637.

²⁶³ 482 U.S. 220, 222 (1987).

²⁶⁴ 482 U.S. at 238. The partial dissenters—Justice Blackmun joined by Justices Brennan and Marshall—disagreed, arguing that SEC oversight of arbitra-

tion under the Exchange Act did not solve the problems identified in *Wilko*, in that arbitration provided neither a record nor judicial review and put the complainant in a forum “controlled by the securities industry.” *Id.* at 242, 260 (Blackmun, J., concurring in part and dissenting in part). Justice Stevens wrote separately to record his dissent that *Wilko* applied. *Id.* at 268 (Stevens, J., concurring in part and dissenting in part).

²⁶⁵ 490 U.S. 477, 485 (1989).

²⁶⁶ 500 U.S. 20, 29 (1991). The SEC continues to exercise oversight over FINRA.

²⁶⁷ Some lower courts have distinguished the inquiry into effective vindication, on the one hand, and unconscionability doctrine, on the other, while others have connected them. For example, the First Circuit concluded that the federal concern focused “more narrowly” on “illusoriness”—that “an arbitration regime . . . is structured so as to *prevent* a litigant from having access to the arbitrator to resolve claims, including unconscionability defenses.” *Auwah v. Coverall North America*, 554 F.3d 7, 13 (1st Cir. 2009).

²⁶⁸ See *Gandee v. LDL Freedom Enterprises, Inc.*, 293 P.3d 1197, 1201 (Wash. 2013). See generally James Dawson, Comment, *Contract after Concepcion: Some Lessons from the State Courts*, 124 YALE L.J. 233 (2014).

²⁶⁹ *Gandee*, 293 P.3d at 1201.

²⁷⁰ *Id.* at 1200 (“*Gandee* struggles financially (as presumably do all Freedom’s customers) and the costs of arbitrating in California would exceed [*Gandee*’s claim]).

²⁷¹ *Id.* at 1200-01.

²⁷² Lower courts have found some obligations to arbitrate wanting, invoking a mix of unconscionability and effective vindication failings. See, e.g., *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916 (9th Cir., 2013); *Boaz v. FedEx Customer Info. Servs., Inc.*, 725 F.3d 603 (6th Cir. 2013); *Hall v. Treasure Bay Virgin Islands Corp.*, 371 F. App’x 311, 313 (3d Cir. 2010) (finding the requirement that the employee pay the “entire costs” and that arbitrators not modify the employer’s disciplinary measure to be substantively unconscionable in the context of a mix of state and federal claims); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003). Yet in the wake of the 2011 and 2013 decisions in *AT&T* and *Italian Colors*, lower courts have retreated. See, e.g., *Duran v. J. Hass Group, LLC*, 531 F. App’x 146, 147-48 (2d Cir. 2013).

²⁷³ *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

²⁷⁴ *Id.* at 90.

²⁷⁵ *Id.* at 96-97 (Ginsburg, J., dissenting).

²⁷⁶ *Id.* at 81 (majority opinion). In the lower courts, this ruling did permit some opponents to obtain discovery on costs—if they could afford to pursue the claim.

²⁷⁷ *Italian Colors*, 133 S. Ct. 2304.

²⁷⁸ *Cf.*, 473 U.S. at 629.

²⁷⁹ *Italian Colors*, 133 S. Ct. at 2310.

²⁸⁰ *Italian Colors*, 133 S. Ct. 2304, 2310-11 (2013) (citing *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000)). See *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000).

²⁸¹ *Italian Colors*, 133 S. Ct. at 2313 (Kagan, J., dissenting).

²⁸² *Italian Colors*, 133 S. Ct. at 2313 (Kagan, J., dissenting).

²⁸³ 131 S. Ct. 1740 (2011).

²⁸⁴ *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013).

²⁸⁵ 539 U.S. 444, 452-53 (2003). The plurality by Justice Breyer, joined by Justices Souter, Scalia, and Ginsburg, concluded that the decision as to class belonged to the arbitrator.

²⁸⁶ 539 U.S. at 458-59 (Rehnquist, C.J., joined by O’Connor, J. and Kennedy, J., dissenting) (arguing that the contract precluded class-wide arbitration). Justice Stevens concurred in the judgment, but argued that class-wide arbitrations were permissible under the FAA. *Id.* at 456 (Stevens, J., concurring in the judgment). Justice Thomas argued in dissent that the FAA did not apply to proceedings in state courts. *Id.* at 460 (Thomas, J., dissenting).

²⁸⁷ *Supplementary Rules for Class Arbitrations*, AMERICAN ARBITRATION ASS’N (Oct. 8, 2003), https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf [<https://perma.cc/U2MN-3BDR>]. See Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DENV. U. L. REV. 301, 303 n. 20 (2004); Judith Resnik, *Fairness in Numbers*, 125 HARV. L. REV. 78, 122-123 (2011). Class arbitrations continue to be filed. See *Class Arbitration Case Docket*, AM. ARB. ASS’N (2015), <http://www.adr.org/aaa/faces/services/disputeresolutionservices/casedocket>; Boyle Materials, *supra* note 29.

As the decision in *AT&T* reported in 2009, the AAA’s searchable class action docket included 283 class actions, of which 121 were active and 162 “settled, withdrawn, or dismissed” without merits rulings. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011) (citing Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party at 22-24, *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010) (No. 08-1198), 2009 WL 2896309).

²⁸⁸ Brief for CTIA—The Wireless Association as Amicus Curiae Supporting Petitioner at 18, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (No. 09-893), 2010 WL 709799.

²⁸⁹ Wireless Cellular Phone Document, 2002 (on file with author). The AT&T 2014 service documents state that “you and AT&T are each waiving the right to a trial by jury or to participate in a class action.” Further, the form states that it “evidences a transaction in interstate commerce, and thus the Federal Arbitration Act governs.” *Wireless Customer Agreement*, AT&T, <http://www.att.com/legal/terms.wirelessCustomerAgreement.html#arbAgreement> [<http://perma.cc/E6RA-3P7A>] (last updated Jan. 20, 2015).

A lack of symmetry raises questions about the enforceability of the provisions. See *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004) (holding that state law may find unconscionable an agreement requiring consumers to arbitrate their claims but permitting the provider to choose between arbitration and litigation). A more recent decision questioned but did not decide whether such symmetry was required. *THI of New*

Mexico at Hobbs Center, LLC, v. Patton, 741 F.3d 1162, 1170 (10th Cir. 2014). See also Alltel Corp v. Rosenow, 2014 Ark. 375 (Sept. 18, 2014) (holding unenforceable an arbitration agreement lacking mutuality and explaining: “there is no mutuality of obligation where one party uses an arbitration agreement to shield itself from litigation, while reserving to itself the ability to pursue relief through the court system”).

²⁹⁰ See CFPB 2015 ARBITRATION STUDY, *supra* note 19, at §2, 45–46.

²⁹¹ Complaint at ¶ 14, Concepcion v. Cingular Wireless LLC, No. 06 CV 0675 DMS (NLS) (S.D. Cal. Mar. 27, 2006), 2006 WL 1194855 [hereinafter Concepcion Complaint]; First Amended Complaint at ¶ 14, Concepcion v. Cingular Wireless LLC, No. 06 CV 0675 DMS (NLS) (S.D. Cal. May 2, 2006), 2006 WL 1866797 [hereinafter Concepcion First Amended Complaint].

²⁹² The Concepcions relied on the 1970 Consumer Legal Remedies Act (CLRA); see CAL. CIV. CODE § 1760 (West). Further, invoking Federal Trade Commission Regulations, the Concepcions argued that footnote or asterisk references to special conditions were inadequate to prevent misunderstanding. See Concepcion Complaint, *supra* note 291, at ¶¶ 23, 32–33, 46 (citing 16 C.F.R. § 251.1, which requires “extreme care” when offers advertise “free” goods or services, and which specifies that any obligations incurred must be explained “clearly and conspicuously at the outset”).

²⁹³ If sales tax were required, the Concepcions argued, then the provider should have absorbed it rather than “illicitly shift[] the tax burden to [its] customers.” Concepcion Complaint, *supra* note 291, at ¶ 17(b).

²⁹⁴ Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).

²⁹⁵ *Id.* at 1110 (Cal. 2005).

²⁹⁶ *Id.*; see also CAL. CIV. CODE § 1668 (West 2014).

²⁹⁷ AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (citation omitted).

²⁹⁸ *Id.* at 1749.

²⁹⁹ *Id.* (citing Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985)).

³⁰⁰ *Id.* (citing *Dean Witter Reynolds Inc.*, 470 U.S. at 220). The Court’s focus on arbitration’s “fundamental attributes,” *id.* at 1748, as an affordable and accessible dispute resolution forum prompted the California Supreme Court to conclude that a state prohibition on waiving access to state labor hearings (a Berman hearing) was not preempted because such proceedings conferred the benefits of arbitration and therefore could be a step on the way to arbitration. See *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013), *cert. denied*, 134 S. Ct. 2724 (2014).

³⁰¹ *Id.* at 1751.

³⁰² *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 686–87 (2010) (discussing the “fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration”). The word “bilateral” appeared earlier in conjunction with arbitration to describe a form of arbitration without discussing it as preferred by the FAA. See, e.g., *Transp.-Comm’n Emps. Union v. Union Pac. R.R. Co.*, 385 U.S. 157, 177 (1966) (Fortas, J., dissenting) (“The Board is essentially a permanent bilateral arbitration institution created by statute for settling disputes arising in the context of an established contractual relationship.”).

³⁰³ 131 S. Ct. at 1751 (noting that “class arbitration requires procedural formality”).

³⁰⁴ *Id.*

³⁰⁵ See CAL. CIV. PROC. CODE § 1281.96 (West 2015).

³⁰⁶ *AT&T Mobility LLC*, 131 S. Ct. at 1751 (citing AAA, *Analysis of the AAA’s Consumer Arbitration Caseload*, https://www.adr.org/aaa/ShowPD-F?doc=ADRSTG_004325 [<https://perma.cc/MC87-483H>] (last visited Apr. 25, 2011); Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party at 22–24, *Stolt-Nielsen S.A.*, 559 U.S. 662 (2010) (No. 08–1198), 2009 WL 2896309).

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 1750.

³¹⁰ *Id.* at 1752. The lack of review stemmed from the Court’s narrow reading of the FAA in *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

³¹¹ *Hall St. Assocs., v. Mattel, Inc.*, 552 U.S. 576 (2008).

³¹² *AT&T*, 131 S.Ct. at 1751. Further, in 2013, the Court concluded that when parties authorize arbitrators to interpret contracts and arbitrators conclude that class arbitration is permissible, that interpretation stands even if it is mistaken. See *Oxford Health Plans, LLC v. Sutter*, 133 S. Ct. 2064 (2013).

³¹³ Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 81 (2014).

³¹⁴ The CFPB found that almost 30 percent of the wireless providers and more than 40 percent of the credit card clauses provided for appeal, usually to three arbitrators. Some required a monetary threshold, which the Study thought would benefit businesses more than consumers. CFPB 2015 ARBITRATION STUDY, *supra* note 19, §2, at 75–79.

³¹⁵ See HANDBOOK ON ARBITRATION PRACTICE, AM. ARB. ASS’N 207–74, 385–94 (2010). The chapters are entitled “Discovery and Evidence in Arbitration” (t 207–274), and “A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator” (at 385–94).

³¹⁶ *AT&T Mobility LLC*, 131 S. Ct. at 1756 (Breyer, J., dissenting).

³¹⁷ *Id.* at 1759.

³¹⁸ *Id.* at 1759.

³¹⁹ *Id.* (citing Admin. Office of the Courts, *Class Certification in California: Second Interim Report from the Study of California Class Action Litigation*, JUD. COUNCIL OF CAL. 18 (2010), <http://www.courts.ca.gov/documents/classaction-certification.pdf> [<http://perma.cc/LV62-UQCK>]).

³²⁰ *AT&T Mobility LLC*, 131 S. Ct. at 1756.

³²¹ The Financial Industry Regulatory Authority (FINRA) requires that data on arbitration awards be publicly available. FINRA RULES § 12904(h), FIN. INDUS. REG. AUTH., http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4192 [<http://perma.cc/WZ7T-CW3V>] (noting that for customer disputes, “[a]ll awards shall be made publicly available”); FINRA RULES § 13904(h), FIN. INDUS. REG. AUTH., <http://finra.complinet.com/en/>

[display/display_main.html?rbid=2403&element_id=4292](#) [<http://perma.cc/3UF7-PRBY>] (providing the same rule for industry disputes); see also *FINRA Arbitration Awards Online*, FIN. INDUS. REG. AUTH., <http://finraawardsonline.finra.org> [<http://perma.cc/KF5Z-JRFD>] (providing a searchable database of arbitration awards); *Dispute Resolution Statistics*, FIN. INDUS. REG. AUTH., <http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics> [<http://perma.cc/D2EA-A6PQ>] (summarizing arbitration statistics) [hereinafter *FINRA Dispute Resolution Statistics*].

³²² See 9 U.S.C. §13. See also *PDV Sweeny, Inc. v. ConnocoPhillips Co.*, 2014 WL 4979316 (S.D.N.Y. 2014) (concluding that arbitral award actions are “judicial documents” that are presumptively open); *Martis v. Dish Network*, 2013 WL 6002208 (W.D. Mich. 2013).

³²³ Richard Frankel, *State Court Authority Regarding Forced Arbitration after Concepcion*, in *FORCED ARBITRATIONS AND THE FATE OF THE 7TH AMENDMENT* at 55, 70 (Pound Civil Justice Institute, 2014), <http://poundinstitute.org/sites/default/files/2014PoundReport.pdf>.

³²⁴ *AAA Ethical Principles*, *supra* note 30.

³²⁵ *Ting v. AT&T*, 319 F.3d 1126, 1151 n.16 (9th Cir. 2003).

³²⁶ *Id.*, 319 F.3d 1126 (9th Cir. 2003); see also *Pokorny v. Quixtar, Inc.* 601 F.3d 987 (9th Cir. 2010). The Ninth Circuit, joined by some state courts, concluded that confidentiality either gives rise to or contributes to a contract’s unconscionability. See, e.g., *Schnuerle v. Insight Communications Co.*, L.P., 376 S.W.3d 561, 578-79 (Ky. 2012).

³²⁷ See *Guyden v. Aetna Inc.*, 544 F.3d 376, 384-85 (2d Cir. 2008); *Iberia Credit Bureau Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175-76 (5th Cir. 2004); *Parilla v. IAP Worldwide Service, VI, Inc.*, 368 F.3d 269, 279-81 (3d Cir. 2004). Further, one court concluded that a for-profit educational service could seek an injunction against former students to prevent them from disclosing the outcomes of arbitration. See *ITT Educ. Serv., Inc. v. Arce*, 533 F.3d 342 (5th Cir. 2008).

³²⁸ *Guyden*, 544 F.3d at 385.

³²⁹ *Id.* (quoting *Iberia Credit Bureau*, 379 F.3d at 175).

³³⁰ *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 686-87 (2010). Justice Alito quoted the Addendum to Brief for American Arbitration Association as Amicus Curiae at 10a, *Stolt-Nielsen S.A.*, 559 U.S. 662, which provided the AAA’s rules on class arbitrations.

³³¹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011).

³³² See CFPB 2015 ARBITRATION STUDY, *supra* note 19, at Section 3, 42.

³³³ Several empirical analyses thank the AAA for making available data not otherwise public. See, e.g., *Colvin & Pike*, *supra* note 165, at 59 n.1, 62 (noting that the AAA enabled full file reviews of 217 cases, thereby permitting access beyond what was available under state mandates).

³³⁴ UNCITRAL, *Rules on Transparency in Treaty-based Investor-State Arbitration*, *supra* note 5.

³³⁵ Disclosure is required by the FINRA Rules. See FINRA RULES §§ 12904(h) and 13904(h) (“[a]ll awards shall be made publicly available”); see also *FINRA Arbitration Awards Online*, FIN. INDUS. REG. AUTH., <http://finraawardsonline.finra.org> [<http://perma.cc/DT7M-NRWC>]; *Dispute Resolution Statistics*, FIN. INDUS. REG. AUTH., <http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics> [<http://perma.cc/H3FA-U5RP>].

³³⁶ Cal. Civ. Proc. Code §1281.96 (a)(b), enacted in 2002, eff., 2003, and amended in 2014. In the 2014 revisions, the statute was modified to state that the “The information required by this section shall be made available in a format that allows the public to search and sort the information using readily available software.” See CAL. CIV. PROC. CODE § 1281.96(b) (West 2015). The statute also requires that paper copies be provided upon request, exempts companies doing fewer than fifty yearly consumer arbitrations from web-based quarterly reporting, and protects companies from liability for providing the information required.

Maryland, Maine, and the District of Columbia provided similar provisions after California’s 2003 enactments. See ME. REV. STAT. tit. 10, § 1394 (2010); D.C. CODE § 16-4430 (2012); MD. CODE ANN., COM. LAW § 14-3903 (West 2011). The requirements vary slightly. Maryland, for example, also requires information on where arbitrations were conducted. MD. CODE ANN., COM. LAW § 14-3903(a)(11) (West 2011). Maine mandates that the information remain available for at least five years. ME. REV. STAT. tit. 10, § 1394 (2010). The District of Columbia authorizes private parties and the Attorney General of the District of Columbia to seek injunctive relief and recover the costs of doing so; as of 2014, no reported case law has resulted. See D.C. CODE § 16-4430(i) (2012) (providing that “any affected person or entity, including the Attorney General of the District of Columbia, can request a court to enjoin the arbitration organization from violating the section and order such restitution as appropriate” and providing for recoupment of attorneys’ fees and costs if those seeking to enjoin the arbitration organization prevail by settlement or court order). California’s statute calls for compliance but specifies no particular method. See CAL. CIV. PROC. CODE § 1281.96(f) (West 2015) (“It is the intent of the Legislature that private arbitration companies comply with all legal obligations of this section.”).

As noted, in 2014, California amended its statute to require additional disclosures, including whether “arbitration was demanded pursuant to a pre-dispute arbitration clause and, if so, whether the pre-dispute arbitration clause designated the administering arbitration company.” The statute also imposed a few other obligations to provide information, some of which the AAA had been providing under the 2003 version. See CAL. CIV. PROC. CODE § 1281.96(a) (West 2015). Furthermore, the data are to be “directly accessible from a conspicuously displayed link.” See CAL. CIV. PROC. CODE § 1281.96(b) (West 2015). Since the information garnered in the research we did was filed under the prior version, the 2003 statute’s mandates governed.

³³⁷ See CAL. CIV. PROC. CODE § 1281.96 (2002).

³³⁸ *Id.* California’s Judicial Council defined “consumer arbitration” in its “Ethics Standards for Neutral Arbitrators in Contractual Arbitration.” See *Ethics Standards for Neutral Arbitrators in Contractual Arbitration*, CAL. JUDICIAL COUNCIL (2002), http://www.courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf [<http://perma.cc/8RLM-BV5H>]. A “consumer arbitration” is “an arbitration conducted under a predispute arbitration provision contained in a contract . . . with a consumer party . . . drafted by or on behalf of the nonconsumer party; and . . . [t]he consumer party was required to accept the arbitration provision in the contract.” *Id.* at 3. A “consumer party” includes:

- (1) [a]n individual who seeks or acquires, including by lease, any goods or services primarily for personal, family, or household purposes including, but not limited to, financial services, insurance, and other goods and services as defined in section 1761 of the Civil Code; (2) An individual who is an enrollee, a subscriber, or insured in a health-care service plan within the meaning of section 1345 of the Health and Safety Code or health-care insurance plan within the meaning of section 106 of the Insurance Code; (3) An individual with a medical malpractice

claim that is subject to the arbitration agreement; or (4) An employee or an applicant for employment in a dispute arising out of or relating to the employee's employment or the applicant's prospective employment that is subject to the arbitration agreement.

Id. at 4.

³³⁹ David J. Jung, Jamie Horowitz, Jose Herrera & Lee Rosenberg, *Reporting Consumer Arbitration Data in California: An Analysis of Compliance with California Code of Civil Procedure §1281.96*, PUB. LAW RESEARCH INST. 9, 51 (2013), <http://gov.uchastings.edu/docs/arbitration-report/2014-arbitration-update> [<https://perma.cc/9M5X-8LH2?type=pdf>] [hereinafter *Reporting Consumer Arbitration Data*].

³⁴⁰ *Id.* at 1.

³⁴¹ *Consumer Arbitration Statistics*, AM. ARBITRATION ASS'N (2014), <http://www.adr.org/aaa/faces/aoe/gc/consumer/consumerarbstat> [<https://perma.cc/8MME-DK4K>].

³⁴² See AAA July 2009-June 2014 Provider Organization Report, *supra* note 27. The data described were obtained by “filtering” the Excel sheet columns through the “Data” tab and then electronically searching the document. The data are taken off the web after five years, but energetic researchers can download and store the data that has been made available. As noted, Lexis and Westlaw allow subscribers to search the texts of arbitral awards provided by the AAA with some redactions.

³⁴³ See AAA July 2009-June 2014 Provider Organization Report, *supra* note 27 (explaining that the 17,368 entries represent 16,436 cases).

³⁴⁴ See AAA July 2009-June 2014 Provider Organization Report, *supra* note 27. The AAA explains that it provides an entry for each individual filing (whether singly or as part of a joint claim) and an entry for each respondent. For example, it provides two separate listings for a complaint that is made both against a car dealer and a manufacturer. The AAA spreadsheet therefore contains 17,368 rows corresponding to the number of individual filings—or 16,436 cases brought after June 2009 and closed before July of 2014. *Id.*

³⁴⁵ *Id.*

³⁴⁶ See *id.* Individual consumers are not named; claims are listed by file numbers.

³⁴⁷ Enough information is included to calculate how many arbitrations per year a particular arbitrator conducts. For example, of the claims against AT&T listed in the database, 598 individuals are shown to have arbitrated at least one of the claims. See *id.*

³⁴⁸ The AAA changed its fee system in March 2013, as noted above. Boyle Materials, *supra* note 29.

³⁴⁹ For example, information on the prevailing party appeared in 34% of the claims when awards are made, and the salary range of employees appeared in 37% of the 6,795 employment claims. See AAA July 2009 to June 2014 Provider Organization Report, *supra* note 24.

³⁵⁰ The zero appearing in the other half may reflect that no monetary relief was provided. See *id.* The “other relief” columns for both the business and the consumer are blank for all awarded claims.

³⁵¹ AAA July 2009 to June 2014 Provider Organization Report, *supra* note 27.

³⁵² Real estate claims involving brokers would fall within this set. Our focus was on claims filed against “AT&T Mobility, LLC” numbered 1,100; 169 were filed against “AT&T Corporation,” 12 against “AT&T,” and 2 against “AT&T Services, Inc.” AAA July 2009 to June 2014 Provider Organization Report, *supra* note 27.

³⁵³ See *id.* (First, filtering “Nonconsumer” column for text containing “AT&T;” second, filtering “Consumer Attorney Firm” for “Bursor & Fisher, PA”). The filings were made between July 2011 and November 2012. The AAA data listed 1,148 and the interview with the firm's attorney confirmed that it had filed more claims than those listed.

³⁵⁴ In January 2011, before the Supreme Court's decision in *AT&T v. Concepcion*, that law firm had sought class action certification in a case alleging that “AT&T's billing system for iPhone and iPad data transactions” systematically overcharged consumers for data not provided or used. *Hendricks v. AT&T Mobility LLC*, 823 F. Supp. 2d 1015, 1017-18 (N.D. Cal. 2011) (quoting Class Action Complaint at 2, *id.* (No. 11-cv-00409)). In October 2011, a federal district court held that the Supreme Court's ruling in *AT&T v. Concepcion* precluded class certification, notwithstanding the argument that “large expenses interfere with the vindication of statutory rights.” *Id.* at 1021.

³⁵⁵ Telephone Interview with L. Timothy Fisher, Bursor & Fisher (Feb. 11, 2015). As Fisher recalled, the firm filed about 1,000 claims on phantom charges and a similar number related to the merger. Not all of those filings are listed on the AAA website. Hearings were held in 24 of the over-charging claims. See, e.g., Commercial Arbitration Tribunal, Award, *Patrick Hendricks and AT&T Mobility, LLC*, Case No. 74-434-E-000041-12, AM. ARB. ASS'N (May 21, 2012) (on file with author). After hearing Hendricks' expert and AT&T's witnesses, the arbitrator found against Hendricks; under the agreement of the parties, AT&T paid the \$750 fee of the arbitrator to Hendricks.

As for the effort to stop the merger, a district court granted an injunction against Sandra Smith, one of the “1,109 AT&T customers” represented by that firm, from using arbitration to do so. Order at 2, *AT&T Mobility LLC v. Smith*, No. 11-cv-5157 (E.D. Pa., Oct. 7, 2011), 2011 WL 5924460, at *1. The court, relying on the AT&T clause stating that arbitrators were to decide all issues except those “relating to the scope and enforceability of the arbitration provision,” *id.* at 4, 2011 WL 5924460, at *2, and that arbitrators could not “preside over any form of a representative or class proceeding,” *id.* at 6, 2011 WL 5924460, at *2, concluded that AT&T would likely prevail on the argument that, functionally, Smith was proceeding as a representative, *id.* at 12-16, 2011 WL 5924460, at *7-9. Further, the Court found that AT&T would suffer irreparable harm by having “its resources, attention, and witnesses” diverted from responding to the Department of Justice's lawsuit against the merger. *Id.* at 16, 2011 WL 5924460, at *9. In addition, the “compressed schedule” required by the AAA for arbitration imposed burdens that would “stretch” the company “too thin.” *Id.* Finding that the balance of hardships and public interest tipped towards AT&T, the court enjoined the arbitration. *Id.* at 16-20, 2011 WL 5924460, at *9-11. For a review of other decisions on the arbitrability of the merger, see *Schatz v. Cellco Partnership*, 842 F. Supp. 2d 594, 601-603 (S.D.N.Y. 2012).

³⁵⁶ One other law firm, Edelson McGuire, LLC, filed 20 claims. See AAA July 2009- July 2014 Provider Organization Report, *supra* note 27. That group is included among the 134 claims because the number of individual filings by the firm was small and the amounts sought varied, as did the filing dates and the dispositions.

³⁵⁷ See AAA July 2009- July 2014 Provider Organization Report, *supra* note 27 (listing “Consumer” for each claim involving AT&T in the “Initiating Party” column). Evidence for the potential counterclaim comes in the form of one non-blank entry—approximately \$1287—within a column listing amounts claimed by the business.

³⁵⁸ See Brief of Civil Procedure and Complex Litigation Professors as Amici Curiae in Support of Respondents at 20, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 3934621, at *20 (citing Declaration of Bruce L. Simon in Support of Plaintiffs' Opposition to Defendants' Amended Motion to Compel Arbitration at paras. 8-9, *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248 (W.D. Wash. 2009) (No. 06-944) (reporting on data collected from statistics posted to the AAA's website and showing that the consumer party was self-represented in 122 of the 140 cases against AT&T)). The district court noted that AT&T has reported a higher figure (570) of customers who had pursued arbitration but had "failed to identify the nature or amount of these claims" or whether any involved deceptive advertising. *Laster v. T-Mobile USA, Inc.*, No. 05-cv-1167, 2008 WL 5216255, at *13 (S.D. Cal. Aug. 11, 2008). AT&T amended the terms of its arbitration as the litigation was ongoing, and offered to pay at least \$10,000 as well as double attorneys' fees to any consumer who won more at arbitration than was offered in settlement. *Wireless Customer Agreement*, Section 2.2(4), *supra* note 4. In addition, "[f]or any non-frivolous claim that does not exceed \$75,000, AT&T will pay all costs of the arbitration." *Id.* Section 2.1. AT&T has not made public the numbers of such claims paid.

³⁵⁹ See *Wireless Customer Agreement*, Section 2.2(1), *supra* note 4. According to Andrew Pincus, who has represented AT&T, a small claims option was available in the AT&T provisions, as well as in those from its predecessor Cingular, since "at least mid-2003," and perhaps earlier. Email from Andrew Pincus, Partner at Mayer Brown, to Judith Resnik, Arthur Liman Professor of Law at Yale Law School (Feb. 18, 2015, on file with author).

³⁶⁰ Diana Li, Jonas Wang, John Giammatteo, Marianna Mao, Ben Woodring, and Chris Milione, *Small Claims Court Filings: A Preliminary Analysis* (March 16, 2015, on file with author) [hereinafter Li, Wang, Giammatteo, Mao, Woodring, and Milione, *Small Claims*, 2015]. These counties were: Santa Clara County, Ventura County, Santa Cruz County, Fresno County, Stanislaus County, Placer County, Kern County, El Dorado County, Contra Costa County, San Joaquin County, San Francisco County, San Mateo County, Monterey County, Marin County, and Mendocino County.

³⁶¹ *Id.* Those counties were Cook, Lake, St. Clair, Vermilion, Clinton, LaSalle, DuPage, Madison, Bard, Champaign, Winnebago, Macon, McHenry, and Jackson.

³⁶² CFPB 2015 ARBITRATION STUDY, *supra* note 19, at § 1, 15-16; § 7, Table 1, at 11-12. The CFPB encountered the challenges we had, that central data bases do not exist and access varies by jurisdictions. Its data drew on sampling by using data bases that aimed to provide statewide data, permitted party name searches, and permitted searches by years, supplemented by county-level data. *Id.* at § 7, 5-6.

³⁶³ CFPB 2015 ARBITRATION STUDY, *supra* note 19, at § 6, 27-28. Although attempts were made to identify filings in a subset of states, data challenges made that plan unworkable. *Id.* at 15. In some of these cases, motions to arbitrate were filed. *Id.* at 6-8.

³⁶⁴ Li, Wang, Giammatteo, Mao, Woodring, and Milione, *Small Claims*, 2015.

³⁶⁵ All courts permit individuals to look at files, which are sometimes stored in the courthouses, other times offsite, and some courts are shifting to "paperless" filings. Online access is often available, sometimes without charges and, for other courts, behind a paywall. Search tools and the capacity to search in depth varied by county and state. See *Public Access to Small Claims Court*, Memorandum from Diana Li, Marianna Mao, Jonas Wang, Benjamin Woodring, John Giammatteo, and Chris Milione, to Judith Resnik, (Feb. 28, 2015) (on file with author).

³⁶⁶ CFPB 2015 ARBITRATION STUDY, *supra* note 19, at § 3, 16-18.

³⁶⁷ The tally listed 1,063 filings in 2010; 1,425 arbitrations in 2011; 2,811 arbitrations in 2012; and 1,741 in 2013. Boyle Materials, *supra* note 29.

³⁶⁸ Chandrasekher & Horton, *supra* note 38, at 23.

³⁶⁹ Section 1281.96 of the California mandate requires disclosure of the "nature of the dispute involved as one of the following: goods; credit; other banking or finance; insurance; health care; construction; real estate; telecommunications, including software and Internet usage; debt collection; personal injury; employment; or other." CAL. C. CIV. P. § 1281.96(a)(3) (eff. Jan. 1, 2015). The earlier version of that section, enacted in 2002, required disclosure of the "type of dispute involved, including goods, banking, insurance, health care, employment." CAL. C. CIV. P. § 1281.96(a)(2) (2014). See also David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1285 n.90 (2009).

³⁷⁰ See *Provider Organization Report*, AM. ARB. ASS'N, *supra* note 27.

³⁷¹ Specifically, in addition to the 17,368 entries over five years from the AAA, the data include filings from the Office of the Independent Administrator designated by Kaiser Foundation Health Plan, Inc. for its California health plan members. OFFICE OF THE INDEP. ADMINISTRATOR, <http://www.oia-kaiserarb.com>, <http://perma.cc/US6M-YSD3> (last visited Mar. 3, 2015). That office provides a non-searchable database listing 9,123 cases over a period of twelve years from January 2003 to December 2014. A searchable five-year database listed 3,294 arbitrations from January 2010 to December 2014. *Sortable Disclosure Table*, OFFICE OF THE INDEP. ADMINISTRATOR, <http://www.oia-kaiserarb.com/51/CONSUMER-CASE-INFORMATION/DISCLOSURE-TABLE-ABOUT-ARBITRATIONS-RECEIVED-IN-PAST-FIVE-YEARS-SORTABLE/SORTABLE-DISCLOSURE-TABLE> [<http://perma.cc/R6A7-KX6U>] (last updated Dec. 31, 2014). JAMS recorded 2,921 entries filed from 2009-2014. JAMS Consumer Case Information, JAMS (2015), <http://www.jamsadr.com/consumercases> [<http://perma.cc/3F47-SYKW>] (last visited Mar. 3, 2015) (click to download "Consumer Case Information" Excel sheet). Judicate West has disclosed 2,250 arbitrations from 2006 to 2014, with 2,221 filed since 2009. Q. *Consumer Arbitration Disclosure*, JUDICATE WEST (Dec. 31, 2014), <https://www.judicategest.com/Services/DisplayPDF/130> (counting cases by determining the number of times "Case Number" appears and determining date range by searching by year for "Filing Date"). A manual search reveals that 29 of the arbitrations reported were filed before 2009. ADR Services, Inc., lists 2,181 arbitrations from January 2006 to October 2014, with 2,137 filed since 2009. *Consumer Arbitration Record*, ADR SERVICES INC. (Oct. 1, 2014), <http://www.adrservices.org/pdf/Consumer%20Arbitration%20Record%202014.10.01.pdf> (counting cases by determining the number of times "Case Number" appears; determining date range by searching by year for "Date Demand Received"). A manual search reveals that forty-four of the arbitrations reported were filed before 2009. Resolution Remedies has reported 240 arbitrations from 2009 to 2014. *Consumer Arbitration Disclosure Report—Standard 8 Report*, RESOL. REMEDIES (Oct. 2014), <http://www.resolutionremedies.com/documents/Standard8Report-Oct2014.pdf> (determining date range by searching by year for "Date"). Many of the entries, however, are labeled as mediations. In order to count the number of arbitrations, a case-sensitive search for "Arb" was conducted—after saving the document and opening outside the Google Chrome web browser, which did not allow a case-sensitive search—because a non-case-sensitive search for "arb" would provide erroneous hits, for example from the arbitrator name "Barbara." A cursory review of the 240 hits found via a case-sensitive search indicated no erroneous hits. Alternative Resolutions Centers has reported 170 arbitrations from January 2009 to September 2013. ARC *Consumer Arbitrations*, ALTERNATIVE RESOLS. CENTERS. (Apr. 1, 2014), (counting cases by determining the number of times "Case Name" appears; determining date range by searching by year for "Case Date"). National Arbitration and Mediation (NAM) has reported eighteen arbitrations from September 2007 to July 2014, with all but one filed after July 2009. *NAM Consumer Arbitrations*, NAT'L ARB. & MEDIATION, http://www.namadr.com/Consumer_cases.cfm (last updated July 30, 2014).

Additional explanation is needed. The number of approximately 28,000 total consumer filings listed under the California mandate from 2009 to 2014 does not include 20,000 listed during 2009 to 2011 by the National Arbitration Forum. See *California CCP 1281.96 Reports*, NAT'L ARB. F. Unlike the other providers, these filings are categorized by the arbitration's end date, and almost all were filed before 2009. NAF stopped administering new consumer arbitrations on July 24, 2009, pursuant to a consent judgment, after the State of Minnesota brought suit alleging that NAF had undisclosed ties to the credit collection industry. See *Minn. v. Nat'l Arbitration Forum*, No. 27-CV-09-18550, 2009 WL 5424036 (Minn. Dist. Ct. July 17, 2009) (consent judgment); Press Release, Minn. Office of the Att'y Gen., National Arbitration Forum Barred from Credit Card and Consumer Arbitrations Under Agreement with Attorney General Swanson, <http://pubcit.typepad.com/files/nafconsentdecree.pdf> (July 19, 2009) (also containing Letter from Lori Swanson, Att'y Gen. of the State of Minn., to President, Am. Arbitration Ass'n (July 19, 2009)); see also *National Arbitration Forum to Cease Administering All Consumer Arbitrations in Response to Mounting Legal and Legislative Challenges*, NAT'L ARB. F., (July 19, 2009), <http://www.businesswire.com/news/home/20090719005034/en/National-Arbitration-Forum-Cease-Administering-Consumer-Arbitrations> [<http://perma.cc/QZA3-JG5M>].

³⁷² See CFPB 2015 ARBITRATION STUDY, *supra* note 19, § 1, 10; *id.* § 2, at 34-35 (identifying the AAA as a provider in eighty-three percent of credit card arbitration clauses and in eighty-six percent of the surveyed mobile wireless arbitration clauses); at Tables 4-5, at § 2, 36-39 (summarizing providers in contracts in the six sectors studied).

³⁷³ See also Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date, CONSUMER FIN. PROTECTION BUREAU 22 (2013), http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf [<http://perma.cc/LS7Q-HTFZ>] [hereinafter CFPB 2013 Preliminary Results].

³⁷⁴ 2015 CFPB Arbitration Study, *supra* note 19, at § 5, at 3. The median amount of consumers' "affirmative claim[s]" was \$11,500. *Id.* at §1, 12.

³⁷⁵ *Id.* § 1, at 11.

³⁷⁶ *Id.*

³⁷⁷ Colvin & Gough, *Individual Employment Rights*, *supra* note 34 at 2.

³⁷⁸ Colvin & Pike, *supra* note 165, at 82.

³⁷⁹ Boyle Interview of Feb. 3, 2015, *supra* note 29.

³⁸⁰ *Laster v. T-Mobile USA, Inc.*, No. 05-CV-1167-DMS (AJB), 2008 WL 5216255 at *3 (S.D. Cal., Aug. 11, 2008).

³⁸¹ Complaint at 3, Federal Trade Commission v. AT&T Mobility, LLC, No. 1:14-cv-3227 (N.D. Ga. Oct. 8, 2014), <http://www.ftc.gov/es/system/files/documents/cases/141008attcmpt1.pdf> [<http://perma.cc/7AXP-67UX>].

³⁸² *Id.* at 3-4.

³⁸³ *Id.*

³⁸⁴ Stipulated Order for Permanent Injunction and Monetary Judgment at 16, Federal Trade Commission v. AT&T Mobility, LLC, No. 1:14-cv-3227 (N.D. Ga. Oct. 8, 2014) <http://www.ftc.gov/es/system/files/documents/cases/141008attstip2.pdf> [<http://perma.cc/RKZ8-XDPL>]. The settlement stipulated that AT&T would have to report to the FTC on its compliance with the settlement order for at least six years. *Id.* at 31.

³⁸⁵ Complaint at 3, Consumer Financial Protection Bureau v. Sprint Corp, Civ. Act. No. 14 CV 9931 (Dec. 17, 2014) [<http://perma.cc/WF4F-PSWN>]. The Bureau, an independent agency, has the authority to regulate consumer financial products and services, and it also undertaking studies of arbitration contracts. See 12 U.S.C. § 5491 (2012).

³⁸⁶ Stipulated Order for Permanent Injunction and Monetary Judgment at 10, FTC v. T-Mobile USA, Inc., W.D. Washington, Cas. No. 2:14-ev-00967 (Dec. 19, 2014); Diane Bartz, *U.S. Settles Lawsuit over T-Mobile US's Unauthorized Charges*, REUTERS (Dec. 19, 2014) [<http://perma.cc/9C6S-BB2J>].

³⁸⁷ CFPB 2015 ARBITRATION STUDY, *supra* note 19, at §1, 17-18; §8, 13.

³⁸⁸ See SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES* (2010).

³⁸⁹ The CFPB determined that many clauses were challenging for consumers to decipher on its "readability" scores. CFPB 2015 ARBITRATION STUDY, *supra* note 19, at § 3, 1-15. In terms of complexity, the study looked at the number and length of rules, and reported that the AAA's 2014 Consumer Arbitration Rules were 10,560 words, shaping 55 rules; the Philadelphia Municipal Court Rules ran 9,649 words, detailing 38 rules. *Id.* at § 4, 7.

³⁹⁰ Boyle Materials, *supra* note 29; Consumer Due Process Protocol, *supra* note 215, at Principle 6 ("Reasonable Cost"). The CFPB found variation in whether institutions paid or reimbursed the consumers' initial filing fees, and that amounts at pre-requisites to doing so varied depending on the market. Further, some clauses permitted arbitrators to impose costs after the arbitration on consumers. See CFPB 2015 ARBITRATION STUDY, *supra* note 19, at §2, 57-64 (summarizing cost provisions in arbitration clauses in the six markets studied). "Significant shares of arbitration clauses across almost all markets . . . did not address attorneys' fees." *Id.* at 66. But in some, attorneys' fees were awarded to prevailing consumers. *Id.* at 67-68.

³⁹¹ *Supplementary Consumer Rules*, *supra* note 287, at 14; *Consumer Arbitration Rules*, AM. ARB. ASS'N (Sept. 1 2014), *supra* note 389.

³⁹² CAL. CIV. PROC. CODE §1284.3(b)(1) (2012). The statute was first enacted in 2002, effective 2003.

³⁹³ CAL. CIV. PROC. CODE §1284.3(b)(2) (2012).

³⁹⁴ American Arbitration Association Affidavit For Waiver of Fees Notice For Use By California Consumers Only, AM. ARB. ASS'N (Oct. 21, 2011), http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004304; Affidavit for Waiver of Fees Notice For Use By California Consumers Only, AM. ARBITRATION ASS'N (2015). See Forms, AM. ARB. ASS'N (2015), <http://www.adr.org/aaa/faces/services/fileacase/forms> (including 58 other forms as well as the fee waiver hardship form for California consumers).

³⁹⁵ American Arbitration Association Affidavit in Support of Reduction or Deferral of Filing and Administrative Fees. Unlike the fee waiver form for California consumers available through the AAA website, the AAA website does not provide this Affidavit form; the web discussion under the heading "Administrative Fee Waivers and Pro Bono Arbitrators" states that "parties are eligible for a waiver or deferral of the administration fee if their annual gross income falls below 200% of the federal poverty guidelines." Administrative Fee Waivers and Pro Bono Arbitrators, AM. ARB. ASS'N, https://www.adr.org/aaa/ShowPDF%3Bjsessionid%3DR295PCqYD5MkNKHqQm9H7jhsMwYh2NnsYFSbG6yrMhgmGVB299lc!1082660915%3Fdoc%-3DADRSTG_004098. There, the AAA explains that, for its "hardship affidavit," "additional information . . . may be considered," including "past income,

assets . . . and income prospects,” and that the decision is discretionary. *Id.* See also CFPB 2015 ARBITRATION STUDY, *supra* note 19, § 4, at 11 n.51 and accompanying text (reporting that the “consumer can apply for a hardship waiver of otherwise applicable administrative fees,” but not citing to the form itself).

³⁹⁶ Boyle Materials, *supra* note 29.

³⁹⁷ *Id.* The CFPB found 22 consumer requests for fee waivers, and 23 “California” fee waiver requests amidst the 1,847 disputes that the AAA administered and the CFPB studied; the results were not recorded based on the “limited data.” CFPB 2015 ARBITRATION STUDY, *supra* note 19, at §5, 77.

³⁹⁸ See, e.g., 28 U.S.C. § 1915. The federal court filing fee, as of 2015, was \$350. See 28 U.S.C. § 1914(a).

³⁹⁹ H.B. 49, 145th Gen. Assem. (Del. 2009); see also DEL. CODE ANN. tit X, § 349 (2009); DEL. CH. R. 96-98.

⁴⁰⁰ Standing Order of Del. Ch. at 1 (Jan. 4, 2010), DEL. STATE CTS., <http://www.delawarelitigation.com/uploads/file/int6E.PDF> [<http://perma.cc/WW4D-8SGE>].

⁴⁰¹ *Id.*

⁴⁰² See Del. Coal. for Open Gov’t, Inc. v. Strine, 894 F. Supp. 2d 493, 496 (D. Del. 2012) (citing Del. Ch. Ct. R. 97(a)(4), 98(b))

⁴⁰³ *Id.* at 496, n.4 and accompanying text.

⁴⁰⁴ *Id.* at 502.

⁴⁰⁵ Del. Coal. for Open Gov’t, Inc. v. Strine, 733 F.3d 510, 512 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).

⁴⁰⁶ *Id.* at 521.

⁴⁰⁷ Motion for Leave To File Brief as Amicus Curiae and Brief for Technet as Amicus Curiae Supporting Petitioners at 10, *Strine*, 733 F.3d 510 (No. 13-869) [hereinafter Technet Amicus] (quoting Jessica Tyndall, *The Delaware Arbitration Experiment: Not Just a “Secret Court,”* 6 J. BUS. ENTREPRENEURSHIP & L. 395, 408 (2013)).

⁴⁰⁸ Thomas J. Stipanowich, *In Quest of the Arbitration Trifecta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 349, 350-52 (2013).

⁴⁰⁹ Technet Amicus, *supra* note 407, at 8 (citing to and extrapolating from Leo E. Strine, Jr., “Mediation-Only” Filings in the Delaware Court of Chancery: Can New Value Be Added by One of America’s Business Courts?, 53 DUKE L.J. 585, 592-93 (2003)).

⁴¹⁰ 1995 LONG RANGE PLAN, *supra* note 175, at 15.

⁴¹¹ *Id.* at 18.

⁴¹² *Id.* at 19.

⁴¹³ *Id.* at 19-20.

⁴¹⁴ *Id.* at 20.

⁴¹⁵ *Id.* at 20.

⁴¹⁶ *Id.* at vii.

⁴¹⁷ Chief Justice noted that the “total filings for civil cases and criminal defendants in the district courts grew less than one percent to 376,536.” See Roberts, *supra* note 107, <http://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf> [<http://perma.cc/GTA2-VV8W>].

⁴¹⁸ The data for Figure 4 (Growth and Fluctuation in Federal Court Filings, 1905-2013) are drawn from multiple sources. Information for 1905-1998 comes from William F. Shughart II & Gökhan R. Karahan, *Determinants of Case Growth in Federal District Courts in the United States, 1904-2002* (ICPSR 03987-v1), INTER-U. CONSORTIUM FOR POL. & SOC. RES., <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/3987> [<http://perma.cc/AN8H-GJ53>]. For data for years 1999-2012, see *History of the Federal Judiciary*, FED. JUD. CTR., [HTTP://WWW.FJC.GOV/HISTORY/CASELOAD.NSF/PAGE/CASELOADS_MAIN_PAGE](http://www.fjc.gov/history/caseload.nsf/page/caseloads_main_page) [<http://perma.cc/4X7G-KXJG>]. Data for 2013 are taken from *Caseload Statistics 2013*, ADMIN. OFF. U.S. CTS., <http://www.uscourts.gov/Statistics/Federal-JudicialCaseloadStatistics/caseload-statistics-2013.aspx> at tbls. C & D [<http://perma.cc/D5G9-GBFK>]. The effective annual growth rate described in Figure 4 reflects the annual rate of growth that would have occurred if filings had increased at a constant rate during the prior five years. This growth rate, based on actual growth in each of the five years, has been smoothed out to avoid the distraction of the volatility in year-to-year growth rates. Five-year growth rates for 1905-1908 are based in part upon estimated filings during 1900-1903, projected backwards using years with reported numbers of filings and cases pending. This graph does not include bankruptcy filings.

⁴¹⁹ 1995 LONG RANGE PLAN, *supra* note 175, at 20.

⁴²⁰ See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

⁴²¹ *Id.* at 465 (between 1962 and 1969, no more than 12% of annual civil terminations occurring during or after trial). See also Judith Resnik, *Failing Faith: Adjudicatory Procedures in Decline*, 53 U. CHI. L. REV. 494, 558 (1986) (trials were completed in 10.5% to 12% of federal civil cases annually from 1960 to 1969); Marc Galanter & Angela M. Frozena, *A Grin Without a Cat: The Continuing Decline & Displacement of Trials in American Courts*, DAEDALUS, Summer 2014, at 115.

⁴²² Table C-4: U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending December 31, 2010, ADMIN. OFF. U.S. CTS. (Dec. 31, 2010), <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2010/dec10/C04Dec10.pdf> [<http://perma.cc/6632-GGDA>] (indicating that 1.0% of the 314,233 civil cases terminated “reach[ed] trial”). The 2013 numbers were about the same. Table C-4: U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending December 31, 2013, ADMIN. OFF. U.S. CTS. (Dec. 31, 2013), <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2013/december/C04Dec13.pdf> [<http://perma.cc/DKE8-2MJ5>] (indicating that 1.2% of the 259,284 civil cases terminated “reach[ed] trial”).

The logic of the decline is argued by John Langbein in *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012). See also Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631 (1994).

⁴²³ See Jordan M. Singer & Hon. William G. Young, *Bench Presence 2014: An Updated Look at Federal District Court Productivity*, 48 NEW ENG. L. REV. 565, 565 (2014).

⁴²⁴ *Id.* at 566-67.

⁴²⁵ See Brief of the Am. Arbitration Ass'n as Amicus Curiae in Support of Petitioners, *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987) (No. 86-44), 1986 WL 727884, at *16.

⁴²⁶ See Brief of the Am. Arbitration Ass'n as Amicus Curiae in Support of Respondent, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (No. 343), 1967 WL 113919, at *15 n.9.

⁴²⁷ Motion for Leave to File Brief of Amicus Curiae at 1, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), 1985 U.S. S. Ct. Briefs LEXIS 1614. Two years later, in 1985, the AAA arbitrated approximately 45,000 cases. See Brief of the Am. Arbitration Ass'n as Amicus Curiae in Support of Petitioners, *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (No. 86-44), 1986 WL 727884, at *2.

⁴²⁸ Brief Amicus Curiae of the Am. Arbitration Ass'n, *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (No. 99-1235), 2000 WL 744161, at *2.

⁴²⁹ Brief of Amicus Curiae Am. Arbitration Ass'n in Support of Affirmance, *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2007) (No. 06-989), 2007 WL 2707884, at *1.

⁴³⁰ See Brief of Amicus Curiae Am. Arbitration Ass'n in Support of Petitioner, *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014) (No. 12-138), 2013 WL 4781545, at 2.

⁴³¹ The American Arbitration Association: A Long History of Working with Government, AM. ARBITRATION ASS'N 1 (2011), http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_017603 [<https://perma.cc/P6PZ-DL7B>].

⁴³² The AAA website continues to cite the 150,000 arbitrations annually, but its growth rate reported in the amici filings suggests higher numbers, now above 200,000 yearly. See Boyle Feb. 3, 2015 Telephone Interview, *supra* note 29.

⁴³³ *Del. Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 512 (3d Cir. 2013), *cert. denied*, 124 S. Ct. 1551 (2014).

⁴³⁴ *Id.* at 518 (3d Cir. 2013) (quoting *Press-Enter. Co. (Press II) v. Super. Ct. of Cal. for Riverside Cnty.*, 478 U.S. 1, 8 (1986)).

⁴³⁵ *Id.* at 520.

⁴³⁶ *Id.* at 522 (Fuentes, J., concurring).

⁴³⁷ *Strine*, 733 F.3d at 519.

⁴³⁸ *Id.* at 519-21.

⁴³⁹ *Id.* at 521.

⁴⁴⁰ *Strine*, 733 F.3d at 523-26 (Roth, J., dissenting). Her views were reiterated forcefully in a petition for certiorari that, despite the support from a host of amici law firms and institutions, was denied in the winter of 2014. Petition for a Writ of Certiorari, *Strine v. Delaware Coalition for Open Government, Inc.*, 134 S. Ct. 1551 (2014) (No. 13-869), 2012 WL 262086, denied, 134 S. Ct. 1551 (2014). Amici included the Chamber of Commerce and the Business Roundtable, TechNet, a large group of law firms, and NASDAQ OMX Group, Inc. and NYSE Euronext. See Brief of the Chamber of Commerce of the United States of America and Business Roundtable as Amici Curiae in Support of Petitioners, *Strine v. Delaware Coalition for Open Government, Inc.*, 134 S. Ct. 1551 (2014) (No. 13-869), 2014 WL 709719; Brief for TechNet as Amicus Curiae Supporting Petitioners, *Strine v. Delaware Coalition for Open Government, Inc.*, 134 S. Ct. 1551 (2014) (No. 13-869), 2014 WL 709721; Motion of Law Firms for Leave to File Brief as Amici Curiae for [24] Law Firms from Throughout the Nation and Brief for Amici Curiae Supporting Petitioners, *Strine v. Delaware Coalition for Open Government, Inc.*, 134 S. Ct. 1551 (2014) (No. 13-869), 2014 WL 768323; Brief of NASDAQ OMX Group, Inc. and NYSE Euronext as Amici Curiae in Support of Granting the Petition, *Strine v. Delaware Coalition for Open Government, Inc.*, 134 S. Ct. 1551 (2014) (No. 13-869), 2014 WL 787212.

⁴⁴¹ *Strine*, 733 F.3d at 525 (Roth, J., dissenting).

⁴⁴² *Id.*

⁴⁴³ *Strine*, 733 F.3d at 524 (Roth, J., dissenting).

⁴⁴⁴ *Id.* at 526 (Roth, J., dissenting).

⁴⁴⁵ *Id.*

⁴⁴⁶ JEREMY BENTHAM, *An Introductory View of the Rationale of Evidence* (1827), in 6 THE WORKS OF JEREMY BENTHAM 356 (John Bowring ed., Edinburgh, Tait 1843).

⁴⁴⁷ See *United States v. Simone*, 14 F.3d 833, 839 (3d Cir. 1994) (citing *United States v. Smith*, 787 F.2d 111, 114 (1986)).

⁴⁴⁸ Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

⁴⁴⁹ *Id.* at 30-54.

⁴⁵⁰ *Id.* at 54-59.

ORAL REMARKS OF PROFESSOR RESNIK¹

I wrote a lengthy paper. I thought it might be helpful to provide a quick overview and a few slides to illustrate some of the points. To start, reflect on the words that appear in many state constitutions, providing straightforward propositions about the importance of courts. Two examples come from the 1818 Connecticut Constitution² and the 1819 Alabama Constitution,³ both of which echo the Magna Carta. With slight variations, these provisions read:

“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.”

These texts reference two kinds of openness—discussed not in this symposium’s term of “transparency” but in the language of rights. A first kind of openness is that courts must be open to individuals to bring claims. Early constitutions expressly recognized a right to seek redress. The second kind of openness is about how courts, as institutions, were to function. These constitutions required that third parties be authorized to watch the proceedings. These are constitutional entitlements to use courts and to be able to see the interactions among litigants, judges, and jurors.

There is much to celebrate in this history, but an important reminder is in order. The words “every person” in those nineteenth century texts did not then include all who are here, in this room, or all who read these remarks. Courts were not then venues as inclusive as they are today. And law recognized and supported those exclusions.

To underscore the distance between the practices then and the current use of courts, consider the responses in Aiken, South Carolina, in the 1930s to a new courthouse mural. In the wake of the Depression, the federal government funded new construction, and hence jobs for architects, artists, and builders through the Works Progress Administration (the WPA). One such project was a new federal courthouse in Aiken.

As in many WPA buildings, the government picked artists, and in this instance the painter provided a large mural in a courtroom behind a judge’s bench. Right is the image.⁴

As you can see, the artist aimed to depict a version of the Renaissance Virtue, Justice, which is a common icon in courthouses in many places in the world. But, as the artist explained in correspondence with federal government officials, he had chosen not to rely on the



Justice as Protector and Avenger, Stefan Hirsch, 1938.

Aiken Federal Courthouse and Post Office (named the Charles E. Simons, Jr. Federal Courthouse in 1986) Aiken, South Carolina. Image reproduced courtesy of the Fine Arts Collection, United States General Services Administration.

conventional attributes of scales and swords. What he did pick were the colors of red, white, and blue from the American flag for her garb.

Yet a local newspaper reporter who saw the mural described the image as a “bare-footed mulatto.” The federal district court judge who was to sit in the new courtroom called the mural “a monstrosity” and sought to have it removed from the courthouse. The artist offered to repaint; and explained that he had not meant to make a statement; darkened hues were the result, he said, of paint pigment. While federal and state officials were initially enthusiastic about the proposed revisions, both the NAACP and artist organizations protested.

The result was that, as one can see from the edges of the photograph, the mural was covered in drapes. In 1938, a “mulatto” Justice could not represent the Virtue Justice. And of course, what was on the walls was echoed in the law of the land, which is to say that “mulattos” and other women and men of color had less than full protection under the laws of the United States.

The next image is one you can easily bring to mind, which is the U.S. Supreme Court when it moved into a building of its own for the first time in 1935. A pause is in order to think again about how to assess this now-familiar architecture. In some respects, we should see it as a “fake” old building, in the sense that it was built in an era rich with Art Deco architecture, moving to Modernism. In contrast, the goal of this temple-style structure was to look as if it has been there all along.⁵

As you all know, the words “Equal Justice Under Law” are carved at the top of the building’s front steps. The architect picked the phrase to fit the space. These exact words do not appear in the U.S. Constitution. But since its appearance on the courthouse, the phrase has gained the place of honor, quoted in dozens of cases.

[E]very person—all of us in this room—are indeed rights holders, both entitled to bring claims and entitled to watch court proceedings.

Recall that the conflict over the “mulatto Justice” in Aiken, South Carolina took place in 1938. Thus, three years earlier when the Supreme Court building opened, “Equal Justice Under Law” did not have the import it has today. It took *Brown v. Board of Education* on racial equality in 1954,⁶ *Reed*

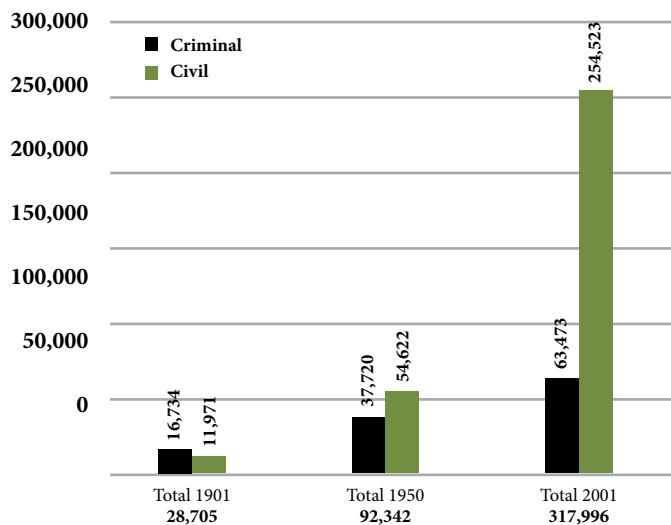
v. Reed in 1971 on women’s equality,⁷ and *Obergefell v. Hodges* on same-sex marriage equality in 2015⁸ to give “equal justice under law” the meaning it has now.

In short, as women and men of all colors gained juridical recognition, the words that appear on the Supreme Court’s building and in nineteenth-century state constitutional texts were reread to mean that every person—all of us in this room—are indeed rights holders, both entitled to bring claims and entitled to watch court proceedings. These precepts are inventions of the twentieth century, in the sense that social and political movements reconfigured courts as public and democratic institutions—open in a different way than the early constitutions imagined—even as these practices build on the traditions enshrined in those constitutions.

Turn then to the transformation of the work of the federal courts in the twentieth century.

In the next chart, I provide a glimpse of the federal system. At the beginning of the twentieth century, there were fewer than 30,000 cases filed nationwide around the United States, and many more of them were criminal

Federal Court Filings: 1901, 1950, 2001



Source: 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, 1799 (2014), Fig. 1, available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5949&context=fss_papers.

than civil. By the end of the 20th century, there were more than 300,000 cases, and many more of them were civil as compared to criminal.

And, as always, one can see the changes by looking not only at filing data but also at buildings. Early twentieth century federal courthouses were often just a few stories high; the image, above, of the federal courthouse in St. Louis, Missouri is from 2000, and when built it was the tallest federal courthouse, soaring 29 stories high.⁹

Of course, all of you who work in state courts know that the federal litigation is a drop in the litigation bucket. In one chart below, I have compared the filings as of 2010 of state cases (litigation excluding juvenile and traffic) with those in the federal system. All federal filings, civil and criminal, in that year numbered about 360,000. In addition, there were about 1.5 million bankruptcy

filings. In contrast, more than 47 million civil filings, contract and tort, were in the state courts.

And, when including juvenile and traffic filings, state courts receive more than 100 million cases a year. These data reflect an enormous and impressive system, with hundreds of courthouses and tens of thousands of judges.

By looking at the data and the courthouses, we can glimpse an important set of public investments. Courts are subsidized social services, providing resources to people with claims or complaints. Courts also enable cross-subsidies, as litigants can support each other through aggregate proceedings such as class actions and through information sharing in discovery. Moreover, constitutional and statutory obligations to provide fee waivers or subsidies for lawyers enable a small subset of civil litigants (such as if the state seeks to terminate parental rights) to bring cases; constitutional mandates require support as well of criminal defendants, if indigent.

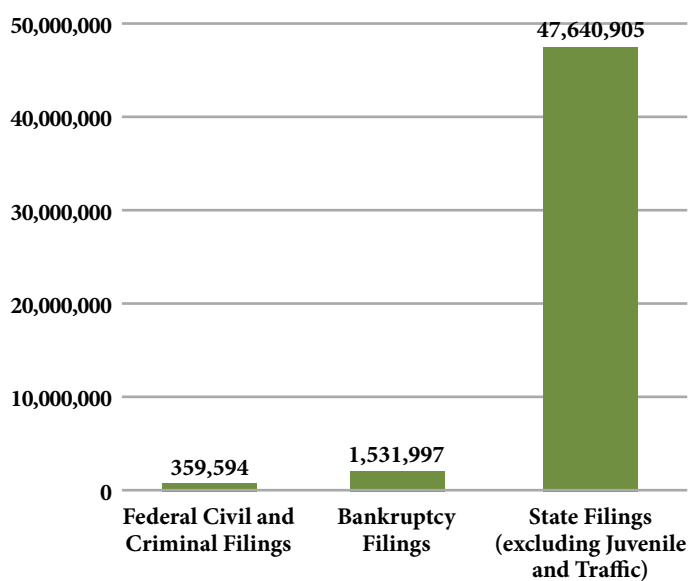
Courts are major sources of debates about rights and remedies, both civil and criminal. Their work merits the word “democratic,” not only as a reference to authorizing decision-making by juries but also to capture how democracies value individuals and require equal and civil exchanges—before a public that can assess whether or not democracies live up to their promises. Because of the odd etiquette in courts, all



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.

Comparing the Volume of Filings: State and Federal Trial Courts, 2010



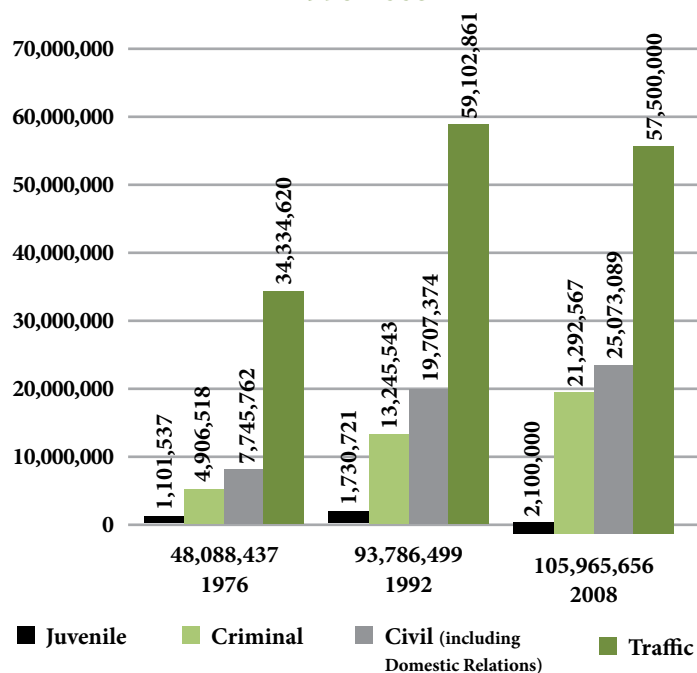
Sources: Administrative Office of the U.S. Courts, Caseload Statistics, 2010, tbls C-1, D-1 and F, <http://www.uscourts.gov/statistics-reports/federal-judicial-case-load-statistics-2010>. Data on state filings come from the National Center for State Courts, Court Statistics Project, National Civil and 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.

litigants—whether an employee or employer, prisoner or prison official, individuals, large corporations or the government—are required to treat each other as equals and to proceed in public in a dignified manner.

Chief Justice Nicole Duval Hesler began the discussion this morning with a reference to Jeremy Bentham, and his famous comment that “publicity is the soul of justice.” Bentham commented that a judge, while presiding over a trial, was himself on trial. The public is authorized to sit in judgment and assess the quality of the exchanges.

[The courts'] work merits the word “democratic,” not only as a reference to authorizing decision-making by juries but also to capture how democracies value individuals and require equal and civil exchanges.

Disaggregating State Trial Court Filings, 1976-2008



Source: National Center for State Courts annual reports, entitled Examining the Work of State Courts. Figures are estimates, as not all states report data in all categories.

Publicity also serves to protect judicial independence. I have heard judges, coming from countries where the judiciaries are much more vulnerable than ours, object to proposals that they become managers, working in their chambers with litigants to organize the proceedings and to conduct settlement conferences. The idea that judges should go into back rooms and chat informally can be a problem for judges. Judges have reason to worry about over-bearing governments as well as about other powerful litigants seeking to pressure them. There is safety in working in public.

The aspirations for courts that I have just sketched are enormous and, of course, are often *not* materialized in practice. In the past year, the name “Ferguson” became a shorthand for deeply unfair actions by government officials. The misbehavior involved not only actions by police,

misusing their power, but also by court officials. These accounts are not *sui generis* to Ferguson. Across the country, issues of court-imposed fines and fees being used oppressively have become the topic of litigation and media reports. Moreover, concerns about unfairness are reflected by decades of work in the state and federal systems around gender, race, and ethnic bias in the courts. Much remains to be fixed.

But through the obligation of courts to do their work in public, we can glimpse some of the problems and understand some of the ways in which to respond. Chief justices of state systems have commissioned inquiries and responded to concerns about fairness. And with public dispute resolution, we can have open conflict about what is right and wrong, and what the remedies ought to be.

Judges have reason to worry about over-bearing governments as well as about other powerful litigants seeking to pressure them. There is safety in working in public.

Do note that I am not suggesting that publicity necessarily generates either progressive or conservative agendas. One can find examples of court-based publicity shaping new rights. For example, as the details of household violence came to light, efforts to buffer against it through law have become prominent. “Domestic violence” is now understood as a problem that law has to address. But also, a string of horrible murders and crimes have produced very punitive sentencing regimes.

In short, we could spend hours on the changes *within* courts and the challenges *of* courts. But these complex public debates about rights and remedies—now underway—are themselves at risk, because court systems are under siege. A set of new practices—diffusing disputes and privatizing process—is disabling the ability to have public interchanges about what harms merit legal protection, what remedies should follow, and how to fashion fair rules.

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By way of introduction for our discussion, I will provide two examples: the privatization of process *inside* courts and the privatization of process by *outsourcing* adjudicatory decision-making outside of courts. And, these two kinds of privatization interact.

Come for a moment back to the federal courts about eighty years ago. In the 1938 Federal Rules of Civil Procedure, Rule 16 mentions the term “pre-trial procedure,” as a reference to the possibility of judges meeting with lawyers before trial. The hyphen in “pre-trial” reflected the idea that lawyers and judges were to talk to each other to prepare *for* a trial. The federal rule drafters borrowed this idea from some localities, such as Detroit, Michigan.

Move forward about 50 years. Rule 16 was first amended in 1983; by then, the job of the federal judge was being reshaped, to instantiate a new role for federal judges, as managerial judges, superintending lawyers and requiring “pre-trial” conferences. The 1983 rule took the hyphen out of “pretrial” and added that the purpose of such conferences included “facilitating the settlement of the case.” Rule 16 authorized what were called in 1983 “extra-judicial procedures,” including “adjudicatory techniques outside the courthouse.”

A decade later, Rule 16 was revised again, and this time what had become “extra-judicial” moved inside the courthouse and became part of what judges do. The 1993 rule instructed that representatives or parties were to be “present or reasonably available by telephone in order to consider possible settlement of the dispute.” Federal judges were charged with using, if they wanted, what the rule called “special procedures,” including the authority to require ADR “even when not agreed to by the parties.” Under the revised rule, litigants *had* to attend, and *had* to be willing to talk about settlement. Judges were not to impose settlements, but unlike the voluntary program discussed in a court tour to the Québec Court of Appeal that we went on yesterday, the federal rules authorized judges to require participation in various forms of ADR—alternative dispute resolution.

To capture the emphasis on settlement, I have borrowed a screenshot from the 2014 website of the federal courts. Because it can’t be read very well, I have enlarged the words set-off in the text box, which reads: “To avoid the expense and delay of having a trial, judges encourage the litigants to try to reach an agreement resolving their disputes.” One could read this opening direction to say, “Welcome to the federal courts. Please don’t stay.”

Indeed, as one esteemed federal district judge in Maine has explained,

“How might reality television portray a federal ‘trial’ judge in civil lawsuit garb? In an office setting without the robe, using a computer and court administrative staff to monitor the entire caseload and individual case



“To avoid the expense and delay of having a trial, judges encourage the litigants to try to reach an agreement resolving their dispute.”

Detail of text box.

Homepage of United States Federal Courts website

Available as of April 2, 2014, at: www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/CivilCases.aspx

progress . . . For federal civil cases, the black-robed figure up on the bench, presiding publicly over trials and instructing juries, has become an endangered species, replaced by a person in business attire at an office desk surrounded by electronic assistants.”¹⁰

Return then to the two senses of openness with which I began. The first is based on constitutional guarantees that “all courts shall be open,” read to mean that people can bring claims, and the second is that courts are “open” to anyone who wants to enter to watch the proceedings. Under the revised federal procedural rules, there’s not much you can watch. A good deal of what judges do now takes place in chambers. Of 100 civil cases filed in the federal courts, about one will start a trial. And many judges conduct pretrial conferences in chambers.

Of 100 civil cases filed in the federal courts, about one will start a trial.

Consider the other sense of openness, which is access to courts through the ability to *use* them, by filing lawsuits. For this aspect of our discussion, I need to provide a thumbnail account of the 1925 Federal Arbitration Act (FAA). In the 1920s, the American Bar Association and the Chamber of Commerce worked together to get the legislation enacted, and what they focused on was a system for volunteers. The FAA stated that if parties agree that, if disputes arise, they will leave the court system, the federal courts should enforce those agreements.¹¹ And, in the 1925 FAA, Congress expressly exempted the only workers that it could clearly regulate under the Commerce Clause as it was then read: seamen and workers in interstate commerce.¹²

From 1925 to 1985, the interpretations by the courts of the FAA were true to this model, predicated on bargains struck after negotiations. One example comes from the 1950s decision in *Wilko v. Swan*.¹³ A brokerage customer objected to being forced, at the behest of the broker, to use arbitration, which was included as an obligation in a form contract. The U.S. Supreme Court sided with the customer. The Court gave two reasons. One was a problem with the process of forming the contract. The Court wrote about the unequal bargaining power; which means that without the possibility of real bargaining, it would be unwise to enforce the contract against the party who had less ability to negotiate. And second, the Court objected to the process of arbitration. The Court identified arbitration as too informal and flexible. In contrast, courts offered enforcement of federal statutory rights and were themselves subject to regulation. Adjudication had rules of evidence and obligations to keep records, and lower court decisions were reviewable on appeal. Basically, one can read the 1953 decision as concluding that arbitration was fine for volunteers but that courts ought not impose it on those who had not genuinely agreed to do so.

But thereafter, the Court retreated from this commitment to the public regulatory model of adjudication. In the decades that followed, the U.S. Supreme Court reread the same 1925 Act and enforced obligations to arbitrate without consent. The Court imposed the obligation to arbitration on employees and consumers. As the Court did so, it started to make claims that arbitration was actually better than adjudication. While previously the Court had objected to arbitration as too flexible and informal, the Court later insisted that these attributes were desirable. The Supreme Court justified its rereading of the FAA through decisions saying that arbitration was an “effective” means of “vindicating” rights, that arbitration was a means of enhancing access to rights-enforcement. A summary is that the Court argued (often 5-4) that arbitration was cheaper and provided more access than did adjudication.

Since I think artifacts are relevant, the next images are the new emblems that need to be understood as putting courthouse iconography at risk. The photocopies are not very easily readable. They come from the record in the case of *EEOC v. Waffle House*, decided by the U.S. Supreme Court in 2002.¹⁴ At the top left it says “Waffle House: America’s Place to Work, America’s Place to Eat.” The handwritten parts come from Eric Baker, who signed these documents in South Carolina in 1994 by filling out a job application form.

What does the two-page form say? First, it basically warns against eating the waffles. It requires that employees take polygraph tests and pay back anything that they took. In the words of the form: “. . . 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 . . .”¹⁵

Second, the application requires that if disputes arise, all and any kind have to go to arbitration, and the parties have to split the costs. The arbitration clause is even smaller than the fine print about “don’t eat the waffles.” Specifically: “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.”¹⁶

Eric Baker signed the application form, but was hired at another Waffle House, miles away. Baker had a seizure soon after he started work, and he was fired. Baker went to the Equal Employment Opportunity Commission (EEOC), which filed an Americans with Disabilities Act (ADA)¹⁷ lawsuit, alleging that Baker was discriminated against because of the seizure. When litigating in the federal court, Waffle House argued that EEOC could not bring this case because Eric Baker signed the job application.

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.

Document Accompanying the Purchase of a Cellular Phone, 2002

The lower court judge rejected Waffle House's views; the judge concluded that because Baker signed the form in one place and was hired after a discussion in another, the form did not constitute a contract at all. The Court of Appeals reversed, with one dissent.¹⁸ The Fourth Circuit held that the EEOC could not seek economic back-pay for Baker because Baker had signed the form but the EEOC could seek injunctive relief.

The U.S. Supreme Court reversed the limits on the EEOC imposed by the Fourth Circuit. While Eric Baker was precluded, the EEOC was not, as it had a statutory mandate to bring claims, including remediation for Baker himself. While this decision is important and used by many state agencies to pursue remedies, it also exemplifies that the Court has now applied the 1925 FAA to employees, even if signing form job applications.

The next step in the expansion of arbitration can be seen from looking at the documents that came with cell phones. Again, it cannot easily be read it, and therefore one could argue that it is a terrible graphic. But it is a great graphic. There is no *point* in reading it, because you cannot do anything about it. I tried to negotiate it, but I couldn't.

What does it say? It says that I must use arbitration or small claims court. I may not be part of a class action. Neither may AT&T bring a class action against me. This symmetry is ironic, although it also has legal utility. Some jurisdictions have required such symmetrical constraints to enforce such documents.

As is now familiar, in various jurisdictions, court held these kinds of forms unenforceable because the provider could exempt itself from liability. In California, there is a statute¹⁹ and a case from the Supreme Court of California²⁰ that said that if a contract mandates waivers of class actions, it is not enforceable under the doctrine of "unconscionability." As you all also know, the U.S. Supreme Court reversed the California ruling in a 5-4 decision in 2011.²¹ The case involved AT&T, and the Court concluded that the California statute and case law were preempted by a reading of the Federal Arbitration Act that precludes the states from banning class action waivers.

I want to be clear that although that *AT&T* decision put state courts under enormous constraints, it does not put them totally out of the business of reading these clauses carefully. One example comes from the Washington Supreme Court, which looked at a clause imposed by a debt adjustor, which is basically an entity offering to help people try to avoid bankruptcy by making agreements with creditors. This adjustor's clause said,

"Arbitration. All disputes or claims between the parties related to this Agreement shall be submitted to binding arbitration in accordance with the rules of [the] American Arbitration Association within 30 days

The states do have a role to play, albeit one that is, under current law, much reduced.

from the dispute date or claim. Any arbitration proceedings brought by Client shall take place in Orange County, California. Judgment upon the decision of the arbitrator may be entered into any court having jurisdiction thereof. The prevailing party in any action or proceeding related to this Agreement shall be entitled to recover reasonable legal fees and costs, including attorney's fees which may be incurred."²²

Instead of the state's regular consumer protection statute of limitations of four years, the document stipulated 30 days. Instead of being in Washington, a claimant had to go to Southern California, and the debtor was at risk of paying fees. The Washington Supreme Court decided, in 2013, that the four sentences in the clause were unconscionable in three ways and were not enforceable in Washington's courts.²³

In short, the states do have a role to play, albeit one that is much reduced.

To clarify the regime imposed by the U.S. Supreme Court, I downloaded from the web my AT&T “contract.” I put the words “contract” in quotes because AT&T provides that “We may change any terms, conditions, rates, fees, expenses, or charges regarding your Services at any time”²⁴ For any of us who believe in the concept of contract as an important part of private ordering in a well-functioning business environment, calling the document “a contract” is a disservice. This is a product, a “thing” (as Professor Arthur Leff explained decades ago), which you may or may not want to regulate, but it is not something that merits being called what the world of commercial and private interactions deserves to have, which are real contracts.

For any of us who believe in the concept of contract as an important part of private ordering in a well-functioning business environment, calling the [AT&T service agreement] ‘a contract’ is a disservice.

If one objection is that there is no negotiated agreement, another objection is about the procedures provided. Arbitration obligations can take disputants to a host of providers. A well-known institution, founded when the FAA came into being, is the American Arbitration Association (AAA), which has in the last decades created special Consumer Arbitration Rules. Under those rules, hearings for arbitration are held in private, in the sense that third parties can only attend with permission.²⁵ Remember that phrase from several state constitutions—“All courts shall be open?” Under current law, that injunction to permit third-party access does not apply to arbitrations, even though they are in theory substitutes for courts. Not only is there no access to process; information about awards are also limited; some may be published, but without individuals’ names.²⁶

What we know about the use of arbitration comes to us in part because a few states require that providers of arbitration publish data about their services. California is one of those jurisdictions. According to one study from Hastings Law School, of 26 arbitration providers in California, 11 comply with these requirements.²⁷

The American Arbitration Association is one of those that does comply, and provides significant amounts of information. I have the great luxury of working with and learning from many talented law students. Because of AT&T’s leadership in insisting on arbitration, we decided to try to find out how many cases had been filed in arbitration against AT&T. The statute requires five-year reports, so that each quarter, data come up and data come down. We analyzed filings from 2009 to 2014.

The [Consumer Financial Protection Bureau] data [on arbitrations] reflect not “effective vindication” of rights, but no vindication.

What we learned was that between 2009 and 2014, AT&T had every year between 85 million and 120 million customers. We went through all the logs to figure out how many turned to arbitration. The punch line on the chart²⁸ is that, according to the AAA database, 134 people, over five years,

brought individual arbitrations against AT&T—or fewer than 30 a year. As I explain in detail in the paper, that volume is not evidence that arbitration provides an “effective vindication” of rights, but rather an *erasure* of rights. The key problem is the ban on class actions. Absent collectivity, virtually no one pursues claims for \$15 or \$42 or whatever the small amounts are.

The data that we examined are mirrored by information from the Consumer Financial Protection Bureau (CFPB), which issued a mammoth report in the spring of 2015.²⁹ The CFPB looked at five credit card markets, and hence at hundreds of millions of consumers. The CFPB researchers found 616 individual arbitrations in a three-year period, of which a third were brought by the companies against the individuals.³⁰ Basically, the data reflect not “effective vindication” of rights, but no vindication.

Before closing, I want to return to the courts again. I do so to explain that arbitration need not be private. Historians tell us that during the sixteenth through nineteenth centuries, some arbitrations were held in *public* in courthouses and in garrisons or other sites. In parallel fashion, one cannot equate openness with today’s courts. Recall that in 2009, Delaware’s legislature authorized its Chancery Court to offer arbitration in the state’s courthouses with the state’s chancery judges, and provided that the proceedings were not to be docketed on the record. The statute’s criteria for using that process required that a million dollars or more be in controversy; that both parties be corporations rather than individuals; and that at least one of those parties be incorporated in Delaware. The costs imposed were to be split, \$12,000 down, and \$6,000 a day (which is inexpensive compared to some private arbitration).

A group called the Delaware Coalition for Open Government brought a lawsuit objecting to the closing of courts, and argued that the First Amendment prohibited that closure. As the lower federal district court judge concluded, chancery judges functioned as “arbitrators,” and what they provided were in essence private civil trials. A majority of the Third Circuit agreed, that under the U.S. Supreme Court case law, the test required asking: Is there a tradition of accessibility, and is there a positive role for public access? The majority concluded that the

As courts privatize their process and as courts outsource to the private, the idea of closed proceedings becomes normalized As a consequence, the rich diversity that enables us to debate what the norms should be, what the rules should be, is diminishing.

proceedings were like a trial and hence could not be held in closed courthouses.³¹ But the dissenting judge argued that the proceedings ought to be categorized as arbitrations; that arbitrations had during the twentieth century become private; that privacy helped; and that Delaware courts needed to offer privacy to compete successfully against the private market for arbitrations.

The test currently used by the U.S. Supreme Court, often summarized as asking about “experience” and “logic,” is insufficient. Experiences are changing. As courts privatize their process and as courts outsource to the private, the idea of closed proceedings becomes normalized. Dispute resolution is diffused—controlled by private parties who make their own rules without public exchange about what the rules are, and without robust public accounting of processes or outcomes.³² As a consequence, the rich diversity that enables us to debate what the norms should be, what the rules should be, is diminishing.

In closing, let me remind you that my comments are not predicated on romantic claims about courts. As the opening image from Aiken, South Carolina makes plain, courts are only egalitarian institutions if we make them, build them, and insist that they be that way. We are watching courts becoming venues that are closed off, rather than lively places for cross-class inquires into the shape and meaning of our laws. These changes put at risk judicial independence, public support for courts, and the important democratic discourse to which courts contribute.

Thank you.

COMMENTS BY PANELISTS

LESLIE A. BRUECKNER

This morning I was reflecting on the prospect of appearing before 150 judges at one sitting. It reminded me of a time several years ago. I received some of the best advice that I have ever received, both as a lawyer and in life. I was getting ready to present a case before the U.S. Supreme Court. I was terribly nervous. For months and months, I was suffering over the prospect of appearing in the Supreme Court. I was studying guitar at the time, and I went to my guitar lesson. I was talking to my guitar teacher and his girlfriend about how nervous I was. His girlfriend happened to be a very spiritual person. She was living in an Ashram. She always wore white clothes. She was very relaxed about things. She looked at me very puzzled. She said, “Leslie, what are you worried about? All you have to do is surround yourself with light and speak the truth.” It really helped.

With that in mind, I will try to at least speak a little bit about my truth. I could not be more pleased than to talk about the subject of judicial transparency, because I have spent a good chunk of the past 25 years of my life as a public interest litigator at a public interest law firm. A lot of what I have done is to intervene in cases in federal and state court to challenge the unwarranted sealing of court records. By court records, I am talking about summary judgment motions, motions to dismiss, dispositive motions where important evidence is appended to the motions or discussed in the motions, and that that bears on public health and safety. In most cases, we go into cases where we are talking about a defective product that may have killed or injured hundreds of people. We have also gone into cases involving serious corporate fraud on the part of insurance companies.

We represent public interest organizations and media organizations to challenge over-broad secrecy orders. I see this complementing Professor Resnik’s remarks, because she talked a lot about how the court system itself is becoming less open because of the pressure on the judiciary to push cases to settle. She talked about how there are fewer and fewer trials and far fewer opportunities for members of the public to actually observe the workings of the court system. That is all true.

What is also true, in my experience, is that all levels of the court system are becoming increasingly closed to the public. Over the past 30 years, we have witnessed what I see as a dramatic rise in the sealing of discovery, the sealing of court records, the sealing of trial exhibits, the sealing of settlements, and sometimes even the sealing of judicial opinions.

All levels of the court system are becoming increasingly closed to the public.

What is so strange about all of this is that the law in this area, at least in the federal courts and in many state courts as well, is actually very pro-transparency. I will talk about what that law is in a minute. But this is one of the areas of the law where in my view the actual practice is most dramatically at odds with the prevailing legal standards.

What is to be done about this? My thesis is that because the law is generally favorable, the damage is not irreversible. But that meaningful change in this area needs to come from the judiciary. I will explain why in a minute.

But first just a word about why we care about transparency. Why does transparency matter? Professor Resnik has some wonderful things to say in her paper. It is an absolute tour de force—an amazing piece of work. She

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talks about how adjudication expresses the values of democracy by constraining the state's power through structuring, and how judges can function legitimately.

To me, translated into lay terms, I think that the court system, an open court system in particular, is essential because people need to know that there is a place that they can go to get a fair shake. To know that they can go into a courtroom and get an impartial judiciary. They are going to have the opportunity to present evidence in the open, in the “disinfecting light of the sun,” and to be judged in the open by a jury of their peers. That is a very powerful thing.

I think it is really not an overstatement to say that judicial transparency and openness are central to some of the core principles of democracy and why this country was created in the first place.

But there is another reason why judicial transparency is extremely important, and that is public health and safety. I will give you an example of one of the cases that we brought several years ago where we were challenging a secrecy order. We were approached by a gentleman by the name of Rich Barber. He was a gun enthusiast. He owned quite a number of firearms, one of which was a Remington rifle. While his wife was cleaning this rifle, she turned off the safety in order to take the ammunition out of it. The trigger went off. She accidentally shot and killed their three-year-old son.

Judicial transparency and openness are central to some of the core principles of democracy and why this country was created.

Mr. Barber started to look into this, and he learned from a colleague that numerous lawsuits had been brought against Remington involving this exact same defect, but that the public had never learned about the defect because the records had been sealed and Remington had quietly settled these, case after case after case. Nobody knew that this rifle had a defective trigger mechanism. Nobody knew that Remington had been selling these rifles. And Remington continued to sell the rifles even though the company knew that there was a defect.

We came into the case on behalf of Mr. Barber, and after years and years of litigation, we managed to open up the records. But that is just one example of why open court proceedings are so essential, not just for the value of discovery, but also to protect the public.³³

What does the law actually say about all this? The law in this area in the federal courts—and many state courts follow the federal courts and have great secrecy provisions of their own—generally provides that court records cannot be sealed absent a compelling showing that the proponent of secrecy's legitimate interests outweigh the public's presumptive right of access to court records. That is what the law says. The law is also very clear that a pre-trial discovery protective order does not justify the sealing of records.

What we have seen, however—and I think where all the rampant secrecy stems from—is that in case after case after case, both in the federal courts and sometimes in the state courts, the parties stipulate to secrecy in the

discovery phase. Documents get designated “confidential.” And when it comes to filing them in court, they are filing them under seal. And in a lot of cases, the judges are allowing that filing without making any specific findings at all that secrecy is required.

Open court proceedings are so essential, not just for the value of discovery, but also to protect the public.

What can you all do? I recognize that you are state appellate judges. You are not in the trial courts. What I would urge you to do is to keep an eye out for the sealing of court records and do what you can at the appellate level to overturn broad secrecy orders: to make clear, as the federal courts have done, that a mere “good cause” protective order does not justify sealing records; to reject litigants’ so-called “reliance” on a discovery protective order as a basis for the sealing of court records; to reject corporate embarrassment as a justification for the sealing of court records. That does not constitute a compelling reason under the law of every jurisdiction to consider the question. Finally, I would urge you to allow liberal intervention by members of the media and by public interest groups to challenge the sealing of court records, because often it is only groups like ours and media entities that are able to bring the pressure to bear to have the sunlight shine in on the judicial process.

HONORABLE ANNE ELIZABETH BARNES

I particularly enjoyed hearing Professor Resnik’s remarks about equal justice. “Equal Justice Under Law” is a wonderful sentiment. Who knew that it was made up to fit on the façade of the Supreme Court building? It is still a great sentiment. It is great to be here and to be reminded of our oaths that we will do equal justice to the rich and the poor and that sometimes that that is not happening because of things like mandatory binding arbitrations. It is not just the disparity of the parties, but also the lack of transparency, which does not lean toward fairness or justice in many cases.

I am going to cede some the rest of my time to the other panelist. I appreciate being given the opportunity to be here today, as I know you all do, and to be reminded again that “sunlight is the best disinfectant.”

MATTHEW W. BAILEY

There is always somebody that has to speak a little different than everybody else, and that appears to be me this morning. I practice in Baton Rouge, Louisiana. I defend individuals, corporations, and insurance companies in private litigation. I am the president of the Association of Defense Trial Attorneys, which is an invitation-only organization. It has 675 members located in cities throughout the United States, Canada, Puerto Rico, and London. We are “one in a million,” in the sense that we only allow one member per million in population.

I firmly believe that courts and judges do not intend to avoid transparency.

Our organization works closely with the DRI, which is comprised of about 22,000 members, the Federation of Defense and Corporate Counsel, which is comprised of about 1500 members, the International Association of Defense Counsel, which is comprised of about 2500 members, and all of our United States state defense organizations and Canadian defense organizations. Together there are about 35,000 members of the defense bar.

Throughout the year, we promote, we educate, and we encourage improvement in our justice system. We encourage improvement in our members' skills, and we educate them. We strongly encourage professionalism and ethics in all aspects of our practices.

I firmly believe that courts and judges do not intend to avoid transparency. Rather there are many factors that influence and impact the judiciary. These include increased filings in state courts (as Professor Resnik stated), budget problems, especially as the need for increased and updated technology continues, and judicial salaries.

These factors operate to create several problems, which include, but are not limited to, case backlogs, fewer judges and increased caseloads, limitations to the length of trials, and fewer qualified lawyers willing to leave the private practice of law.

Respectfully, Professor Resnik seems to suggest several things in her paper. First, she suggests that the judicial branch has created an unconstitutional system of justice by limiting access to courts, privatizing the legal system, and preventing courts from dispensing justice. Secondly, she indicates that the judiciary's ability to adjudicate matters is dwindling due to rules, which push judges to force settlements and outsource decision making. She used the term "diffusion" of disputes. Third, she seems to suggest that courts should not enforce the Federal Arbitration Act. But Congress enacted this statute, and accordingly courts are bound to enforce arbitration agreements that are entered into between two willing and voluntary participants. Courts do not force

We do know that class actions hurt corporate America.

mediation and do not force arbitration. Rather they enforce arbitration *agreements*, and order arbitration in disputes in which private parties have agreed to it voluntarily. Arbitration and the Federal Arbitration Act relate to private, civil litigation involving private, nongovernment parties. There is no data to suggest that public access to court proceedings has been hampered by the use of

arbitration. Additionally, there is no data to support the belief that aggregate or class arbitration would benefit private litigants. We do know that class actions hurt corporate America.

I represent private parties who do not volunteer to be sued. They want to protect their assets, proprietary and financial information, and their businesses. Class action litigation puts them at a significant cost and resource disadvantage at the outset. They do not want lengthy, protracted and expensive discovery before being forced to settle. Additionally, they do not want public disclosure of proprietary and/or confidential business information. Again, this is private party civil litigation.

Protective, confidentiality and secrecy orders . . . prevent parties from having to sacrifice privacy because they bring suit or have been sued.

There was a discussion earlier about protective, confidentiality and secrecy orders, which are often necessary for both sides of the dispute. They protect trade secrets and financial information, and they prevent parties from having to sacrifice privacy because they bring suit or have been sued.

Again, the purpose of discovery is to permit the parties to gain access to information needed for a particular dispute. The purpose of discovery in a civil matter involving private parties is not to make the information discovered public. Thus the need for protective orders and confidentiality. Again, the standard is good cause.

In conclusion, let me say this: our federal and state laws favor arbitration when agreed to by the parties to an agreement. It is inexpensive, streamlined, and very efficient. There are plenty of safeguards in place for those who agree to arbitrate and thus it is a favored method of dispute resolution between private parties to a civil dispute.

Thank you for the opportunity to speak in front of you today.

LANCE COOPER

I am going to focus my comments on filed lawsuits because, as a trial lawyer who represents solely plaintiffs, that is what we do, so that is what I am most familiar with—although I will comment on the Arbitration Act in a moment.

I think what is so important about what Professor Resnik has done is she reminds us of what we all take for granted, and that is there is a constitutional right to trial by jury, under the U.S. Constitution and all of our state constitutions. I think that is sort of forgotten. As she says, we then invent these processes, which ultimately, in my opinion (and I agree with Professor Resnik to this extent), undermine the right to trial by jury and access to a jury trial. Under the Constitution, as Professor Resnik says, individuals have a right to come to court. The public has a right to observe.

Individuals have a right to come to court. The public has a right to observe.

And the right to observe has an interesting history. I practice in Cobb County, Georgia. I am not from there originally, but I am told by lawyers that 50 years ago a primary form of public entertainment was people watching jury trials, watching the outstanding lawyers do what they did. The citizens participated in the process, they saw the process—democracy in action. You don't have that anymore in the cases we try unless the media is interested in them. There is really nobody in the courtroom observing trials.

Generally, it would appear that if you look at our system now and you go to a courthouse, for example in Cobb County, it would appear that the system is healthy. It is working properly. People have access to the courts. As Professor Resnik showed us, there are a lot of filings. All you need is a filing fee and the courts are open. In other words, I can go into Cobb County any day and go into a courtroom and observe. Generally, it would appear that it is working properly. But the issue is what is going on behind the curtain. Leslie Breckner talked about that a little bit, and I will add to some of what she had to say.

This privatization process has harmed access to the courts and access to jury trials.

We would think that the privatization process would be limited to the Federal Arbitration Act. But Professor Resnik provocatively says privatization includes what is going on in the public courts, as well. It really is happening. I deal with it every day in my practice. This privatization process has harmed access to the courts and access to jury trials.

How has it harmed access to jury trials? It undermines the constitutional rights, which exist in the federal and state constitutions, as Professor Resnik says, and I will repeat, because I think it is important to repeat. To avoid the expense and delay of having a trial, judges encourage litigants to try to reach an agreement resolving

their dispute. In other words, there is this feeling among some in the judiciary that jury trials are not the way to resolve disputes, which is completely different from what it was at the outset of our country, when the way disputes were resolved was via jury trials.

And Professor Resnik's paper highlights how this provides the judges with a mandate to promote settlement. That is my experience, with judges who have tried to interject themselves into the settlement process. That is an unhealthy development, because the judge puts himself or herself in the position of having to pressure one of the parties. If the parties are represented by counsel, they can choose whether a case should be settled or not.

I had a case a few years ago where it was very uncomfortable because it was clear the judge thought that my client should take the offer on the table, and the question was what would happen as this case went forward.

There is this feeling among some in the judiciary that jury trials are not the way to resolve disputes That is an unhealthy development, because the judge puts himself or herself in the position of having to pressure one of the parties I think judges should be very careful about injecting themselves in any way in the settlement process.

How is that judge going to handle our case? I assumed that judge would still be objective and independent, but the judge wanted the case settled. I think judges should be very careful about injecting themselves in any way in the settlement process—particularly judges who tend to be more strong-armed and involved.

The processes which dramatically reduce the chances to go to trial include not only the settlement issues, but also the processes that Leslie Brueckner talked about, including limiting the public's access to judicial proceedings. I'll respond to Matt Bailey to this extent: Protective orders are routinely entered by

judges in cases nowadays. When I file a lawsuit, the first communication to me is, "Can I get an extension on the answer?" and "We need to enter into a protective order." And what protective orders do is they keep the information between the litigants. They privatize the litigation. Only I and my client and my experts know what the defendant has produced, and I am forbidden from sharing it with anyone else. Again, it is privatizing the process.

What ultimately happens is, we go before the judge and say, "We don't need a protective order." Unfortunately nowadays, even though, as Leslie says, the law is very liberal and the party asking for the protective order has the burden, most judges unfortunately now say, "I am not interested in allowing you to share your documents with anyone else. We are willing to give you everything. Why don't you just sign what they put before you because then you are going to get all the documents you are asking for?" That's privatizing the system and very much limiting the public's access to the documents.

I will give you an example. We were involved in the General Motors ignition switch litigation. They produced documents to us that had never been produced before, showing that they knew about

the problem for a decade. Pursuant to my protective order, I could not tell anybody about that. But the public had a right to know. The problem then is, when the system is privatized, the defendant comes to me and says, "We now want to settle the case, because you have the documents that we don't want to go to trial with. We are

The judges need to step in and look at why a protective order is being entered in this case.

going to offer your client enough money to settle the case and we want all our documents back.” As the attorney representing the clients, I have an ethical obligation to them, not to the public. That is Leslie’s job. But really it is the judge’s job.

The judges need to step in and look at why a protective order is being entered in this case. Why am I signing a document, which says that when a deposition is filed in this courtroom, it is sealed automatically? Or when documents are filed in this courtroom, they are sealed automatically? That harms the public interest. I could give you other examples as well, but our time is limited.

If you think about it, particularly in significant litigation, discovery occurs behind the curtain and in private. When you walk into that courtroom as a member of the public and you sit down and you observe a hearing, you would think that there would be publicity, as Professor Resnik talks about with the Jeremy Bentham quote. But the public knows 1 percent of what is going on in that courtroom, because all this other stuff, the important stuff, the stuff that the public ought to know about, is all going on behind the curtain in private.

You still have that right to trial by jury, but the hurdles are greater now than they were 20 or 30 years ago, which harms in particular individual litigants.

I am not being critical of judges who have dockets to manage, but I really do believe, as Professor Resnik said, that the focus is on the process, not on protecting the parties and the public’s right to observe. Most judges would say they do that, because people have access to the courtroom. Again, that is a limited view.

I will close with this: there are also processes that have been put in place over the last 30 or 40 years, where judges have become case managers, as Professor Resnik discussed. And what we have seen, particularly in federal court, but also in some of our state court cases, is that the liberal discovery rules are out. Limiting expert testimony is in. All of these processes raise the barrier to get to a trial. That is what we have seen over the last 20, 30, 40 years. It is just processes. You still have that right to trial by jury, but the hurdles are greater now than they were 20 or 30 years ago, which harms in particular individual litigants. The cost of litigating is now so high that, as a trial lawyer, I sometimes have to look at the client and say, “You have not been harmed enough to justify

The Founding Fathers . . . understood that citizens sitting in a courtroom were the best people to make the decisions about disputes between private litigants.

going to court, because it is so expensive now, because of all these processes that have been put in place, that you are ultimately not going to get your day in court.”

I would suggest this: the Founding Fathers, however flawed they clearly were, understood the importance of a right to trial by jury. They

understood that citizens sitting in a courtroom were the best people to make the decisions about disputes between private litigants. We have come so far from that now that the public, unfortunately, does not look at juries as the best way to decide cases. We need to get back to putting processes in place that allow private litigants to do what has been done for 200-plus years, and that is have access to the courts and to give everyone that opportunity to have a right to trial by jury, not just certain people who can afford it or certain people who have the right lawyers to make it happen.

RESPONSE BY PROFESSOR RESNIK

I just want to comment briefly on a few aspects. Thanks for doing all that reading.

I think styling this as a conversation about businesses versus individuals is to misunderstand how much businesses *and* individuals as well as governments need courts. Over the decades, “equal justice under law” has become such a “tagline” for the U.S. Supreme Court. While not in the U.S. Constitution, that phrase has, since it was etched in stone on the Court’s façade, appeared in hundreds of opinions. During the second half of the twentieth century, the Court interpreted the Fourteenth Amendment to protect against racial and gender discrimination; this past year, the Court’s decision on the federal constitutional right to same-sex marriage reaffirmed how important equality is to our constitutional values. We have come to think of courts as for all of us, whether rich or poor, and perhaps as specially hospitable to the concerns of poor people. That is a wonderful innovation—a re-invention of courts as institutions for us all.

But courts have a long history of protecting commercial and property interests, and those practices make courts important institutions for businesses. These institutions are as much creditors’ courts as debtors’ courts. Thus, to think of courts as a social service that is only for poor people—whether proceeding individually or as part of an aggregation—is to miss the vital role that these institutions play for everyone.

I kept thinking of the time when my brother-in-law was stuck in Louisiana, in New Orleans and then in Houma, without resources during Hurricane Katrina. After he was rescued, we wanted to send those who had helped him packages to thank them. But all the roads were blocked. Neither private carriers (such as FedEx) nor the U.S. Post Office could deliver anything because the roads were not passable. We—individuals, businesses, and the government—need the infrastructure; and courthouses and post offices and roads are part of the infrastructure on which we all depend.

From my point of view, by deeming the documents that accompany cell phones and other products “contracts,” the Court is undermining that form of agreement. The assault on contract ought to be troubling for everyone. In the academy, a group of libertarians are as upset at the Federal Arbitration Act as I am. They too believe in contract, in voluntariness. And I am not a volunteer when it comes to opting out of courts.

The assault on contract ought to be troubling for everyone.

Research by a group of law professors has shown that when corporations contract with each other, they leave the courthouse door open. These researchers analyzed large-scale corporations (such as some on *Fortune*’s lists) and reviewed their contracts. These corporations did not bind *themselves* to have to do arbitration. They could volunteer for it, but they did not make a pre-commitment to preclude themselves from using courts or from choosing arbitration as a voluntary system.

Further, as reported decisions also illustrate, in some written contracts for arbitration, parties provide for court review. Some contracts say, in essence, “We want to arbitrate, and then we want the option of either party going to court, if claiming errors of law or fact.” The U.S. Supreme Court in 2007 held that the Federal Arbitration Act (the FAA) does not permit parties to create grounds for review beyond the narrow provisions (such as allegations of fraud) specified in the FAA.³⁴ But the Court indicated that state courts might authorize

In essence, the Court held that there are procedural arbitration rules that the states can still control under their state arbitration acts.

such review under state law. In essence, the Court held that there are procedural arbitration rules that the states can still control under their state arbitration acts.

For example, the Texas Supreme Court has held that parties entering contracts can include enforceable provisions authorizing judges to review arbitrator decisions for errors of law and fact. The Texas Supreme Court explained that it did not want to put someone in the position of having to choose between arbitrating with zero legal review, or going to court. Rather, the court thought that it would be wise—and promoting of arbitration as well as of freedom of contract—to permit arbitration *plus* court? My point is that, arbitration is regulated, and the question is what kind of regulation ought to be imposed?

What I tried to show in this paper is how deeply regulated the private process of arbitration has become, in a parallel fashion to the fact that courts are deeply regulated. Rather than equating arbitration with “the private,” and courts with “the public,” both are public/private venues. We all need them. And then the question is, what should that regulation be? I am for the FAA as it was in 1925. I am against the recent interpretations of FAA, which Justices O’Connor and Thomas, among others, have noted are far afield from what the Act originally was understood as meaning, which is that it was for volunteers.

What are the options and what are the models? There are actually various forms of mixed systems which I think are very interesting. In the federal court system, there is something called court-annexed arbitration. A federal statute provides that if a lawsuit is under a certain dollar value and if it does not raise civil rights issues, arbitration is available. The jurisdictions with arbitration are not many, but there are a few. The governing statute speaks of the need for consent to be freely given, so as to ensure that no one is pressured into using arbitration. It is also not an either/or, in that one can go back to court thereafter.

If we are really trying to create a genuine litigant-friendly dispute system, there are many changes that courts and public and private actors can undertake together to simplify the system.

Another example comes from California, which by statute requires private arbitrators to waive the filing fee. Very little attention has been paid to the question of *in forma pauperis* in arbitration. It can cost \$200 to file. Some wireless providers will have clauses in their documents that require them to reimburse costs afterwards, but there is still an upfront cost for someone who may think that they have lost small amounts, whether \$20 or \$300.

Because California requires fee waivers, the American Arbitration Association (AAA) website explains that option. But for those outside California, although the Association has a form for “deferral” or “reduction” of fees, the form is not on the web. One has to call the AAA to ask for it—and in essence know about it to ask for it.

Moreover, it is actually hard to know and to use the rules of arbitration. I worked with a group of law students to read the various rules—in consumer product documents and those provided by the AAA in its Consumer, Commercial, and Wireless Rules. We tried to figure out how they all fit together. We are used to

reading rules, but nonetheless, the rules provided were confusing, as it looked like more than one version could apply. If we are really trying to create a genuine litigant-friendly dispute system, there are an awful lot of things that courts and public and private actors can do together to simplify the system.

The next point I want to talk about is class arbitration. It is a complex question because it is not obvious to me that it is desirable to privatize a decision about group adjudication outside the court system. There have been class arbitrations, and in some instances, the arbitrators decide to ask a judge to determine whether to certify a class, and then the arbitrator may decide the case thereafter. That approach is sometimes described as a “hybrid.” That is once again an example of the deep interrelationship between public and private decision making.

The importance of class arbitration comes from the numbers involved. Given the millions of people and of entities now holding rights, how can one manage the volume? An obvious answer is collective responses, through agencies such as Workers’ Compensation and Social Security Administration reliant on schedules and forms and grids. Class actions are another method. We need to debate how to deal with collectivizing as well as what ought to be rights and the remedies. Answers should not come only via the Supreme Court’s interpretation of the FAA and the Federal Rules.

AT&T and all the major wireless providers have recently been sued by the federal government for something called “third-party cramming.” Many consumers had bills with \$10 extra a month—charges for extra services that they had not sought to have. According to the government filings, when consumers complained to providers, they may have received some refunds, but not all that was overcharged. These complaints were settled, with state attorneys general and the federal government that provides some redress. Thus, these kinds of cases make plain the need for enforcement actions.³⁵

What the Spring 2015 Report from the Consumer Financial Protection Bureau taught us is that, in a lot of instances, the government filing comes *after* class action, after private filings. Public and private enforcement interact. And those of us who think that all power ought to not reside only in the government want to be sure that an entrepreneurial system of litigation exists. We want to make possible a mix of public and private enforcement and to find methods by which the conflicts become public. The key point is to ensure methods for bringing the public into the process.

Thank you.

QUESTIONS AND COMMENTS FROM THE FLOOR

HONORABLE JAMES T. WORTHEN, TEXAS COURT OF APPEALS. I would like to direct my question to Ms. Brueckner. You mentioned that there are actually courts that are sealing judicial opinions. Could you tell us which courts they are and how often they are doing it?

LESLIE BRUECKNER. I was referring to a case that we got involved in a number of years ago. It was in a California state trial court. It was an incredible case. It was against a car manufacturer, Honda, I believe. And during the course of discovery, Honda’s expert was caught in the act of destroying evidence, literally caught

in the act of destroying evidence. The plaintiff's counsel brought this to the judge's attention and asked for judgment to be entered for the plaintiff as a sanction for this egregious misconduct. The court agreed and wrote a 37-page sanctions order describing in detail the nature of the misconduct and ordering that judgment be entered on liability for the plaintiff, which meant that the damages portion of the still remained to be tried.

After that happened, Honda wanted to settle the case, naturally, and reached a settlement with the plaintiff's counsel for a sizeable settlement. But Honda insisted as a condition of settlement that all the records be sealed and that the judge's opinion be sealed and vacated. The court agreed. The whole shebang was sealed up.

We learned about it. Went into court on behalf of the Center for Auto Safety, and I believe one other auto safety group, and objected to the sealing of all of the records and in particular the court's decision. As a result of that motion, the court did the right thing and unsealed its sanction decision.

Our work in this case—and our other work fighting court secrecy—is described at length in my congressional testimony in support of a federal sunshine law. The testimony is on our website.³⁶

We should all think about refusing to allow an appeal to be withdrawn where either bad conduct is going to be exposed, where the public should know about it, or, in the alternative, where the opinion is necessary to advance the law.

HON. ANNE ELIZABETH BARNES.

If I could comment on that point, Jim. When I first became a judge, I would always allow the parties to withdraw an appeal if they said they would settle the case. And then someone much later came up to me and said, "We are so sorry that you allowed that, because they were insisting on it and my client wanted their

money. They wanted it resolved, but we wished you had said no because it would have settled anyway." I think where bad conduct is involved and you have already written the opinion, you should issue it anyway. It is going to advance the law, perhaps. We should all think about refusing to allow an appeal to be withdrawn where either bad conduct is going to be exposed, where the public should know about it, or, in the alternative, where the opinion is necessary to advance the law.

HONORABLE COLLEEN M. O'TOOLE, OHIO COURT OF APPEALS. It is a very interesting question because as you guys know, we are stuck with the assignments of errors raised in most cases. What do you anticipate is best practice? Because on one side you have corporate defendants that understandably want to keep things not public because of the effect of holding them hostage on a settlement or other things that could influence pending litigation, as well as future litigation and trade secrets and other things.

On the plaintiff's side, you have brought forward quite honestly the fact that you are kind of stuck with having to seal these things because your interest is your clients and you want to make the settlement correct. Then the public interest piece cannot be brought forward. You have known for ten years that this is a bad ignition switch. What is the best practice idea or concept?

When we are hearing them on the backside as appeals, we are kind of stuck with what is there. Even if the judge wants to help, if it is not in the law, or it is in violation, our hands are tied.

PROFESSOR RESNIK. There are local rules that do require disclosure. Examples include rules in state courts of South Carolina and in that state's federal district court. The local rules govern what cannot be sealed, as a matter of public interest, and no matter what the parties want. If you are bargaining in the shadow of the law, there is actually supposed to be some law. And the questions are about what the boundaries of bargaining will be. Can I bargain for vacatur or not—which means, can I bargain to have a lower court decision be made a nullity?

If you are bargaining in the shadow of the law, there is actually supposed to be some law.

I was involved in a case once where they wanted to have us promise that we would never be litigating any of those kinds of cases again. Legal and ethical rules can address that issue, and prevent (or not) such bargains. A host of regulatory options exist for both *ex ante* court rules and lawyers' ethics as well as *ex post* decisions, and through both rules and decisions, some kinds of details are off the table. When procedure becomes contract, which it increasingly is, it does not mean that judges go out of the business of deciding what the rules for those contracts are, and what may not be bargained.

There is a famous Supreme Court case called *Evans v. Jeff D.*,³⁷ which dealt with this kind of question. At issue was whether a party could offer to settle contingent on the plaintiff's lawyer waiving rights to fees, under federal statutes authorizing fee shifts. In addition to what law permits, attorneys and clients can agree, in advance as part of the retainer agreement, not to have the lawyers waive fees to obtain a settlement, and thereby take some things off the table as well. There are many stops along the way, which is to say that judges and lawyers can be actively involved in regulation of settlements and their negotiations.

LANCE COOPER. This all starts when the protective order is entered, and it gets the ball rolling on all this stuff being filed as sealed. The best practice for a trial court judge, I would submit, is, instead of signing off on consent protective orders, require a hearing and a finding by the trial judge in every case if he or she is going to sign a protective order, and make a separate finding based on evidence produced by the party wanting that protection. The finding would say that the judge has determined that, yes, these materials should be protected and that it has not been bargained for by private litigants. I think that is a practice that would stop a lot of this from happening.

LESLIE BRUECKNER. I would add that, in addition to requiring individualized findings before discovery may be sealed, to also insist that any discovery protective order not permit the filing of court records under seal

Court records cannot be sealed absent specific judicial findings of a compelling need for secrecy that outweighs the public interest in access to the document.

simply because they contain a document designated confidential in discovery. Court records cannot be sealed absent specific judicial findings of a compelling need for secrecy that outweighs the public interest in access to the document. To me, the most important best practice is to ensure that no court records are filed under seal absent a specific finding of compelling need. As to vacatur, "if I ran the zoo" (as Dr. Seuss said), I would have as a best practice that it not be within the judge's power to vacate his or her own opinion at the behest of the settling parties.

HONORABLE KELLY THOMPSON, KENTUCKY COURT OF APPEALS. My question is for Matt Bailey. Your argument for arbitration was that it's two private parties in a voluntary agreement. How do you equate that with the fact that I cannot have cell phone service if I don't sign an arbitration agreement, and with all of the other mandatory arbitration agreements that are forced upon us?

MATTHEW BAILEY. We are not required to have a credit card. Nobody requires us to have a credit card. You don't have to enter into that agreement. While we like cell phones, no one has to have a cell phone. It is a voluntary agreement that you are entering into. Sometimes private arbitration is better than the public courtroom in certain instances. In these instances that we have been talking about today, they are clearly the better alternative.

LESLIE BRUECKNER. It is a myth that arbitration benefits consumers. It does not. The Supreme Court's case law upholding class action bans and arbitration agreements has essentially wiped out consumer's access to justice in a huge swath of areas. Anywhere you have a credit card, a financing agreement, a cell phone, any other kind of product like that, that is accompanied by some sort of "contract," essentially the right to justice has been eliminated.

HONORABLE RICHARD C. BALDWIN, OREGON SUPREME COURT. As the last question suggested, the type of agreements or private disputes that we are talking about here involve usually a big power differential between an individual and a large corporation. I am interested in Professor Resnik's thoughts about our relative responsibility as guardians of justice system (I think we all see ourselves that way), but also the relative responsibility of legislatures and the public in terms of access to justice in this regard.

PROFESSOR RESNIK. As I mentioned before, one could read the Federal Arbitration Act as the Supreme Court did for 60 years to be responsive to the problems of unequal bargaining and see arbitration as a genuinely voluntary process. Instead, as you know, the U.S. Supreme Court has, often 5-4, changed the way it reads the Federal Arbitration Act; the result is that the Court has made enforcement of mandates to arbitration available broadly—and applied these mandates to consumers and employees, and even to tort victims.

A powerful example comes from families entering into agreements on behalf of elders to have individuals in residential care, designed for senior citizens and colloquially known as "nursing homes." There was litigation in West Virginia in which families said that people had died from malpractice when in a nursing home. But the documents that signed a relative into a nursing home required the use of arbitration. The West Virginia Supreme Court assumed that the U. S. Supreme Court would not apply its rules mandating arbitration in situations when plaintiffs alleged wrongful death, but the U.S. Supreme Court reversed the West Virginia court and held that such obligations were enforceable, absent findings of unconscionability in an individual instance.³⁸

To translate that into practice, it is possible, at great expense, to litigate the question of contract unconscionability, but one would have to do so for each individual nursing home "contract." And again, I don't think that such documents should be called "contracts" because they are not bargainable or bargained for.

That isn't to say, by the way, that form contracts are themselves undesirable. Boilerplate can be egalitarian because it treats us all the same. I am not anti-boilerplate. The question for enforcement of causes ought to be: "Can you bargain?" If you cannot bargain, don't call it a contract. Call it a thing. There is a wonderful article by

Art Leff, which I mentioned, that was published in 1970 and called “The Contract as Thing.”³⁹ Leff’s insight was to appreciate the thoughtfulness of 1940s contract theorists who elaborated ideas of unconscionability. But Leff argued, while those professors were dazzling, they made a category error by working on the problem as one of contract. Instead of having this doctrine trying to buffer against unfairness, Leff argued that the documents were not really contracts because to be a contract required bargaining.

The Court has, I have argued—as have many others—misread the FAA. But Congress can make changes if it wants to do so. Congress has had before it for many years different versions of what is now called the Fairness in Arbitration Act of 2015. Al Franken is one of the leaders, and the proposed statute would revise the FAA to not

The Court has, I have argued—as have many others—misread the FAA. But Congress can make changes if it wants to do so.

make *ex ante* obligations to arbitrate enforceable in civil rights, employment, consumer cases, and specified other kinds of claims.

Congress has also considered specified responses, for individuals who are veterans or in the military and dealing with loans of various kinds.

Moreover, Congress has already acted in a few situations and concluded that form obligations to arbitrate, if entered into before a dispute arises, are unenforceable. These are carve-outs from the FAA. One, from 2002, applies to automobile franchise dealerships. Another, in which Senator Grassley took a leadership role, protects poultry farmers. Pending are proposals for broader protections.

And, remember that a space—smaller, but still remaining—exists for protection under state law. For example, a Kentucky case found unconscionable a requirement for arbitration for disputes with wireless providers, as there were not options to obtain services without that mandate.⁴⁰ Many cases have been decided in lower federal courts and state courts, and list serves help people keep track of the law. My concern is that it is extremely expensive to make the expanding and contracting law of arbitration; it is time-consuming for everyone.

HONORABLE JIM KITCHENS, SUPREME COURT OF MISSISSIPPI. Jim Kitchens from across the river from my good friend in Louisiana. You are absolutely right that I don’t have to have a cell phone. In fact, I hate the thing. I don’t have to have a credit card, but some places I do have to have a credit card or I cannot buy anything. But I am wondering about surgery. I need a knee replacement and I cannot find a doctor, an orthopedic surgeon, who will operate on my knee unless I sign an arbitration agreement. My wife had to have emergency eye surgery within the last few months. We could not find an ophthalmologist who would do that unless she signed an arbitration agreement. These are things that we have to have.

When you are talking about whether we have to see or we have to walk and we have to have people to help us do that who won’t help us unless we sign a mandatory arbitration agreement, how does that equate with parties who are equal to each other bargaining when they won’t bargain with me? Tell me what I do.

When you are talking about whether we have to see or we have to walk and we have to have people to help us do that who won’t help us unless we sign a mandatory arbitration agreement, how does that equate with parties who are equal to each other bargaining when they won’t bargain with me?

MATTHEW BAILEY. Your honor, Louisiana and Mississippi are frequently identified with equality at the bottom of most lists. We are good friends. I am not aware of those forced arbitrations for medical procedures, but the option is if you are forced into arbitration before you engage in a medical procedure, there are methods to handle that. And part of what I talked about earlier was the case backlog and the backlash, of the judiciary especially in state court. I know numerous judges in Louisiana. There is a tremendous backlog. If you are forced into arbitration, you can get a quick trial by an arbitrator that you choose. It is efficient. It is streamlined. It is not a three-year medical malpractice claim that you have to go through. It is an acceptable method.

LESLIE BRUECKNER. With all due respect, I would say that the benefits of arbitration are greatly exaggerated. Arbitration is known to favor repeat players. You often don't have an impartial tribunal. Punitive damages are not available in arbitration. There are great limits on the amount of discovery, deposition, documentary evidence that you can get in arbitration.

For his Honor's question, I would suggest to look closely at that arbitration clause to see whether or not it can be struck down on any state unconscionability law grounds. That type of challenge to an arbitration clause is still alive and well, notwithstanding what the Supreme Court has done to class action bans in arbitration clauses, if the arbitration clause is one-sided. There are all sorts of different contract doctrines that you can look to to strike down an arbitration clause, and they may be available to you in that context. I would urge you to contact my office and we can talk more about it.

HONORABLE DAVID A. WIGGINS, IOWA SUPREME COURT. Professor Resnik talked about the Delaware arbitration law being struck down. How would those principles apply to court-sanctioned nonbinding mediation, where judges actually are doing the settlement conference and another judge may try the case? Do the same principles apply, or is it different?

PROFESSOR RESNIK. The question of what part of court activities have to be public is the central question on which to be focused. You have heard about issues of access to information from discovery. You can hear about the same issues in the context of ADR.

Last summer I was in a small courthouse in Wyoming, where I walked into the courtroom. The "hearing" was a judge talking on the telephone to two pro se parties who were extremely economically limited, and the judge was trying to negotiate a debt arrangement between what I believe was a formerly married couple. It was really wonderful to see this talented trial judge be so gentle and enabling of people who needed help. As total strangers, we could walk into a public courtroom and watch the exchange, and see government at work. One could see that, even as judges change their role in the trial level courts and turn the process into mediation or other forms of dispute resolution, both judges and litigants could do parts of that work in public, and third parties could see what goes on. Aspects of these exchanges can remain accessible to the public.

In terms of court-annexed arbitration in the federal system, there are about six districts that use it a good deal, as does the State of Illinois. In the Eastern District of Pennsylvania and in Illinois, arbitrations are open to the public. Any of us could walk in and watch. In the federal system, when court-annexed arbitration is used, some of the districts permit public access. But not all do, even when proceedings are held in courthouses. To figure out whether the public had access, we had to go district by district and call clerks' offices.

The question on the table is: Will courts remain public venues? And if shifts are made, such as through technology as we have heard, as well as through alternative dispute resolution, can we bring the values of public processes into the new procedures? Procedures are changing all the time. The question will be, for you state court judges: What do state constitutional guarantees of “open courts” mean in practice? And if your work isn’t jury trials, but some other work, the questions are about how to build in a space for openness, for accountability, and for methods to protect judicial independence?

Notes

¹ All rights reserved, Judith Resnik, 2016.

² Constitution of Conn., art. I, § 12 (1818) (“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.”).

³ Constitution of Alabama, art. I, § 14 (1819) (“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.”).

⁴ This image, and some of the others included in Professor Resnik’s presentation, are from the book, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (Yale University Press, 2011), which she co-authored with Professor Dennis Curtis. Additional information on this mural can be found in that volume at pages 110-113.

⁵ For discussion of the building and its impact, see Judith Resnik and Dennis Curtis, *Inventing Democratic Courts: A New and Iconic Supreme Court*, 39 J. SUP. CT. HIST. 207 (2013).

⁶ *Brown v. Board of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483 (1954).

⁷ *Reed v. Reed*, 404 U.S. 71 (1971).

⁸ *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

⁹ The photograph is reproduced with the permission of the photographer, the Honorable David D. Noce, U.S. Magistrate Judge for the Eastern District of Missouri.

¹⁰ Hon. D. Brock Hornby, “The Business of the U.S. District Courts,” 10 Green Bag 453, 462 (2007).

¹¹ 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.

¹² “But 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.

¹³ 346 U.S. 427 (1953), *overruled* by *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477 (1989)

(Even if some buyers and sellers “deal[t] at arm’s length on equal terms,” the federal securities laws were “drafted with an eye to the disadvantages under which buyers labor.” Arbitrators’ “award[s] may be made without explanation of their reasons and without a complete record of their proceedings,” and hence, one could not examine “arbitrators’ conception of the legal meaning of such statutory requirements as ‘burden of proof,’ ‘reasonable care’ or ‘material fact’ . . .”).

¹⁴ *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

¹⁵ *EEOC v. Waffle House*, 534 U.S. 279 (2002), excerpted from Waffle House Application for Employment, Joint Appendix at 58-59.

¹⁶ *EEOC v. Waffle House*, 534 U.S. 279 (2002), excerpted from Waffle House Application for Employment, Joint Appendix at 58-59.

¹⁷ 104 Stat. 328, 42 U.S.C. § 12101 et seq.

¹⁸ *E.E.O.C. v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999).

¹⁹ CAL. CIV. CODE § 1668 (West 2014).

²⁰ *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005) (“[I]n 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.”).

²¹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (“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.”).

²² Contract provision provided to Patty Gandee by LDL Freedom Enterprises, Inc.

²³ *Gandee v. LDL Freedom Enterprises, Inc.*, 293 P.3d 1197 (Wash. 2013).

“1.3 Can AT&T Change My Terms And Rates?,” effective as of June, 2015.

²⁵ American Arbitration Association, Consumer Arbitration Rules (effective Sept. 1, 2014):

Rule 30: Attendance at Hearings. “The arbitrator and the AAA will keep information about the arbitration private except to the extent that a law provides that such information shall be shared or made public. The parties and their representatives in the arbitration are entitled to attend the hearings. The arbitrator will determine any disputes over whether a non-party may attend the hearing.”

²⁶ American Arbitration Association, Consumer Arbitration Rules (effective Sept. 1, 2014): Rule 43: Form of Award. “. . . (c) The AAA may choose to publish an award rendered under these Rules; however, the names of the parties and witnesses will be removed from awards that are published, unless a party agrees in writing to have its name included in the award.”

²⁷ David J. Jung, Jamie Horowitz, Jose Herrera & Lee Rosenberg, Reporting Consumer Arbitration Data in California: An Analysis of Compliance with California Code of Civil Procedure §1281.96, PUB. L. RES. INST. 9, 51 (2013), <http://gov.uchastings.edu/docs/arbitration-report/2014-arbitration-up-date> [<http://perma.cc/9M5X-8LH2>].

²⁸ See figure 3 in the article that follows..

²⁹ *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street and Consumer Protection Act § 1028(a)*, CONSUMER FIN. PROTECTION BUREAU (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [<http://perma.cc/P5B9-JPSZ>].

³⁰ *Id.* § 1, at 11.

³¹ *Del. Coal. for Open Gov’t, Inc. v. Strine*, 733 F.3d 510, 512 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).

³² I discuss these issues in depth in *Diffusing Disputes*, *supra* note 77-82.

³³ See Public Justice, “Federal Court Unseals Remington Rifle Court Documents,” Sept. 5, 2012, <http://publicjustice.net/content/federal-court-unseals-remington-rifle-court-documents>; Mike Dennison, “Remington agrees to rifle recall sought by Montana man,” THE MISSOULIAN, Dec. 6, 2014, http://missoulian.com/news/local/remington-agrees-to-rifle-recall-sought-by-montana-man/article_9d4f2d6b-2eaa-5626-bc84-a8c9d3f73b35.html; USA Today Editorial Board, “Amid court secrecy, guns continued to kill: Our view,” USA TODAY, Dec. 28, 2014, <http://www.usatoday.com/story/opinion/2014/12/28/sealed-settlements-remington-rifles-model-700-editorials-debates/20979945/>.

³⁴ *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576 (2008).

³⁵ Stipulated Order for Permanent Injunction and Monetary Judgment at 16, *FTC v. AT&T Mobility, LLC*, No. 1:14-cv-3227 (N.D. Ga. Oct. 8, 2014) <http://www.ftc.gov/es/system/files/documents/cases/141008attstip2.pdf> [<http://perma.cc/RKZ8-XDPL>].

³⁶ See <http://www.publicjustice.net/sites/default/files/downloads/Bailey-Testimony-on-Sunshine-Litigation-6-04-09.pdf>.

³⁷ 475 U.S. 717 (1986).

³⁸ *Marmet Health Care Center, Inc v. Brown*, 132 S.Ct. 1201 (2012).

³⁹ Arthur Alan Leff, *Contract as Thing*, 19 AM.U.L.REV. 131 (1970).

⁴⁰ See generally James Dawson, Comment, *Contract After Concepcion: Some Lessons from the State Courts*, 124 YALE L.J. 233 (2014).



LUNCHEON ADDRESS

FIRST AMENDMENT ISSUES IN JUDICIAL TRANSPARENCY

Adam Liptak, U.S. Supreme Court correspondent for *The New York Times*

It is great to be here. I feel like I already have learned so much at the opening presentations, and then I had a chance to visit many of the discussion groups. This is such an urgent topic. I'm going to contribute a few thoughts.

As you've heard, I'm a newspaper reporter, meaning I'm a complainer in general—and particularly when the government denies me access to information. I'll start complaining in a minute. But given the setting here in Montréal, which is lovely, and my own occasional commitment to intellectual honesty, I'll start by saying that in many ways we journalists have it pretty good in the United States, notwithstanding all of the valid complaints we've heard this morning. At least in the pure good of legal theory, American courts, American judicial proceedings and records are marked by exceptional openness.

I put to one side Judith Resnik's important critique of the ways in which transparency is destroyed by keeping disputes out of court entirely. But once a matter is in the court system, the American approach compares favorably to most of the rest of the world. As a journalist, I'm grateful for that. I recognize that law and practice sometimes have a gap, but we have it pretty good. Citizens in a democracy have a right to see what their government does, to assess its performance, and hold it accountable. Courts are part of the government. It makes very little difference in my analysis that they happen to resolve disputes involving private parties.

Our courtrooms are open to be visited by anyone who is interested, without making an appointment, giving a name, or having a reason beyond idle curiosity—not the case in much of the rest of the world.

With a very few, and mostly sensible, exceptions, our courtrooms are open to be visited by anyone who is interested, without making an appointment, giving a name, or having a reason beyond idle curiosity—not the case in much of the rest of the world. The same, in the main, is true of our court files. Video coverage of court hearings and appellate arguments is becoming more common, although it is not allowed in the United States Supreme Court. Almost all judicial opinions, and many court filings from the parties, are available on the Internet almost immediately, though an alarming number of court decisions are unpublished in the sense of being non-precedential.

There seem to me to be good reasons for the general presumption of openness, even beyond self-governance and accountability. People perform better under scrutiny. Perjury, for instance, is more likely to be noticed and punished if it is public. A community that can see justice at work is less likely to take matters into its own hands.

A community that can see justice at work is less likely to take matters into its own hands.

There is a second important principle that distinguishes the United States from many other legal systems. In passing, we heard Chief Justice Hesler say this morning that technology is problematic because it makes it harder to enforce publication bans. We refer to “publication bans” in the United States as “prior restraints,” and we don’t have them. American courts are essentially powerless to stop the press from publishing what it has learned, even if the information in question may be said to affect the

outcome of a judicial proceeding. Certainly what is said in open court cannot be taken back. But so too if, say, the press learns of a defendant’s confession that has been excluded from evidence—it is free to publish, just as it is free to publish accurate and newsworthy information of any other sort. The limits that Britain imposes, and Canada apparently imposes, limiting press coverage of trials are wholly foreign to the American way of thinking.

American courts are essentially powerless to stop the press from publishing what it has learned, even if the information in question may be said to affect the outcome of a judicial proceeding.

The general idea is that access to information aids in self-governance where it allows people to monitor the activities of government. That formulation does suggest one limit. It is the governmental *decision making* that matters. Merely submitting information to a court—or merely exchanging information between the parties—does not make it relevant to the decision making process. But once a court relies on that information to reach a decision, it must be presumptively open.

There is one major, and troubling, exception to this general framework, and that is in the area of “national security surveillance.” Operating alongside the federal court system, which is subject to the presumption of openness I have been describing, is the Foreign Intelligence Surveillance Court, which operates in almost complete secrecy to hear applications from the government for surveillance warrants and orders. There is no adversarial presentation: the court only hears from one side, the government. The court grants almost every request. Since there is no party on the other side, there is no chance of appeal. There is thus little oversight or accountability, and that court operates in considerable tension with the ordinary American approach to open judicial proceedings.

Here, too, though—and this is important from my perspective—there is general agreement that the authorities are powerless to stop the press from reporting on any aspect of the court’s work that it is able to uncover. This is distinctively American, and it is in keeping with the conventional understanding of the First Amendment: the government is free to do what it can to maintain its secrets, but cannot stop the press from publishing what it learns. It is an unruly accommodation, as Alexander Bickel wrote, between two principles, but it has worked fairly well. And even in the age of Edward Snowden and Wikileaks, I don’t think anybody seriously contests the notion that if *The New York Times* or another news organization is able to uncover something that the government would like to keep secret, but that we deem newsworthy and important to citizens in running their democracy, we are free to publish it.

Often now we really have to count on judges to vindicate the constitutional right to openness, even when no one is making the argument on behalf of the press and public.

We heard that the American approach to open courts was largely the product of litigation by newspapers in another age—a more prosperous age. The names of the great Supreme Court cases tell the story: *Richmond Newspapers v. Virginia*,¹ *Press-Enterprise v. Superior Court*,² *Globe Newspaper Co. v. Superior Court*.³

Before I was a reporter, I spent a decade as a press lawyer in the legal department of The New York Times Company, back when it was a thriving media conglomerate. We spent a lot of time and money seeking access to closed proceedings and records, and not always because there was a story to be had. Often we sued on principle. Sometimes we thought it was the job of the press to be the sheriff, to make sure that, just because two sides to a dispute wanted it secret, that a judge should hear from an outsider representing the public interest about why the thing should not be secret. I am sad to say that, with the news business on the ropes now, those days are largely gone. We don't litigate those cases as we used to, and I worry about the consequences. Others, notably Leslie Brueckner's group (Public Justice), the American Civil Liberties Union, and the Media Freedom and Information Access Clinic at Yale Law School, still do important work. But often now we really have to count on judges to vindicate the constitutional right to openness, even when no one is making the argument on behalf of the press and public. It is the judge's job to make sure that the sealing is appropriate. You don't need to hear that from some outsider making an adversarial presentation. You have to make that judgment yourselves, even when the parties themselves are just as happy to litigate in secret.

It is the judge's job to make sure that the sealing is appropriate. You have to make that judgment yourselves, even when the parties themselves are just as happy to litigate in secret.

Let me revert to form now and start complaining. I'll confine myself to the Court I cover, and I'll focus on three areas: press credentials, camera coverage and the Supreme Court plaza. The Supreme Court plaza, as you will hear, is a First-Amendment-free zone.

While press coverage of state supreme courts and circuit courts shrinks, we still have this enormous fetishized interest in the U.S. Supreme Court.

There are perhaps 25 reporters who cover the Supreme Court full time. That is nice. All of us write the same story every day. The Supreme Court is not a particularly hard-working court. Its nine Justices manage to issue some 70 decisions a year, each of them helped by four braniac law clerks. While press coverage of state supreme courts and circuit courts shrinks, we still have this enormous fetishized interest in the U.S. Supreme Court. There I am, sitting in the courtroom. By my side is the dean of our press corps, Lyle Dennison—an old-school journalist of fearsome integrity and independence. He has covered the Court—I'm not making this up—for more than 50 years. He works for SCOTUSblog, which is an indispensable resource. But SCOTUSblog has never gotten a press credential from the Supreme Court, and its Senate credentials were recently revoked. Neither institution has explained what is going on, though everybody knows what concerns them: Tom Goldstein, the blog's publisher, also argues before the Supreme Court.

Whether Goldstein has a conflict of interest is a good question for a journalism seminar. But should these issues matter in deciding whether the SCOTUSBlog.com is entitled to credentials? Should the government distinguish among entities that report on its activities based on shifting notions of journalistic best practices?

It's true that some government resources are scarce, like seats at the Supreme Court. But my own view is that if the Court is forced to make distinctions, it should use only neutral criteria, like a publication's circulation and sustained attention to a subject. The content of the coverage, the writer's motives, and the publication's ownership should not matter.

I don't think we are going to see cameras [in the U.S. Supreme Court] any time soon.

All of this would be of little moment if citizens had direct access to arguments and opinion announcements at the Supreme Court, and so did not have to rely on proxies like me. Instead, the Court makes people line up for days to try to land one of the perhaps 300 seats in the courtroom. It looks the other way while celebrities and rich lawyers pay people thousands of dollars to hold places in line, mocking the inscription on the front of the building that Professor Resnik showed you: "Equal Justice Under Law."

Camera coverage would solve this, of course, but the justices are dead set against it. I don't think we are going to see cameras any time soon. In fact, I think the case for cameras has been set back in a couple of ways.

A series of recent protests at the Court on the anniversaries of major campaign finance decisions did not help matters. Nor did a 2012 attack ad that used audio from Solicitor General Don Verrilli's argument in the first Affordable Care Act case.

Even justices who supported cameras during their confirmation hearings seem to lose enthusiasm for them when they take the bench. The latest was Justice Sonia Sotomayor, whom I had thought to be a populist. But she revealed a paternalistic streak in announcing that now that she is actually on the Court, she had rethought the enthusiasm for video coverage Supreme Court arguments that she expressed at her confirmation hearings.

She was singing a different tune on Charlie Rose not long ago, saying that most Americans would not understand what goes on at Supreme Court arguments, and that there was little point in letting them try. "I don't think most viewers take the time to actually delve into either the briefs or the legal arguments to appreciate what the Court is doing," she said.

As a descriptive matter, she is right: making sense of a Supreme Court argument without substantial preparation is hard. But Justice Sotomayor's approach also sounds like an intellectual poll tax that would just as well justify limiting attendance in the courtroom to people smart enough and diligent enough to know what is going on.

Even as the Supreme Court is digging in its heels, nations with legal systems similar to the one in the United States are moving in the other direction. The Supreme Court of the United Kingdom, which was formed in 2009, allows camera coverage. Arguments in the Supreme Court of Canada have been broadcast since the mid-1990s, and more recently they have been streamed live on the Internet.

As for me, I am probably better off not to have camera coverage, so people have to read my stories. True, the presence of the observer may change the nature of what is observed, probably for the better. But even if that is so, it is also true that allowing visiting members of the public and the press to observe may change what is being observed,

and I don't think anyone is talking about barring those observers. True, they say television may only broadcast excerpts—the pejorative term is “soundbites.” I publish excerpts, too. I call them “quotations.”

What the justices are actually afraid of is being mocked on Jon Stewart (or whoever succeeds Jon Stewart) and similar shows, and on YouTube. They are right to be afraid—they say a lot of goofy things. That is a reason to bar camera coverage, but it is not a principled reason. What the court's really concerned about is its prestige, its authority, and that someone will show Justice Scalia saying “jiggery-pokery,” or “argle-bargle,” or “applesauce.” But again, that is not a reason to keep that away from the American people. It happens.

Finally, I wonder about the Court's commitment to the First Amendment in one last setting. Where others are involved, the justices are not shy about saying that the First Amendment is strong medicine that requires even vulnerable people to listen to things they do not want to hear. Chief Justice Roberts explained this in 2011 to the father of a fallen soldier who had to endure a hateful protest while he tried to lay his son to rest. The First Amendment, the Chief Justice said, protects “even hurtful speech on public issues to ensure that we do not stifle public debate.”⁴

It seems that people with power or connections can use the [Supreme Court] plaza, but a student who sought to call attention to police brutality cannot.

Similarly, Chief Justice Roberts told women seeking abortions essentially the same thing in a decision striking down buffer zones around clinics in Massachusetts. “Vital First Amendment interests,” he said, required women to hear from opponents of abortion in the fraught moments before they entered those clinics.⁵

But the Supreme Court's devotion to the First Amendment has its limits. It stops at the edge of the grand marble plaza outside its own courthouse. Have you been there? That vast and inviting space, with its benches and fountains, seems better suited to public debate than a military funeral or the sidewalk outside an abortion clinic. But the Court insists on banning free speech on the plaza. Court police officers—I've seen this—have been known to instruct visitors to remove small buttons bearing political messages.

In 2013, a federal judge struck down the law that bans protests on the plaza, calling it “irreconcilable with the First Amendment.” The Court promptly reinstituted the ban under a different provision.⁶ The Marshal of the Supreme Court appealed the district court's decision. The D.C. Circuit is taking its sweet time in issuing its decision about what the Supreme Court can do. I can't imagine why.⁷

The case itself involves a student from Maryland who was arrested on the plaza in 2011. His crime was wearing a sign that read, “U.S. Government Allows Police to Illegally Murder and Brutalize African Americans and Hispanic People.” Such a statement, on a topic of urgent public interest, would seem to be precisely what the First Amendment was intended to protect. Then again, a Supreme Court police officer once threatened a woman with arrest for displaying a sign bearing the verbatim text of the First Amendment. The law invoked by the Supreme Court police officers, enacted in 1949, bars “processions or assemblages” or the display of “a flag, banner or device designed or adapted to bring into public notice a party, organization or movement” in the Supreme Court building or on its grounds.

This law appeared before the Supreme Court once before, in 1983, in *United States v. Grace*,⁸ and the Court ruled that it could not be applied to demonstrations on the public sidewalks around the court, but it did apply to

the Supreme Court plaza. Since then, the sidewalks, which are broad and set off by stairs from the plaza, have been regularly used for protests of all kinds. You can see pictures of crowds of people there. They are not up on the plaza—they are on the sidewalk down below.

But the First Amendment vanishes when concrete turns to marble, Justice Department lawyers representing the court’s Marshal told the appeals court. Their primary argument for the distinction was a curious one. “Demonstrations outside courthouses might give rise to actual or apparent efforts to subject judicial officers to improper influence,” they said in a brief.

The idea that the justices would actually be swayed by protest signs on the plaza borders on the silly. If they were susceptible to that sort of influence, there would be no reason to think that signs on the sidewalk would be less effective.

The Supreme Court is not even particularly consistent in how it treats speech on its plaza. The Court allows lawyers and parties in cases that have been argued to address the media on the plaza immediately following argument. The court also occasionally permits commercial or professional filming on the plaza. It seems that people with power or connections can use the plaza, but a student who sought to call attention to police brutality cannot.

Justice Thurgood Marshall, who knew something about the power of protests, dissented in the 1983 case. “Visitors to this court,” he wrote, “do not lose their First Amendment rights at the edge of the sidewalks.” He died in 1993, long before the Court fully established the double standard requiring grieving parents and distraught women to experience the gale force of the First Amendment, while shielding the justices from its slightest breeze.

The Court fully established the double standard requiring grieving parents and distraught women to experience the gale force of the First Amendment, while shielding the justices from its slightest breeze.

But Justice Marshall seemed to sense where things were heading. “It would be ironic indeed,” he said, “if an exception to the Constitution were to be recognized by the very institution that has the chief responsibility for protecting Constitutional rights.”

Thank you.

Notes

¹ 448 U.S. 555 (1980).

² 478 U.S. 1 (1986).

³ 457 U.S. 596 (1982).

⁴ *Snyder v. Phelps*, 562 U.S. 443 (2011).

⁵ *McCullen v. Coakley*, 573 U.S. ___, 134 S.Ct. 2518 (2014).

⁶ See U.S. Supreme Court Regulation 7, <http://www.supremecourt.gov/publicinfo/buildingregulations.aspx#Reg7>

⁷ *Hodge v. Talkin*, 799 F.3d 1145 (D.C. Cir. Aug. 28, 2015), rehearing en banc denied, Nov. 3, 2015. See Jackie Calmes, “Ruling Limits Protests Outside Supreme Court,” *NEW YORK TIMES*, Aug. 28, 2015, available at <http://www.nytimes.com/2015/08/29/us/politics/ruling-limits-protests-outside-supreme-court.html>.

⁸ 461 U.S. 171 (1983).

AFTERNOON PAPER, ORAL REMARKS, AND COMMENTS

JUDICIAL TRANSPARENCY IN THE TWENTY-FIRST CENTURY

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Introduction

Courts in the twenty-first century face a challenge. Courts are institutions in which traditions play a central role; yet we live in a digital age in which technology and communication are rapidly changing. How can courts maintain judicial transparency in the twenty-first century? How can courts encourage citizens to observe courts in action and educate the public about the work that courts do, while still maintaining the traditions that courts have always followed? Courts need to “update” their methods, yet they need to do so in ways that do not endanger any of their main functions. To this end, I propose that courts engage in “incremental updating,” and I develop five principles that courts can follow to put incremental updating into practice.

Members of the public, including young people, need to be knowledgeable about courts and the work they do.

By incremental updating, I mean that courts should take small steps to update how they reach out to the public, but the updating should be continuous, and the goal should be toward more effective public outreach and education. If not, courts will lose touch with the public, particularly the next generation. Members of the public, including young people, need to be knowledgeable about courts and the work they do. They need to be informed citizens so that they will participate as jurors and so that they will observe court proceedings and ensure that judges and courts perform their jobs properly. With social media, for example, citizens do not have to be passive observers; they can provide feedback to courts, which can improve the way courts function. This two-way method of communication is one that is likely to engage young people so that they can help shape the courts of the twenty-first century and make them more responsive to the public’s needs.

As courts strive to update their public proceedings and outreach, there are several principles that could guide them in their efforts. As courts consider whether to adopt a new practice or even alter an old one, they should ask about possible unintended consequences of the new practice, whether a pilot program is feasible, whether the change entails moving from a face-to-face experience to an online experience and what the differences are, whether the new practice entails trade-offs between privacy and public access and what they are, and how best to reassess whether the new practice is working. I illustrate how these principles can be put into practice by using the example of cameras in the courtroom.

- This article is structured in four parts: In Part I, I lay the groundwork by describing two ways in which courts try to be transparent: through the public proceedings of both trial and appellate courts and through public outreach. I also discuss why it is important that we have an educated citizenry, and I consider some limits to transparency.
- In Part II, I paint in broad-brush strokes some of the practices that have interfered with court transparency, such as pressure to settle cases quickly and to move cases from the more public setting of the courtroom to the more private setting of the arbitration hearing. Although courts are not solely responsible for these developments, they have responded to outside pressures, which have come from litigants and legislatures alike. I also discuss the limited extent to which courts, thus far, have reached out to the public.
- In Part III, I explain how “incremental updating” can help courts to be more transparent in the future and how it can be undertaken in ways that allow for change while minimizing risk. To that end, I propose five guiding principles: consider unintended consequences; start with small steps and expand later; carefully consider when and if to move to online interactions with the public; consider the tradeoffs between privacy and public accessibility; and reassess practices over time.
- Finally, in Part IV, I suggest innovations that courts could adopt that depend on new forms of technology and communication to reach the public—including the next generation—in order to teach them about and engage them in the work of courts. These innovations include: creating settlement databases available to the public; providing effective websites for prospective jurors; appointing public advocates; introducing state court “apps” that update the public on court developments, and using social media to reach the next generation.

I. What Transparency Entails for State Courts

When “transparency” is used in the same sentence as “courts” most of us assume we know what it entails. However, transparency can mean different things to different people, and it is rarely absolute. Thus, I begin

by identifying two ways in which state courts are transparent about the work they do. One way is by having court proceedings that are open to the public (“public proceedings”) and another way is by making citizens aware of the workings of state courts (“public outreach”). Both are essential to developing a citizenry that is educated about courts and the work they do. I will argue that courts need to take additional steps with respect to public outreach. In this Part, I provide a thumbnail sketch of what transparency includes and what it does not include for state courts, and why transparent courts are critical for citizens in a democracy.

Transparency can mean different things to different people, and it is rarely absolute.

A. Public Proceedings

1. Trial courts

One way that courts² make their work transparent is by holding proceedings that are open to the public. For trial courts, this means that proceedings that take place in the courtroom are public proceedings; members of the press and public can attend. Typically, such courtroom proceedings include motions, trials, bail hearings,

and sentencing.³ Of course, this does not mean that every discussion that takes place in the courtroom is available for the public to hear. For example, during jury selection a prospective juror can approach the bench and can give a personal reason to the judge to explain why he or she needs to be excused from jury duty. Similarly, during a trial, the lawyers can approach the bench and have a colloquy with the judge that is not heard by members of the press, public, and jury, even though they are present in the courtroom. Proceedings in a trial court are open to the public and take place in front of the public, but are not always heard in their entirety by the public.

Although [jurors] might be unfamiliar with courtroom procedures initially, they usually pay close attention and try to perform their task as responsibly as possible.

Members of the public not only serve as observers of trial court proceedings, but also have a role to play as jurors. After they are summoned to the courthouse and assigned to a courtroom, they have the opportunity to be selected for a petit jury. If they are selected, in many courtrooms they have the opportunity to be “active jurors.”⁴ They can take notes, submit written questions for witnesses via the judge (in courts that permit this practice),⁵ and ultimately, deliberate and reach a verdict. Although they might be unfamiliar with courtroom procedures initially, they usually pay close attention and try to perform their task as responsibly as possible. Jurors, like judges, experience the difficulty of rendering judgment.⁶ They usually have a better understanding of the judicial process from having served on a jury than those who have not served.

Another way in which the work of trial courts is public is that many of the documents that a court creates in a case or that the parties file with the court are available to the public. The docket sheet, which contains a list of the documents filed with the court and the decisions made by the court, is a public document, as are the briefs that are filed before argument on a motion or before a trial. In the past, these documents were available to the public, but only if they went to the courthouse and asked to see them. Members of the public could view them in the clerk’s office and could make copies of them, but could not remove them from the courthouse. These

In today’s digital society, documents filed with some trial courts are available for the public to view online.

documents were publicly available but “practical[ly] obscur[e]”⁷ because they required that extra step that few members of the public willingly took.

In today’s digital society, however, documents filed with some trial courts are available for the public to view online. Some courts, such as federal district courts, charge a fee,⁸ but the convenience of viewing such documents from one’s computer, tablet, or smartphone means that these documents are far more accessible to the public than they have ever been before. In fact, courts and lawyers have to take extra steps to ensure that the parties’ personal information, such as social security or bank account numbers, is redacted from the documents before they are posted online.⁹

A state trial court judge’s opinion is also written and sometimes available to the public online. When a judge decides motions after argument, or holds a bench trial to resolve a dispute, the judge issues a written opinion containing his or her reasons for the decision. Today in some states, such as New York, New Jersey, and a few jurisdictions in Pennsylvania, selected trial court opinions are available online,¹⁰ whereas in other states, such as Illinois, trial court opinions are rarely available except from the courthouse.¹¹

In addition, an increasing number of opinions that are non-precedential are available online. For example, federal district court opinions, including non-precedential opinions, are available online through database services, such as Lexis/Nexis, Westlaw, and Bloomberg Law, as well as through various free sources on the Internet, such as Google Scholar. Although a representative from Westlaw would only say that Westlaw includes “selected unpublished opinions” and not *all* unpublished opinions in its database, a research librarian explained that “as a practical matter, you could find any given [federal] district court decision or appellate court decision online somewhere with very few exceptions.”¹²

2. Appellate courts

For appellate courts, oral argument is the main proceeding that takes place in the courtroom and is open to the public to observe. Not all appeals require oral argument, but those that do are public. Those who are present in the courtroom during oral argument can observe the lawyers present their argument as well as answer questions from the bench.¹³

In today’s digital world, in which “publication” is so easy, this distinction [between published and unpublished decisions] is less significant.

The documents that precede and follow oral argument are also public documents. Prior to oral argument, the parties file briefs staking out their respective positions. After oral argument, the panel issues a written opinion. An appellate panel, like a trial judge, can decide whether its opinion has precedential effect or is merely an application of existing law. In the

former case, it would be published; in the latter case, it would simply be sent to the parties and become part of the public record of the case. However, in today’s digital world, in which “publication” is so easy, this distinction is less significant.

In some states, both precedential and non-binding appellate opinions are available online. For example, in Illinois, the opinions of the Illinois Appellate Courts and the Illinois Supreme Court are available online without charge, including non-precedential opinions, because in 2011 Illinois moved from publishing the official version of opinions in reporters to publishing them online.¹⁴ Illinois is not alone in this practice. New Mexico, Arkansas, and Ohio, among others, also publish their state supreme court and appellate court opinions only online.¹⁵ In fact, Arkansas has gone a step further than these other states and abolished “unpublished opinions.” As of 2009, the Arkansas Supreme Court and Court of Appeals opinions are all precedential and available online.¹⁶

B. Public Outreach

Another way in which state courts make their work transparent is by reaching out to the public to educate them about courts, courtroom proceedings, and court documents. Although there is an overlap between efforts by courts to inform the public, which I will refer to as “public outreach,” and the public nature of courtroom proceedings, which I have described in the preceding section and which I refer to as “public proceedings,” I want to highlight both these practices as contributing to state court transparency.

Citizens can learn about the work of state courts in several different ways. They can go to the courthouse and sit in a courtroom—either trial or appellate—and observe the proceedings that take place there. They can also

be summoned by the court to report for jury duty and learn about the work of a trial court by serving as a juror. However, there are also steps that courts can take to reach out to the public and to educate them about the work that courts do.

One way that state courts reach out to citizens is by having a website that provides information about the state court system. These websites vary considerably in terms of how much information they provide and how effectively they provide it. In spite of these variations, state court websites do serve as a resource that citizens usually have access to (whether at home or in a library) when they want to learn about state courts.

There are steps that courts can take to reach out to the public and to educate them about the work that courts do.

State court websites also provide a way for citizens to access court documents, including some of the documents that parties file (briefs, motions) and that courts create (docket sheet, opinions, and audio and/or video of oral arguments or other court proceedings). The Illinois appellate court website, for example, includes among its offerings a calendar of upcoming oral arguments, audio recordings of past oral arguments, and opinions that have been handed down.¹¹⁷⁷

C. Why an Educated Citizenry Matters

It is important that state courts provide both public proceedings and public outreach because both are ways of educating citizens about the work that state courts and state court judges do. There are several reasons that citizens need to be knowledgeable about the judiciary.

An educated citizenry can be a more effective watchdog, making sure that judges perform their job properly. . . . The public gaze ensures that judges have not engaged in corrupt behavior.

One reason is that an educated citizenry can be a more effective watchdog, making sure that judges perform their job properly. In this sense, the public gaze ensures that judges have not engaged in corrupt

behavior.¹⁸ Justice Holmes explained that it was important for court proceedings to take place “under the public eye” so that “those who administer justice should always act under the sense of public responsibility, and every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.”¹⁹ Citizens need to understand the role of courts and how they work so that they will recognize when they are not working properly.

In addition to guarding against a corrupt judiciary, an educated citizenry is needed so that those who are summoned for jury duty respond to their summonses and perform their job as jurors effectively. Getting citizens to respond to their summonses remains a challenge for trial courts.²⁰ If citizens knew more about the trial court, they might be more willing to heed their summonses. Indeed, some courts have embarked on educational campaigns to teach citizens about courts, juries, and the need to serve. For example, Duluth, Minnesota has pursued an ad campaign that included the slogan “It Isn’t Fair, If You’re Not There,” whereas Pittsburgh, Pennsylvania tried “Jury Service: Your Role in the Justice System.”²¹ Not only is an educated citizen more likely to be responsive to a jury summons, as the ad campaigns posit, but also a citizen who serves as a

juror is more likely to think highly of the jury after jury service²² than is a citizen who has not served, and to perform other responsibilities associated with citizenship, such as voting.²³

Another reason for courts to educate citizens about how courts work is so that they will have an understanding of and respect for the judicial process. Without courts reaching out to citizens and teaching them about their work, citizens rely on popular culture to form their views. Judge Judy becomes the model of a judge and the studio in which her television show is recorded becomes the model of a courtroom. With reality judge shows filling the airwaves from morning until night, it is important for state courts to counteract the misleading but wildly popular portrayals.²⁴ Otherwise, when citizens enter an actual courtroom they will be disappointed by how slowly a case proceeds, the legal language that pervades, and how somber and lacking in entertainment and repartee an actual court proceeding is.

D. Limits to Transparency

Although courts need to be transparent in a democracy, there are limits to their transparency. For trial and appellate courts and judges and jurors alike, the place where deliberations occur is not open to the public. For trial judges, that place is in their chambers and in discussions with their law clerks. For jurors, that place is in the jury room, which is off limits to everyone, including the judge. For appellate judges, whether they are deciding a case as a panel or en banc, that place is wherever the judges hold their discussions, whether among themselves or in chambers along with their clerks.

There is a need for candor during deliberations. Deliberations are more likely to be robust and thorough if they are done behind closed doors.

There is a need for candor during deliberations. Deliberations are more likely to be robust and thorough if they are done behind closed doors. Jurors and judges can say what they think without worrying about espousing unpopular views. They are also free to change their mind as the deliberations

proceed and to be persuaded by others' arguments. Jurors, deliberating in the privacy of the jury room, remain cut off from outside influences or jury tampering, particularly if they are sequestered. For the jury, the secrecy of the jury room deliberations is a tradition that continues even today.²⁵ The tradition began in England and is adhered to there, even more stringently than in the United States, by making it a crime for jurors to reveal their deliberations or votes and for anyone to ask jurors to do so.²⁶ In the United States, there is a federal statute making it illegal to record, listen to, or observe jury deliberations in federal courts.²⁷ Most states have similar limitations.²⁸ However, in the United States, unlike in England and Wales, there is usually no limit to what jurors can reveal about their deliberations after they have reached their verdict and have been dismissed.

Although deliberations, whether by judges or jurors, are conducted behind closed doors in the United States, not every country shares this practice. For example, the Brazilian Supreme Court conducts its deliberations in public and the deliberations are even televised.²⁹ However, the Chief Justice of that court acknowledged that the practice is unusual and one that is unlikely to work elsewhere.³⁰ Indeed, she did not know of another country that followed this practice.³¹

Although no American judges deliberate in public, they do provide reasons for their decisions in a written opinion. They either join another judge's opinion or they write their own opinion, but in either case, they give written reasons to explain their decision. Even though their deliberations are not transparent, the results they reach are carefully explained and publicly available.

II. How Courts Undermine Transparency

Courts do not intend to undermine transparency, but some of their practices have had that effect. Academics have noted the dwindling number of trials, including jury trials, in federal and state courts and in criminal and civil cases.³² As trials disappear, so too does the opportunity to observe court proceedings. Courts are not the only institution responsible for the declining number of trials,³³ but they have been a contributing factor. Appellate courts have also contributed to a decline in transparency by forgoing oral argument in some cases and relying on non-precedential opinions rather than published precedential opinions in the interest of speed. My focus in this Part will be on court practices that undermine transparency, and I will paint with broad-brush strokes.

Courts do not intend to undermine transparency, but some of their practices have had that effect.

A. Courts' Contributions to the Declining Number of Public Proceedings

1. Trial Courts

For several decades, trial court judges have been under pressure to move cases along and to get them off their dockets. In federal district court, judges responded to federal rules that required courts "to secure the just, speedy, and inexpensive determination of every action"³³⁴⁴ and to meet with parties and to facilitate settlement,³⁵

Academics recognized the pressure trial court judges were under and urged them to resist a preference for settlement over adjudication.

as well as to federal statutes that required courts to "ensure just, speedy, and inexpensive resolutions of civil disputes,"³⁶ and to send certain cases to Alternative Dispute Resolution (ADR).³⁷ Another federal statute created deadlines that federal district court judges had to meet: sixty days in which to resolve a

motion or a bench trial under submission and three years in which to terminate a case after it had been filed.³⁸ Judges who did not meet these deadlines found their name on a list of shame. State court judges, who had even larger dockets, felt similar pressures particularly because state courts had fewer resources and more cases to resolve than federal courts. One way in which both federal district court and state trial court judges responded was by encouraging parties to settle.

Academics recognized the pressure trial court judges were under and urged them to resist a preference for settlement over adjudication. Professor Judith Resnik, in *Managerial Judges*, lamented the transformation of judges into case managers, particularly in the pre-trial stage when their actions would be harder for appellate courts to review.³⁹ Professor Owen Fiss, in *Against Settlement*, identified the advantages of adjudication over

settlement especially for cases involving public values at a time when ADR was all the rage.⁴⁰ Academics' misgivings notwithstanding, judges encouraged settlement and parties agreed. After all, trials were lengthy, risky, and expensive, whereas settlements were under the control of the parties and supported by judges. Not surprisingly, settlements flourished and trials languished.

With the decline in the number of trials, there was a concomitant decline in the number of judicial opinions. After all, settlements do not require judicial opinions. In fact, settlements often involved confidentiality agreements and sealed records, thus diminishing the range of documents available for public review.⁴¹ Although settlements did not necessarily have to result in sealed agreements, they sometimes did,⁴² much to the consternation of some academics, judges, consumer advocates, and others.⁴³

Another way to move cases off the docket was to decide them based on motions to dismiss or motions for summary judgment. Although these motions could entail a hearing in the courtroom, which is open to the public, if the motions were granted that would foreclose a trial. Again, parties preferred to resolve the case by motion because it avoided the expense, risk, and delay of a trial. Judges also preferred this form of resolution because it avoided the labor intensiveness of a trial.

2. Appellate Courts

Appellate courts contributed to the declining number of public proceedings by holding oral argument in fewer cases and writing more unpublished opinions. In federal circuit courts, for example, a three-judge panel can decide that oral argument is unnecessary as long as the panel agrees that the appeal is frivolous, that the dispositive issues have been decided definitively, or that the facts and legal argument are adequately presented by the briefs and record.⁴⁴ There is already a trend among federal circuit courts toward holding fewer oral arguments.⁴⁵ For example, in 1997 the federal courts of appeals heard oral argument, on average, in forty percent of all appeals.⁴⁶ Ten years later, in 2007, the federal courts of appeals heard oral argument, on average, in twenty-seven percent of all appeals.⁴⁷ From 1997 to 2007, there was a thirty-three percent decline in the percentage of cases in which there was oral argument. Not only is there a “vanishing trial”⁴⁸ problem, but also there is a “vanishing oral argument”⁴⁹ problem.

B. Limited Public Outreach by Courts

While courts have been cutting back on public proceedings, such as trials and oral arguments, they have made few concerted efforts to reach out to the public.

Admittedly, the move from court filings in hard-copy at the courthouse to court filings online has helped make these documents more readily available to the public. Similarly, the creation of state court websites has provided a means of reaching citizens and educating them through a form of communication that is convenient for them to use.

Although the creation of state court websites was a good first step, many state courts seem to have stopped developing their websites after that first step. Their websites are skeletal, badly organized, and difficult to use. Some state court websites include biographical sketches of judges, but lack contact information.⁵⁰ The limited information they do provide is often difficult to find. For example, on some websites, opinions are available

[C]ourts have been cutting back on public proceedings, such as trials and oral arguments.

only in a large list, with no search engine that would enable a person to search for the opinion he or she needs.⁵¹ On some websites, there are only recent opinions posted, with no archive of past opinions.⁵² Yet on other websites, the news and information has the opposite problem: it is old and outdated.⁵³ Still other websites include outdated links⁵⁴ or functions that do not work at all.⁵⁵ In spite of a diverse citizenry, few websites offer their information in any language other than English, though Arizona's Division One offers Google Translate, and California is planning to make its website more accessible to those who speak other languages, but it has not done so yet.⁵⁶ Admittedly, these additions cost money and many state courts lack the resources (money and personnel) to add this feature.

Although many courts achieved a milestone when they moved from hard-copy documents in the courthouse to online documents, the technology has not stood still, but courts appear to have. The digital world has burgeoned. There are numerous forms of social media, such as Twitter, Facebook, and LinkedIn, along with numerous devices, such as tablets, smartphones, and even watches, from which people would like to access this information. As the technology develops at a rapid pace, how should courts respond so that they can continue to reach citizens using relevant forms of communication? As citizens move from computers to mobile phones for retrieving information, can courts keep up? They need to keep pace, without falling too far behind or making any serious mistakes along the way.

III. Five Principles to Guide Courts Toward Greater Transparency Through Incremental Updating

A. The Need for Incremental Updating

The approach that courts need to take for proceedings and outreach to be public, especially in this age of rapid growth in new forms of technology and communication, is one that I call "incremental updating." Courts need to "update." They need to respond to changes in technology and communication. They cannot simply act like ostriches and keep their heads in the sand. If they do, they will be reneging on their commitment to transparency by failing to provide proceedings and outreach that are public in a meaningful way.

Yet, courts cannot respond so rapidly that they make mistakes in their effort to update, especially when citizens' trust in the judiciary is at stake. Courts, unlike start-up companies, cannot race to find the next big thing. Rather, they need to move forward, but they need to do so in "incremental" ways. Courts need to strike the proper balance and to take small, incremental steps toward greater transparency through enhanced public outreach and public proceedings. Toward that end, I offer five guiding principles that will help courts to strike the proper balance.

B. Five Guiding Principles for Incremental Updating

How should courts decide whether to adopt a new form of public outreach or to update an old form in order to remain transparent in the twenty-first century? There is no one-size-fits-all approach. Given that challenge, I propose five principles that could guide courts as they update. I will use the example of cameras in the courtroom to illustrate how these principles can help courts to decide when to adopt a new form of outreach or tweak an old form. The goal is for courts to keep up with new forms of technology and communication

and use them to enhance public outreach and public proceedings while minimizing any risks that new approaches might entail.

1. Consider unintended consequences.

Courts need to think about unintended consequences. Institutions are not static. A change in one practice or procedure can affect other practices and procedures and not always in predictable ways. For example, as

Courts need to think about unintended consequences. Institutions are not static.

federal courts struggle with whether to introduce cameras in the courtroom—a question that fifty state courts have answered in the affirmative, albeit with some restrictions⁵⁷—one question federal courts should consider is: what are the unintended consequences of cameras in the courtroom?

The main goal of cameras in the courtroom is to allow the public to “see” what takes place in the courtroom without actually having to enter a courtroom. The idea is to reach many more members of the public than an actual courtroom can hold and to show them what trial and appellate courts do. In theory, the viewing public will be able to see how well judges and lawyers perform their roles and hold them accountable if they are not doing a good job.

Although the goal is to open up the public proceeding to public scrutiny, what if the unintended consequence of cameras in the courtroom is to exacerbate the declining number of trials and oral arguments? If that were the case, then cameras in the courtroom would not add to what the public knows about courts and how well they work, but would actually curtail what the public can learn.

In trial courts, parties could choose to proceed by using the more private processes of settlement or arbitration,⁵⁸ rather than the more public process of trials, if they were worried about having cameras in the courtroom and having their faces appear every night on the news or forever on YouTube. Even if parties did not have that concern, they might have other concerns about cameras that could still lead them to resolve their dispute in a more private setting than the courtroom. They might worry about the effects of cameras on witnesses or jurors and whether either would be more nervous about having cameras in the courtroom. They might also worry about the effects of cameras on judges and lawyers and how that might change their behavior. Although some lawyers and judges say that they forget about the cameras after a few minutes, others say that they remain self-conscious throughout the entire proceeding. Criminal defense lawyers, who tend to have reservations about cameras in the courtroom and worry about having their client tried by the media, particularly if they have an unpopular client, might pursue plea agreements even more often than they do now, and already the percentage of criminal cases that end in a plea agreement is extremely high. The effect for both civil and criminal cases could be a further reduction in actual trials as participants move from the more public setting of the trial, made even more public by cameras, to the more private setting of settlement, arbitration, or plea negotiations.

In appellate courts, judges and parties could also decide to forgo oral argument and have the appeal decided just on the briefs. Admittedly, cameras pose less risk in appellate courts than they do in trial courts because

there are no witnesses or jurors involved. Lawyers and judges are the only participants and their behavior might or might not be affected by cameras. If federal courts decide to introduce cameras in the courtroom, putting them in appellate courts poses less risk than putting them in trial courts.

However, even in appellate courts there is the risk of unintended consequences. Oral argument can be waived, and judges and lawyers might be more inclined to do so if cameras are present. Thus, cameras in appellate courtrooms—a practice intended to make a public proceeding reach a large number of citizens—might actually have the unintended consequence of further reducing the number of oral arguments and contributing to their steady decline.

2. Start small and then expand.

Courts can experiment with pilot programs before they fully adopt a new practice or procedure. They can try it on a small scale and for a limited amount of time to see how it works. This approach has the benefit of allowing courts to experiment without harming those who depend on their services. Of course, courts can look to other state courts, as well as to federal courts, to see how a particular practice has worked elsewhere.⁵⁹ Another benefit to a pilot program is that the experience with a new practice gives lawyers and judges, who might have reservations initially, a chance to see how the practice actually works. If they like it, then they are likely to become proponents of it. This was the case with pilot programs that permitted jurors to submit written questions to witnesses through the judge. In states that tried the practice as a pilot program, such as Colorado,⁶⁰ New Jersey,⁶¹ and selected federal courts in Illinois,⁶² lawyers and judges usually supported the practice after having experience with it. In some courtrooms, judges adhered to the practice even after the pilot program had ended.⁶³

[Pilot programs allow] courts to experiment without harming those who depend on their services. They can try it on a small scale and for a limited amount of time to see how it works. This approach has the benefit of allowing courts to experiment without harming those who depend on their services.

As the federal courts consider whether to allow cameras in the courtroom, they are following this principle. The Federal Judicial Center (FJC) conducted a pilot program that began in 1991 and that resulted in a report issued in 1994 (FJC Study).⁶⁴ The FJC Study examined the use of cameras in a few select courtrooms. Participating judges completed a questionnaire and were asked about *their* perceptions as to whether cameras had any effect on the participants, including lawyers, jurors, witnesses, and the judges.⁶⁵ The main limitation of this approach was that the study could only report on *judges'* perceptions, rather than on any actual effects. The report found few effects on participants, but federal judges as a body were reluctant to allow cameras in the courtroom at that time. Although the FJC Study had a number of methodological limitations, it was the best study available; the few state studies that had been done lacked rigor. However, the research for the FJC Study was conducted twenty-four years ago, before the advent of the Internet; the study is in need of updating.

In July 2011, the FJC, at the request of the Judicial Conference of the United States, began another pilot program.⁶⁶ This pilot program, like the earlier one, still depended on volunteer judges, rather than randomly chosen judges, but included both supporters and skeptics of cameras in the courtroom. The task of the pilot

program is to figure out what effect cameras have in the courtroom in a digital age when images can be posted and re-posted online, and are available without any end in sight. This study has not been completed yet, but federal courts are wise to wait for its results before deciding on their course.

3. Think carefully before moving from a face-to-face experience to online interactions.

There is a tendency to move from face-to-face experiences to online interactions because the online version is often cheaper and quicker than the face-to-face interaction. The problem is that in moving from face-to-face to online, the experience is not precisely the same. There are differences between the two, and courts need to be aware of them. They also need to identify the adjustments required whenever they move from face-to-face to online interactions.

For example, as discussed earlier, when documents were filed with a court in the past, a person went to the clerk's office, handed over the document, and asked for it to be filed. Members of the public could look at those documents, but they, too, had to go to the clerk's office and request a particular document and read it or copy it on the premises. When courts began to require lawyers to file documents online it meant that the documents were available to anyone anywhere in the world who wanted to see them.

With online filing, documents can be viewed by anyone with an Internet connection, including identity thieves.

What had worked when documents were filed in a face-to-face encounter did not work in exactly the same way when they were filed online. Documents can contain personal information, from social security numbers to bank accounts to tax information. When documents were viewed on an individual basis by a person who went to the

clerk's office, there was little danger that the personal information would be spread across the globe. With online filing, however, documents can be viewed by anyone with an Internet connection, including identity thieves. Identity thieves, or even just the merely curious, can develop an extensive profile of a person containing much personal information—some found in court documents and some gleaned from other sources—all of which is only a mouse-click away. As a result, a person's personal information can be collected and used for good or bad purposes without much effort by the voyeur or thief and with little recourse for the victim. Suddenly, lawyers and judges had to worry about redacting such information before the documents were made available online.

Cameras in the courtroom pose a similar challenge. When trial participants enter a courtroom, they know it is a public setting and that members of the public and press can observe them. Their words will be taken down by a court reporter, and a transcript is often made. The transcript will become part of the record. The trial or oral argument is a public proceeding and might eventually result in a judicial opinion that will bear the parties' names. However, few people will be able to identify the parties when they walk down the street or carry on with their daily lives.

However, cameras in the courtroom can change the level of recognition that is given to trial participants. When an image is involved, there is much greater recognition. With the Web, and websites like YouTube, and with social media, and networks like Facebook, what is seen in the courtroom can be played and replayed elsewhere. Images go viral and millions of people view them. There is a significant difference between members

of the public sitting in the courtroom and observing a trial, and millions of viewers around the world watching an image (or a video) over and over again (sometimes with distortions, depending on the intentions of the person who posted the image or video).

As the public proceeding of a trial moves from the face-to-face experience in the courtroom and becomes an online experience that can potentially be manipulated, used for good or bad purpose, or repeated without any end in sight, courts should move carefully before taking that step. There are precautions that courts can take, such as maintaining control over what is filmed in the courtroom, where the cameras are placed, where the videos are posted, and whether and how they are made available to the public. Yet, even with courts exercising control and proceeding cautiously, once images or videos are made available online, like the proverbial genie, they cannot be put back into the bottle. In this age of the citizen-journalist, courts also need to worry about members of the public entering the courtroom with their cell-phone cameras. It will be hard to draw a line and allow court proceedings to be filmed but to say to citizens that they cannot do the filming. It is easier to enforce a “no cameras” rule than to enforce a rule that allows cameras but only selectively.

4. Consider the privacy/public accessibility trade-offs.

Even in public proceedings, such as a trial, in which participants appear before members of the public and press, they still retain some privacy rights. Thus, even a public proceeding entails some privacy considerations, and courts need to consider them as part of their decision about when or how to make updates in the courtroom or in their outreach. For example, citizens are summoned to serve as jurors; they do not volunteer. When they heed their summons and are selected to serve on a jury, they play a public role; however, that role does not mean they give up all of their privacy interests. In some cases, jurors’ names are not made public during a trial. They are assigned a number and are identified by that number. Although their names are eventually released—sometimes with a delay of several days after the trial has ended—their identity has not been disclosed during the course of a public trial. Although the reason is to protect jurors from outside influence, it also allows jurors some modicum of privacy even during the performance of this very public role. In criminal trials in some states, such as California, jurors’ names are routinely withheld; in other states, the practice is to withhold jurors’ names only in high-profile cases.

This principle has applicability to cameras in the courtroom as well. When trial participants enter a courtroom, they know they will appear before the public and the press. They understand that they will not have just a private conversation with the judge. However, appearing before other people in the courtroom is a different experience than appearing before a global audience online. Having one’s words recorded for a transcript is a different experience than having one’s image filmed and recorded for posterity. Although both are records, the latter is more intrusive than the former.

Appearing before other people in the courtroom is a different experience than appearing before a global audience online.

From a teacher’s point of view, there is a difference between having students take notes on what you say in the classroom and having a school administrator film your classroom performance—capturing both what you say and how you say it—and posting it online. The filming is a greater invasion of one’s privacy than the note-

taking. In addition, it is not just the teacher who is likely to experience the difference, but also the students. Their classroom interactions with each other and the teacher are likely to be affected by the filming for the same reason. The students, like the teacher, are likely to feel that it is a greater intrusion into their privacy. Of course, there might be extenuating circumstances that would lead both teacher and students to give up some of their privacy interest and allow a particular class to be filmed, but they might be unwilling to do it as a steady diet, recognizing that it would change the nature of the interaction for everyone involved.

5. Reassess practices over time.

Even after a court has adopted a new practice, the practice should not be written in stone. Although courts, like all institutions, find it hard to change a practice once it has been implemented, this does not mean that courts should not reassess a practice and see how well it is working. If a practice is not working, it should be

[New court practices] should not be written in stone.

abandoned; if it could be working better, then adjustments should be made. Empirical studies, whether conducted by courts, or those academics or institutions that study courts, should be part of every court system. Courts, like other institutions, should not adhere to a practice simply because they have done so in the past.

Primo Levi, in his book *The Periodic Table*, tells the story of a paint factory that added a certain chemical to compensate for too much of another chemical that had been mistakenly added to a particular batch of paint.⁶⁷ Long after that batch had been shipped, however, the factory continued to add the chemical to subsequent batches. It did so for so long that the people who worked in the factory no longer knew why they added the chemical; they simply adhered to the practice, even after the chemical was no longer needed. Courts should not be like the paint factory and simply do something because it has been done that way for a long time without anybody knowing why. As lawyers, we like to adhere to practices we have always followed, but practices need to be changed when circumstances have changed.

The federal courts have followed this principle and are in the midst of reassessing whether they should have cameras in the courtroom. The FJC has undertaken a study, and its results will soon be known. Presumably this second study will correct some of the methodological weaknesses of the earlier study.

State courts have experimented with cameras in the courtroom since 1978,⁶⁸ and have conducted their own studies of their use, but their studies have not always been sufficiently rigorous. Several state courts have conducted surveys to see how the practice was faring. State courts in Arizona, California, Florida, Hawai'i, Kansas, Maine, Massachusetts, Nevada, New Jersey, New York, Ohio, and Virginia have conducted surveys to see whether jurors or witnesses thought that cameras affected their behavior.⁶⁹ The 1994 FJC Study found that these state court surveys, "to the extent they are credible,"⁷⁰ gave support to the FJC Study's findings that cameras did not affect witnesses or jurors. However, the FJC Study found some state surveys too anecdotal. For example, one study consisted merely of a judge polling a jury after a verdict and asking them whether they thought cameras had affected their behavior.⁷¹ The FJC Study did not rely on such state surveys because they "used methods [the FJC] did not consider sufficiently rigorous . . ."⁷² States have undertaken surveys of this practice, but they need to conduct surveys that are methodologically sound and also reassess the practice in ways that are appropriate to the digital age.

Now that some state courts post videos of public proceedings online, one type of survey they could undertake is to see how many visitors go to their website's videos, how long they spend watching a video, and which videos they watch. Analytics of this type are commonplace. This information could be collected as anonymous hits to the website and aggregated, so that no one's privacy would be invaded. In this way, courts could learn whether people view these videos and what might make them more accessible. For example, the Illinois Supreme Court posts audio and video recordings of each of its oral arguments online.⁷³ A visitor to the website just needs to click on the appropriate icon. It would be interesting to learn whether audio or video attracts more viewers. The website lists the current cases, organized by case name, but what if a viewer wants to listen to or view a case from another year? Is it available and how would he or she find it without a search function? The posting of videos online opens up new questions about cameras in the courtroom and these are questions that state courts should study.

IV. Technology and Innovations That Have the Potential to Increase Court Transparency by Teaching Citizens about the Working of Their Courts

There are several ways in which courts are using or can use technology to enhance public outreach in the digital age. Building on an observation by Justice Brandeis, state courts can learn from each other by using the principles described in Part III to help them decide whether a practice that another state court has adopted is one that they should adopt as well. What follows are several practices that have the potential to increase court transparency by reaching out to citizens and teaching them about how courts work.

A. A Settlement Database

Judge Morton Denlow, a magistrate judge in the U.S. District Court for the Northern District of Illinois, and Jennifer E. Shack, Director of Research for the Center for Analysis of Alternative Dispute Resolution Systems in Chicago, wrote an article in which they described a settlement database that magistrate judges in Chicago developed.⁷⁴ The database allows magistrate judges who preside over settlement conferences to give guidance to parties by showing them what similar cases have settled for in the past.

[A settlement database] allows judges to give guidance to parties by showing them what similar cases have settled for in the past.

In their article, Judge Denlow and Ms. Shack offer some hands-on advice for creating a settlement database so that other judges will be able to replicate their model.⁷⁵ They describe a five-step process for building a settlement database. At the beginning, the judges need to decide which types of cases they will track, such as employment discrimination, civil rights, and personal injury. They also need to decide which case information they will collect. Then they need to design a settlement report that a judge can complete in under five minutes, right after a settlement has been reached. A staff member will then need to spend about one hour per month entering the settlement reports into the database in order to generate a monthly settlement report. This monthly report enables judges to prepare for upcoming settlement conferences, to advise parties on what past comparable cases have settled for (without revealing any case-specific information), and to reassure parties that they are settling for an appropriate amount.⁷⁶ It is particularly

useful for parties who do not have any experience with settling a case and do not know what an appropriate settlement is, and for sole practitioners settling a case in an area in which they do not often practice. The settlement database allows judges, lawyers, and parties to settle cases in an informed way. Over time, judges who have access to such a database will be able to discern patterns, including the most propitious point at which to begin settlement talks.

Although the settlement database that Judge Denlow and Ms. Shack described in their article was unavailable to the public in 2004 when they published their article, there is no reason why it could not be public information, and the authors make that point as well.⁷⁷ This pilot project (see principle 2) would provide a good vehicle for making public information that is currently unavailable to the public, and doing so without compromising the privacy of the parties (see principle 4). The information is aggregated and no party names are included. By creating a settlement database and making it available to the public, courts would help inform the public about general trends in settlement, making available information in an area about which little is known. In addition, by making the settlement database public, courts would enable researchers to learn more about settlements, the roles judges play in them, and differences among case types. Researchers, in turn, could suggest ways to improve the settlement process. Instead of settlements producing little public information, they could serve as the impetus for an exchange between courts and those who study courts.

B. Websites for Prospective Jurors

Many judicial districts maintain websites that include a section for prospective jurors. This is a way for courts to reach out to the public and to explain the role of the jury. Citizens are most likely to consult these websites once they have received a summons for jury duty. Some jurisdictions even permit prospective jurors to respond to their jury summons and questionnaire online.

The websites for prospective jurors vary in terms of the information they provide and how well they provide it. The Justice John Paul Stevens Jury Center at Chicago-Kent has undertaken a state-by-state, and judicial district by judicial district, study of juror websites. The goal is to share with states a template for creating an effective website that provides information that will be helpful to prospective jurors in a format that is easy for them to use. It might even lead to some economies of scale if every judicial district did not feel the need to have such a website, but could redirect web traffic to the state court website and provide this juror information

Juror websites allow courts to reach out to prospective jurors and provide them with information that is useful for their jury service.

there. Even the barest websites tend to include practical information, such as where the courthouse is located, how to reach it by public transportation, where prospective jurors should go when they enter the building, the hours that court is in session, and where they can find lunch. Some websites go beyond the bare bones, and offer prospective jurors a brief history of the jury and the role that they, as jurors, will be asked to play. A few websites, such as one of the websites for

a court in Colorado, include the orientation video online so that prospective jurors can watch it at home and arrive at the courthouse with information about how the trial will proceed. One juror website in Florida offers viewers a virtual tour of the courthouse. Juror websites give courts a platform for creativity, though few courts take advantage of that opportunity.

Juror websites allow courts to reach out to prospective jurors and provide them with information that is useful for their jury service. By educating prospective jurors, juror websites can help to allay any anxiety prospective jurors might have about jury duty, thus, making it easier for them to respond to their summonses, to serve as jurors, and to learn how courts work from having firsthand experience as jurors. Websites are easy for prospective jurors to access and relatively easy for courts to maintain.

Juror websites also allow information to be presented in a user-friendly manner that can be easily updated. This is an example where moving online is a benefit (principle 3) compared to the old-fashioned way that courts used to reach out to prospective jurors, which was to send them a handbook in the mail—a very expensive process. For example, in 1987, federal courts were still sending prospective jurors a handbook that had been published in 1975,⁷⁸ and contained material that had appeared in a handbook published in 1959.⁷⁹ Through juror websites, courts can provide public outreach and present up-to-date material in a format that is more accessible than the formal language and static presentation of the ancient juror handbooks.

C. A Public Advocate

State courts could create a public advocate, if they do not have one already, who serves as a liaison between courts and citizens. The public advocate would provide citizens with basic information about the courts, its forms, terminology, and procedures.

Public advocates can provide citizens with basic information about court forms, terminology, and procedures.

There are various models for this role. One model could be the person who advises pro se litigants in federal district court. Another model could be the judicial press officer in the United Kingdom Supreme Court, who explains the workings of the court to members of the press.⁸⁰ Yet another model could be the Self-Help Desk that Chicago-Kent maintains at the Daley Center in Chicago, the home of the Circuit Court of Cook County. Chicago-Kent law students volunteer at the desk (three students per two-hour shift aided by one supervising student).⁸¹ The students assist pro se litigants by providing and helping them complete court forms, such as complaints and fee waiver forms, answering questions about procedures, and helping them figure out where else in the building they need to go for further assistance. The Self-Help Desk has three computers, and the law students can take pro se litigants through a form, question by question, as if the students were interviewing a client. After going through each question with the pro se litigant, they are able to print the completed form, which the pro se litigant can then file with the court.

Any of these models would allow courts to reach out to the public through the public advocate, who would assist members of the public to navigate through the court. This is an instance where face-to-face communication is more effective than simply making an online form available (principle 3). The power of the Self-Help Desk model is that a person works with a pro se litigant to take him or her through every step of a form, which is available online but which might be daunting or inscrutable to one unfamiliar with the law. Similarly, the public advocate would be a person who serves as a liaison between members of the public (not just pro se litigants) and the courts and provides a public face for the courts as well as information for those members of the public in need of it.

D. State Court Apps

State courts could also reach out to the public through the Oyez Project at IIT Chicago-Kent College of Law, a multimedia archive devoted to the Supreme Court of the United States and its work. Oyez is currently being adapted for state court proceedings. The Oyez Project provides a website (www.oyez.org) that includes the audio and transcripts of oral arguments, visual representations of the justices with their voting records, and a sorting function so it is easy to see how any justice voted in a case and what the alignments among justices were. In this age of mobile devices, the Oyez Project has expanded to include two apps for smartphones and tablets. One app is Pocket Justice, which contains case abstracts, opinions, and audio of the oral arguments. A second app is Oyez Today, which contains abstracts of current cases and new developments at the Court. These apps allow the public to follow the proceedings of the U.S. Supreme Court easily and from any location.

The Oyez Project, with the aid of a foundation grant, is currently working with Texas courts to develop an app that would allow members of the public to have easy access to the public proceedings of the Texas state courts.⁸² Members of the public could tap on the app and immediately go to a case in state court and see the party names, an abstract of the case, a link to audio or video of the oral argument, as well as a transcript of the argument. This would provide essentially “one stop shopping” for any member of the public who is following a case in the Texas court system. In addition, this would be an aid to reporters who are following a case. The app provides a description of the case as well as a search function so that reporters can find other related cases. Reporters, lawyers, and members of the public can also sign up for notification on their phone or tablet so that they will know whenever there is a new development in a case they are following. Jerry Goldman, who is the creator and director of the Oyez Project, explained that the state court app will allow the public “to listen, watch, and search any oral argument” and gain a basic understanding of how their courts work.⁸³

The state court app provides members of the public with easy access to information about their courts.

The state court app provides members of the public with easy access to information about their courts. The fact that all the information is in one place makes it a useful resource, as does the fact that it is searchable information. The state court app for Texas will allow other state courts to see how it works (principle 2) and to benefit from the Texas experience. This is also an example where moving online (principle 3) is a benefit because prior to the existence of the app, the information could not be found in one place that was easy for lay people to use and understand. Lawyers could find this information

by checking with the clerk of the court or going to the courthouse, or more recently, going to the state court’s website, but lay people faced greater challenges. Few would go to the courthouse to find out about a case unless they were personally involved in it. With the advent of this state court app, lay people will have information at their fingertips and might be more inclined to learn about cases and courts because the information will be collected in one place, written in plain language, and easy to use.

E. Using Social Media to Reach the Next Generation

One of the challenges that courts face today is how best to engage in public outreach directed to young citizens; one way to reach them is through social media. Courts need to reach out to the next generation and they need to use forms of communication that young people use.

For example, a few state court systems have social media accounts and these can be used to share news and educational information. The Connecticut and Hawai'i state courts have Twitter and YouTube accounts. Both states also use Twitter to announce recent news, arguments, and opinions, and both states also post educational videos on YouTube. Illinois Appellate Courts give members of the public the option of receiving information via Twitter or email⁸⁴ and the Illinois Supreme Court makes oral argument available as a podcast.⁸⁵

Through social media, courts [can] not only reach out to citizens, but also enable citizens to give feedback. Communication would be a two-way, rather than a one-way, street.

State courts could also take advantage of the interaction that social media networks foster. For example, courts can communicate with members of the public using Twitter or Facebook, but members of the public can also communicate with courts in this way. Courts could use Google Docs or even a moderated forum to allow members of the public to comment on a new court form or procedure. Through social media, not only would courts be able to reach out to citizens, but citizens would be able to give feedback to courts. Communication would be a two-way, rather than a one-way, street. This would not only foster the engagement of citizens, but also would improve the processes of courts because they could be tailored to meet the needs of the people who use them. This form of crowd-sourcing would benefit the public because they would be more engaged in their courts if they could interact with them, particularly young citizens who are accustomed to such interaction. It would also benefit courts because they would have “the wisdom of crowds”⁸⁶ as they design practices and procedures for the twenty-first century.

Conclusion

Courts have much to gain, and little to lose, by trying to reach out to the public in a meaningful way. Courts need to do this in order to have a citizenry that understands what courts do, how they work, and how citizens can and must participate in their court system. Without an informed citizenry there is a danger that courts will

Courts have much to gain, and little to lose, by trying to reach out to the public in a meaningful way.

lose touch with the concerns of ordinary citizens; or worse, that courts will abuse their position and citizens will fail to notice. It is particularly important that young citizens receive this education. Courts need to develop ways to reach the next generation even if the ways are new to judges and involve technology or innovation that is a departure from tradition.

If courts are successful in this endeavor, the benefits will be enormous. Citizens will continue to have trust in courts and understand that courts operate with integrity. If citizens trust courts and believe the procedures are fair and above board, then they will also accept court decisions even when they disagree with them. Countries around the world—from Japan and Korea to Georgia and the Ukraine—are trying to decide how best to involve citizens in their court systems.⁸⁷ Their efforts include establishing or returning to jury systems or adding citizens to mixed tribunals to work alongside professional judges.⁸⁸⁸ State courts in the United States already have the benefit of juries, but more is needed in order to have educated jurors who respond to their summonses. State courts need to take the next step and reach out to the public in ways that make use of everyday technology and communication to teach citizens about courts and spark their interest in being informed and involved.

Of course, there is always the chance that some experiments might not work, but if they are tried on a small scale, then they will do little harm. The five principles described in Part III will help courts to move forward in their public outreach, while avoiding mistakes that could come about if courts blithely follow the next big thing. Courts need to strike the proper balance between experimentation and stasis; incremental updating will help them to reach and inform citizens in today's digital world.

Notes

¹ Professor of Law and Director of the Justice John Paul Stevens Jury Center at IIT Chicago-Kent College of Law. I am grateful for feedback from Mary Collishaw and James Rooks at the Pound Civil Justice Institute, conversations with Jerry Goldman, Matthew Gruhn, and Ron Staudt at Chicago-Kent, research assistance from Elly Drake, library assistance from Clare Willis, and technology assistance from Debbie Ginsberg.

² Although my focus in this article will be on state courts, much of my discussion is also applicable to federal courts.

³ In federal district court, the proceedings are transcribed by a court reporter, which means that the proceedings can reach a larger audience than just those present in the courtroom. In state courts, practices vary with respect to court reporters. In some civil suits in Illinois, for example, the parties are responsible for hiring a court reporter if they want to have one. However, in criminal cases in Illinois, the court automatically provides a court reporter at almost every stage in a criminal proceeding. See <http://www.cookcountycourt.org/ABOUTTHECOURT/OfficeoftheChiefJudge/CourtRelatedServices/OfficialCourtReporters.aspx>.

⁴ B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1241 (1998) (urging trial courts to allow jurors to play a more active role so that jurors will remain focused on the trial and better able to absorb all of the evidence presented during the trial).

⁵ See, e.g., Nancy S. Marder, *Answering Jurors' Questions: Next Steps in Illinois*, 41 LOY. U. CHI. L.J. 727 (2010) (recommending that state trial courts try pilot programs in which jurors can submit written questions for witnesses because once lawyers and judges have experience with the practice they usually like it; jurors always like it).

⁶ See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609 (1986).

⁷ U.S. Dep't of Justice v. Reporters' Comm. for Freedom of the Press, 489 U.S. 749, 762 (1989) (Stevens, J.).

⁸ See, e.g., Kate Marquess, *Open Court?*, A.B.A. J., Apr. 2001, at 54, 57 ("[F]ederal courts have authorized charging a fee for access to their Case Management/Electronic Case Files system . . .").

⁹ See Nancy S. Marder, *From "Practical Obscurity" to Web Disclosure: A New Understanding of Public Information*, 59 SYRACUSE L. REV. 441, 451-53 (2009) (recommending that courts and lawyers take extra steps to ensure that the parties' personal information is not disclosed in court documents made available online).

¹⁰ Trial courts in New York and New Jersey provide online opinions in "selected" cases. See N.Y. OFFICIAL REPS.: MOST RECENT DECISIONS, <http://www.nycourts.gov/reporter/slipidx/miscolo.shtml> (last visited May 15, 2015); N.J. CTS., http://www.judiciary.state.nj.us/trial_court_opinions/index.htm (last visited May 15, 2015). In Pennsylvania, trial courts in a few counties provide opinions online. See, e.g., FIFTH JUD. DISTRICT OF PENNSYLVANIA, <https://www.allegheynecourts.us/opinion/default.aspx?action=viewfolder&path=/civil> (last visited May 15, 2015) (Allegheny County); THE PHILADELPHIA CTS., <http://www.courts.phila.gov/opinions/> (last visited May 15, 2015) (Philadelphia County).

¹¹ See BRB'S GUIDE TO COUNTY COURT RECORDS 16 (Michael Sankey ed. 2011) (noting that Illinois trial court documents are rarely available online); *id.* at 208-26 (noting in general that access to Illinois court records is only at the courthouse).

¹² Email from Clare Gaynor Willis, Research and Faculty Services Librarian, IIT Chicago-Kent College of Law Library, to author (May 13, 2015, 15:37 CST) (on file with author).

¹³ In oral arguments in federal courts of appeals, as in federal district court proceedings, there is a court reporter who takes down what is said and creates a transcript that is a public document.

¹⁴ See Press Release, Illinois Supreme Court, Illinois Supreme Court Announces New Public Domain Citation System, Ending Era of Printed Volumes (May 31, 2011), available at <http://www.illinoiscourts.gov/media/pressrel/2011/053111.pdf>.

¹⁵ See N.M. COMPILATION COMMISSION, <http://www.nmcompcomm.us/nmcases/NMAR.aspx> (last visited May 15, 2015); ARK. JUDICIARY, <http://courts.arkansas.gov/rules-and-administrative-orders/court-rules/rule-5-2-opinions> (last visited May 15, 2015); SUPREME COURT RULES FOR THE REPORTING OF OPINIONS, REP.OP.R.2d 2.1 (providing for Ohio Supreme Court opinions to be posted on the website and published in the official reporter); REP.OP.R. 3.2 (providing the same for the Ohio Courts of Appeals and the Court of Claims) (July 1, 2012). Interestingly, when there are questions of accuracy in the opinions the version in the *Ohio Official Reports* will control. REP.OP.R. 4.2.

¹⁶ Email from Clare Gaynor Willis, Research and Faculty Services Librarian, IIT Chicago-Kent College of Law Library, to author (May 15, 2015, 11:07 CST) (on file with author).

¹⁷ See ILL. APP. CT., <http://www.illinoiscourts.gov/appellatecourt/> (last visited May 13, 2015) (providing additional information about Illinois appellate courts, including the names of judges and clerks, caseload statistics, local rules, accommodations for disabilities, and a pro se guide).

¹⁸ See, e.g., Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 526-28 (2006) (describing Renaissance town halls with scenes suggesting that judges should not be influenced by personal ties or gifts of money).

¹⁹ Cowley v. Pulsifer, 137 Mass. 392, 394 (1884).

²⁰ See, e.g., ROBERT G. BOATRIGHT, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS ix-x (American Judicature Society, 1998); Susan Carol Losh et al., "Reluctant Jurors": What Summons Responses Reveal about Jury Duty Attitudes, 83 JUDICATURE 304, 310 (2000). For a recent example of a county that imposed escalating fines and found that citizens responded to their summonses with much greater alacrity as a result, see Amy Leigh Womack, *New Penalties Spur Uptake in Bibb Juror Attendance*, TELEGRAPH (Macon, Ga.), available at <http://www.macon.com/news/local/crime/article30232524.html>.

²¹ JURY TRIAL INNOVATIONS 26-27 (G. Thomas Munsterman et al. eds., 1997).

²² See, e.g., John Gastil, Hiroshi Fukurai, Kent Anderson & Mark Nolan, *Seeing is Believing: The Impact of Jury Service on Attitudes Toward Legal Institutions and the Implications for International Jury Reform*, 48 CT. REV. 124 (2012).

²³ See, e.g., JOHN GASTIL, E. PIERRE DEESS, PHILIP J. WEISER & CINDY SIMMONS, *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* (2010) (finding that jury service in criminal trials boosted voting among low-frequency voters).

²⁴ See, e.g., Nancy S. Marder, *Judging Reality Television Judges*, in LAW AND JUSTICE ON THE SMALL SCREEN 229, 229 (Peter Robson & Jessica Silbey eds., 2012) ("In fact, *Judge Judy*, with 6.3 million daily viewers, has recently overtaken *Oprah* as the most popular daytime television show").

²⁵ See, e.g., *United States v. Thomas*, 116 F.3d 606, 618 (2d Cir. 1997) (describing the importance of preserving the secrecy of jury deliberations).

²⁶ See Contempt of Court Act, 1981, § 8(1) (Eng.) (providing that "it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings").

²⁷ See 18 U.S.C. § 1508.

²⁸ See, e.g., CAL. PENAL CODE § 167 (WestlawNext through Ch. 2 of 2015 Reg. Sess.); 705 ILL. COMP. STAT. ANN. 315/1-1 (WestlawNext through P.A. 99-3 of the 2015 Reg. Sess.); LA. REV. STAT. ANN. § 14:129.2 (WestlawNext through 2014 Regular Session); MASS. GEN. LAWS. ch. 272, § 99A (WestlawNext through Chapter 25 of the 2015 1st Annual Session); MICH. COMP. LAWS ANN. § 750.120b (WestlawNext through P.A. 2015, No. 38, of the 2015 Regular Session, 98th Legislature); N.C. GEN. STAT. ANN. § 14-227.2 (WestlawNext through Chapter 10 of the 2015 Regular Session of the General Assembly); N.D. CENT. CODE ANN. § 12.1-09-05 (WestlawNext through all 2013 legislation and HB 1104, HB 1105, HB 1107, HB 1127, HB 1134, HB 1159, HB 1199, HB 1206, HB 1281, HB 1358, HB 1370, HB 1390, HB 1407, SB 2052, SB 2079, SB 2082, SB 2100, SB 2176, SB 2188, SB 2237, SB 2271 and SB 2301 of the 2015 Regular Session of the 64th Legislative Session); 18 PA. CONS. STAT. ANN. § 5103 (WestlawNext through Act 2015-4); VA. CODE ANN. § 18.2-468 (WestlawNext through the End of 2014 Reg. Sess. and the End of the 2014 Sp. S. I and includes 2015 Reg. Sess. cc. 1, 7, 8, 39, 61, 67 and 89).

²⁹ Ellen Gracie Northfleet, President of the Supreme Court of Brazil, Remarks at the Joint Luncheon: AALS, Conference of Chief Justices, and AALS Committee on International Cooperation, AALS Annual Meeting (Jan. 3, 2008) (notes on file with author).

³⁰ *Id.*

³¹ *Id.*

³² See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); see also 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, 2934-35 (2015) ("In the 1960s, trials took place in about ten percent of the civil cases brought to federal courts. By 2010, trials began in about one case out of 100 civil cases filed.") (footnote omitted).

³³ For a comprehensive exploration of the roles that the Federal Arbitration Act played in the growth of arbitration and the decline of trials, aided by the U.S. Supreme Court's interpretation of the Act, and businesses' expansive use of it, especially in consumer contracts in which businesses have all the power and consumers have few alternatives, see Resnik, *supra* note 32, at 2808.

³⁴ FED. R. CIV. P. 1.

³⁵ FED. R. CIV. P. 16.

³⁶ 28 U.S.C. § 471 (Civil Justice Expense and Delay Reduction Plans).

³⁷ 28 U.S.C. §§ 651-658 (2000) (allowing judges to encourage, if not require, that certain cases proceed to ADR).

³⁸ 28 U.S.C. § 476 (a) (1), (2) & (3).

³⁹ Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

⁴⁰ Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

⁴¹ Even in settlements in which the settlement agreement was sealed, docket sheets and complaints were not typically sealed; rather, the amount of settlement was sealed. See Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439, 458, 462 (2006).

⁴² But see *id.* at 452 (describing an empirical study that found that of the 288,846 federal civil cases that were terminated in 2001 or 2002, only 1270 had sealed settlement agreements, which constituted 0.44% or less than one-half of one percent).

⁴³ See generally Symposium, *Secrecy in Litigation*, 81 CHI.-KENT L. REV. 301 (2006).

⁴⁴ FED. R. APP. P. 34(a)(2).

⁴⁵ See, e.g., Galanter, *supra* note 32, at 529 ("Although the number of appeals has increased, the number subject to intensive full-dress review has declined. More appeals are decided on the basis of briefs alone, without oral argument.").

⁴⁶ See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1997, at 38 (1998).

⁴⁷ See ADMIN. OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 46 (2008).

⁴⁸ Galanter, *supra* note 32, at 459 (describing “the vanishing trial”).

⁴⁹ Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489, 1544-46 (2012) (describing the “vanishing oral argument” trend in federal circuit courts).

⁵⁰ See, e.g., CAL. CTS.: THE JUD. BRANCH OF CAL., <http://www.courts.ca.gov/20495.htm> (last visited June 1, 2015).

⁵¹ See, e.g., FLA. FIRST DISTRICT CT. OF APPEAL, http://www.1dca.org/opinions/opinions_default.html (last visited May 26, 2015).

⁵² See, e.g., *Recent Opinions*, OHIO FIFTH DISTRICT CT. OF APPEALS, <http://www.fifthdist.org/fifth-district/recent-opinions> (last visited June 1, 2015) (providing opinions that go back only as far as November 2014).

⁵³ See, e.g., *Court of Appeals*, COLO. JUD. BRANCH, <https://www.courts.state.co.us/Media/Opinions.cfm> (last visited February 16, 2016) (posting only two Recent Orders and Opinions of Interest from 2015).

⁵⁴ For example, Alaska has a link advertising Netscape, a long-abandoned browser. See ALASKA CASE MGMT. SYS., <http://www.appellate.courts.state.ak.us/> (last visited June 1, 2015).

⁵⁵ Alaska’s case management system is still posted on an outdated and broken website. See *id.* Several links are broken, including two, “Opinions and Rules” and “Alaska Court Systems,” in the top navigational bar. *Id.*

⁵⁶ Memorandum from Debbie Ginsberg, Educational Technology Librarian, IIT Chicago-Kent College of Law Library, to author, May 6, 2015 (on file with author).

⁵⁷ See Marder, *supra* note 49, at 1492 n.2 (providing sources).

⁵⁸ Admittedly, the more private processes of settlement and arbitration could be more public. There is nothing inherent about these processes that requires privacy. As Professor Resnik points out, the processes that are regarded as private could become more public, just as the processes that were once regarded as public have become more private. See Resnik, *supra* note 18, at 549, 552-55.

⁵⁹ Justice Brandeis recognized the benefits to the federal government of learning from the states’ experimentation: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁶⁰ See Leland Anderson, Practice Tips for Handling Juror Questions 1 (June 2004), available at http://www.americanbar.org/content/dam/aba/migrated/jury/doc/Practice_Tips_for_Handling_Juror_Questions_Judge_Anderson.doc (“Actual experience with juror questions at trial increases support from judges and attorneys on the benefits of the procedure.”).

⁶¹ Jury Subcomm., N.J. Sup. Ct. Civ. Prac. Comm., Report on Pilot Project Allowing Juror Questions 2, available at <https://www.judiciary.state.nj.us/reports2002/civappa.pdf>.

⁶² Patricia Manson, *Practice of Allowing Jurors To Ask Questions Is Facing Challenges*, CHI. DAILY L. BULL., Apr. 25, 2009, at 4 (“Two of the procedures that got good reviews were allowing jurors to submit written questions and having judges instruct jurors on the substantive law before any evidence was presented in a case.”). But see *id.* (“Many other judges, lawyers and litigators concur with [Judge] Holderman. But the verdict is not unanimous.”).

⁶³ See, e.g., James F. Holderman, *Foreword*, 90 CHI.-KENT L. REV. 785, 787 (2015) (describing Judge Holderman’s experience with the pilot program of permitting jurors in civil cases to submit written questions to witnesses, among other practices, and finding that it worked so well that he decided to continue it even after the program had ended).

⁶⁴ MOLLY TREADWAY JOHNSON & CAROL KRAFKA, FED. JUDICIAL CTR., ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS (1994), available at [http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/\\$file/elecmediacov.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/$file/elecmediacov.pdf) [hereinafter FJC Study].

⁶⁵ *Id.* at 8.

⁶⁶ See, e.g., *Courts Selected for Federal Cameras in Court Pilot Study*, UNITED STATES COURTS (June 8, 2011), http://federalevidence.com/pdf/2011/05_May/JCUS.Camera.Pilot.pdf (“Fourteen federal trial courts have been selected to take part in the federal Judiciary’s digital video pilot, which will begin July 18, 2011, and will evaluate the effect of cameras in courtrooms.”).

⁶⁷ PRIMO LEVI, *THE PERIODIC TABLE* 150-59 (Raymond Rosenthal trans., Schocken Books 1984) (1975).

⁶⁸ See *Chandler v. Florida*, 449 U.S. 560, 564 (1981) (“In 1978, based upon its own study of the matter, the Conference of State Chief Justices, by a vote of 44 to 1, approved a resolution to allow the highest court of each state to promulgate standards and guidelines regulating radio, television, and other photographic coverage of court proceedings.”).

⁶⁹ See FJC Study, *supra* note 64, at 38.

⁷⁰ *Id.* at 42.

⁷¹ See *id.* at 38 n.33.

⁷² *Id.*

⁷³ See ILL. SUP. CT., <http://www.state.il.us/court/> (last visited May 15, 2015).

⁷⁴ Morton Denlow & Jennifer E. Shack, *Judicial Settlement Databases: Development and Uses*, JUDGES’ J., Winter 2004, at 19.

⁷⁵ See *id.* at 20-21 (describing five-step process).

⁷⁶ See *id.* at 21-22.

⁷⁷ See *id.* at 22.

⁷⁸ See, e.g., ADMIN. OFFICE OF U.S. COURTS, HANDBOOK FOR JURORS SERVING IN THE UNITED STATES DISTRICT COURT (1975).

⁷⁹ Compare *id.* at 11, with ADMIN. OFFICE OF U.S. COURTS, HANDBOOK FOR JURORS SERVING IN THE UNITED STATES DISTRICT COURT 11 (1959).

⁸⁰ See Les Moran, *Managing the News Image of the Judiciary: The Role of Judicial Press Officers*, 4 OÑATI SOCIO-LEGAL SERIES (2014) (describing the role of the judicial press officer who serves as a liaison between the press and the UK Supreme Court).

⁸¹ Interview with Elly Drake, Student Volunteer, Self-Help Desk, Chicago-Kent College of Law, May 18, 2015 (notes on file with author).

⁸² Interview with Jerry Goldman, Director, Oyez Project, and Matthew Gruhn, Applications Development Specialist, Oyez Project, IIT Chicago-Kent College of Law, May 6, 2015 (notes on file with author).

⁸³ *Id.*

⁸⁴ See ILL. APP. CT., *supra* note 17.

⁸⁵ See ILL. SUP. CT., *supra* note 73.

⁸⁶ See generally JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004).

⁸⁷ See, e.g., Symposium, *Comparative Jury Systems*, 86 CHI.-KENT L. REV. 449 (2011).

⁸⁸ *Id.*

ORAL REMARKS OF PROFESSOR MARDER

Courts in the 21st century face an enormous challenge. They have a central role, and yet we live in a digital age in which technology and communication are rapidly changing. How can courts maintain judicial transparency in the 21st century? How can they encourage citizens to observe courts, and how can they educate the public about the work that courts do, while still maintaining the traditions that courts have always followed? They need to update their methods, yet they need to do so in ways that do not endanger any of their functions. To this end, I propose that courts engage in incremental updating, which I will describe. I will also provide five principles that courts can follow to put incremental updating into practice.

But first, I want to convince you that this matters. I have a niece named Emily. She graduated from college two years ago as a peace and justice major. It is hard to get a job with that major. She knows little about the court system in Massachusetts where she grew up and went to school. The challenge for courts is how to reach Emily and her peers, the next generation, and to teach them about the work that courts do and get them to care about the role of courts in our society. If a peace and justice major does not know or care, then there is not much hope for courts in the 21st century. But I am an optimist. I think that courts can get Emily and her peers to know and care, and I will explain how.

I want to begin by identifying two ways in which state courts are transparent about the work they do. One way is by having court proceedings that are open to the public, public proceedings. The other way is by making citizens aware of the workings of the state courts—in other words, public outreach. And both are essential to developing a citizenry that is educated about courts and the work they do. I want to say a few words about public proceedings and then move on to public outreach.

Public Proceedings

Trial courts fulfill their role of providing public proceedings by having their courtrooms open to the public. Members of the public not only observe trial court proceedings, but they can also participate in them when they are summoned to serve as jurors. Although citizens do not always relish this opportunity, at least initially, this is one way they can play an active role in their courts.

Another way in which the work of trial courts is public is that many of the documents that a court creates, or that a party files, are available to the public. It used to be that interested members of the public had to go to the courthouse to view these documents. They were publicly available, but “practically obscure,” to use Justice Stevens’s phrase,¹ because they required that extra step of going to the courthouse, and few members of the public were willing to do that. In today’s digital society, however, documents filed with some trial courts are available for the public to view online. Given the proliferation of laptops and smartphones, this means that these documents are far more accessible to the public than they have ever been before.

In terms of appellate courts, oral argument is the main proceeding that takes place in the courtroom and is open to the public to observe. The briefs that precede oral argument and the opinions that follow are also public documents and are part of public proceedings.

The challenge for courts is how to reach the next generation, and to teach them about the work that courts do and get them to care about the role of courts in our society.

Public Outreach

Another way in which state courts make their work transparent is by reaching out to the public to educate them about courts. Here, I draw from my home state of Illinois.² The Illinois court website provides information about the courts, as do the websites of many states' courts. Websites can vary considerably in terms of the information they provide and how effectively they provide it. But state court websites are also a way for citizens to access court documents.



Why is it important that state courts provide both public proceedings and public outreach? Because both are ways of educating citizens about the work that state courts do.

There are several reasons that citizens need to be knowledgeable about courts and judges. One is so that they can be an effective watchdog making sure that judges—all of you—perform your job properly. Another is so that those who are summoned for jury duty will respond to their summonses and will perform their job well. Also, without courts reaching out to citizens and teaching them about their work, citizens rely on popular culture to form their views. Judge Judy becomes their model of the judge,³ and the studio in which her television show is recorded becomes their model of the courtroom. With “reality TV” judge shows filling the airwaves from morning until night, it is important for state courts to counter this misleading but popular portrayal of judges.

Limits to Transparency

Although courts need to be transparent in a democracy, there are limits to transparency. I am sort of afraid to say that at this conference. For trial and appellate judges, as well as jurors, the place where deliberations occur is not open to the public, in spite of a recent article by Judge Kozinski of the Ninth Circuit

I think there is a need for candor during deliberations, whether amongst judges or jurors, so deliberation should continue to take place behind closed doors.

urging that jury deliberations be made open by having cameras in the jury deliberation room.⁴ I think there is a need for candor during deliberations, whether amongst judges or jurors, so deliberation should continue to take place behind closed doors.

Courts might not have intended to undermine transparency, but some of their practices have had that effect. For trial courts, the pressure to move cases along has led to a reduction in the number of trials and an increase in the number of settlements, with the concomitant loss in the number of public proceedings and public documents. For appellate courts, there has been a reduction in the number of oral arguments, especially in federal courts. There have also been few concerted efforts to engage in public outreach.

Admittedly, the move from hard copy court filings at the courthouse to court filings online has helped to make these documents more readily available to the public. Also, the creation of state court websites has provided a means of reaching citizens and educating them through a method of communication that is familiar to them. Although this was a good first step, many state courts seem to have stopped developing their websites. Some are skeletal, badly organized, and difficult to use.

Incremental Updating

As technology develops at a rapid pace, how should courts respond so that they can continue to reach citizens using relevant forms of communication? The approach that courts need to take for proceedings and outreach to be public, especially in this age of rapid growth and new forms

of technology and communication, is one that I will call incremental updating. Courts need to update. They need to respond to changes in technology and communication. They need to try to reach Emily and her peers. Yet courts cannot respond so rapidly that they make mistakes in their effort to update. Courts need to strike the proper balance and take small, incremental steps toward greater transparency through enhanced public outreach

Courts need to . . . take small, incremental steps toward greater transparency through enhanced public outreach and public proceedings.

Courts might not have intended to undermine transparency, but some of their practices have had that effect.

and public proceedings. Toward that end, I offer five guiding principles that I think will help courts to strike the proper balance. I will use the example of cameras in the courtroom to illustrate how these principles can help courts to decide when to adopt a new form of outreach or to tweak an old form.

1. Consider unintended consequences. Institutions are not static. A change in one practice or procedure can affect other practices and procedures, and not always in predictable ways. For example, as the federal courts struggle with whether or not to introduce cameras in the courtroom (a question that 50 states have answered in the affirmative, albeit with restrictions), one question federal courts should consider is the unintended consequences of cameras in the courtroom. The main goal of cameras is to allow the public to see what takes place in the courtroom without actually having to enter a courtroom. The idea is to reach many more members of the public than the actual courtroom can hold and show them what trial and appellate courts do.

Although the goal is to open up the public proceeding to public scrutiny, what if the unintended consequence of cameras in the courtroom is to exacerbate the declining number of trials and oral arguments? In trial courts, parties could choose to proceed by using more private processes of settlement or arbitration if they were worried about having their face on the news every night—or on YouTube forever!

Cameras in the appellate courts . . . might actually have the unintended consequence of further reducing the number of oral arguments and contributing to their steady decline.

In appellate courts, judges and parties could decide to forego oral argument and have the appeal decided on the briefs. Thus cameras in the appellate courts, even though intended to make public proceedings reach a large number of citizens, might actually have the unintended consequence of further reducing the number of oral arguments and contributing to their steady decline.

2. Start small and then expand. Courts can experiment with pilot programs before they fully adopt a new practice or procedure. They can try something on a small scale for a limited amount of time to see how it works. Another benefit to a pilot program is that it will provide experience with a new practice that lawyers and judges might otherwise have reservations about. It gives them a chance to see how the practice actually works. If they like it, they are likely to become proponents of it. This was the case with pilot programs that permitted jurors in Colorado and New Jersey to submit written questions to witnesses through the judge.

Federal courts considering cameras in the courtroom are following this principle. The Federal Judicial Center conducted a pilot program in 1991 and issued a report in 1994. Now it is engaged in another pilot program begun in 2011 to see what effects cameras may have in the courtroom in the digital age, when images can be posted and re-posted online and are available forever. This pilot program has not been completed yet, but federal courts are wise to wait for its results.

3. Think carefully when moving from a face-to-face experience to an online experience. There is a tendency to move from a face-to-face interaction to an online one because online is quicker and cheaper. However, face-to-face and online are not the same. For example, when moving from face-to-face to online filing of documents, there are new concerns. Documents can contain personal information. When documents are filed online and available to everyone through the Internet, lawyers and judges have to worry about redacting information.

Cameras in the courtroom can change the level of recognition that is given to trial participants. Images go viral, and millions of people can view them.

Cameras pose similar challenges. When trial participants enter a courtroom, they know it is a public setting and that the public and press can observe them.

However, cameras in the courtroom can change the level of recognition that is given to trial participants. Images go viral, and millions of people can view them. Yes, there are precautions that courts can take, such as regulating what is filmed, the placement of cameras, where the videos are posted, etc. Yet once the videos are online, they cannot be controlled.

4. Consider the tradeoffs between privacy and public accessibility. Even in public proceedings, such as trials in which participants appear before members of the press and public, they still retain some privacy rights. For example, citizens are summoned to serve as jurors. They are required to play a public role. But even in some cases, especially in high profile cases, their names are not made public during the trial. In part, this is to protect them from outside influence, but it also preserves some modicum of privacy. This principle has applicability to cameras in courtrooms. Trial participants know that they are going to appear before the public and press, but that is different from appearing before a global audience online. Having one's words recorded for a transcript is less intrusive than having one's image filmed and recorded for posterity.

5. Reassess practices over time. Even after a court has adopted a new practice, the practice is not written in stone. Courts should reassess practices and see how well they are working. If a practice is not working, it should be abandoned. If it could be working better, it should be adjusted. Empirical studies, whether conducted by courts or academics, should be part of every court system. Federal courts are following this principle and are in the midst of reassessing whether they should have cameras in the courtroom. State courts have conducted their own studies, but they have not been all that rigorous. State courts should reassess cameras in the courtroom in a rigorous way.

Empirical studies [on the efficacy of court practices], whether conducted by courts or academics, should be part of every court system.

Technology in Public Outreach

I want to end on an upbeat note by describing several ways in which courts are using technology to enhance public outreach and understanding, especially in a digital age. These are actual examples that you are welcome to try in your own state court.

Settlement database. Judge Morton Denlow, a retired magistrate judge, and Jennifer Shack described a settlement database that magistrate judges in Chicago developed.⁵ The

[A settlement database] is an example of a pilot program that could be made available to the public without compromising any privacy interest.

database allows judges to give guidance to parties at settlement conferences by showing them what similar cases have settled for without revealing case-specific information. Although the database was not available to

Appendix A

SETTLEMENT REPORT

TYPE OF ACTION (Check all applicable boxes): SETTLEMENT DATE: _____

EMPLOYMENT DISCRIMINATION	CIVIL RIGHTS	OTHER ACTIONS
<input type="checkbox"/> Age: _____ years old	<input type="checkbox"/> Deliberate Indifference	<input type="checkbox"/> P.L. (FEIA) - Describe Injury: _____
<input type="checkbox"/> Disability: _____	<input type="checkbox"/> Excessive Force	<input type="checkbox"/> P.L. (Other) - Describe Injury: _____
Describe condition: _____	Describe Injury: _____	
<input type="checkbox"/> Race: Identify: _____	<input type="checkbox"/> False Arrest	<input type="checkbox"/> Intell. Prop.: _____
<input type="checkbox"/> Sex: <input type="checkbox"/> Female <input type="checkbox"/> Male	<input type="checkbox"/> False Imprisonment	<input type="checkbox"/> Truth in Lending
<input type="checkbox"/> Sex Harassment: _____	How Long: _____	<input type="checkbox"/> Fair Debt Collection
<input type="checkbox"/> Retaliation: _____	<input type="checkbox"/> Malicious Prosecution	<input type="checkbox"/> ERISA: <input type="checkbox"/> Union Benefits/Concub
<input type="checkbox"/> Other: _____	<input type="checkbox"/> Other: _____	<input type="checkbox"/> Insurance policy: <input type="checkbox"/> Other
		<input type="checkbox"/> _____

TYPE OF ADVERSE EMPLOYMENT ACTION ALLEGED (Check all applicable boxes):

☐ Failure to hire ☐ Failure to promote ☐ Wrongful discharge

☐ Reduction in force ☐ Other: _____

Length of Employment with Defendant: _____

SETTLEMENT TERMS: \$ _____ Other: _____

PLAINTIFF'S ITEMIZATION OF DAMAGES: Total \$ _____

BREAKDOWN OF DAMAGES SOUGHT: _____

PLAINTIFF'S INITIAL DEMAND: _____

DEFENDANT'S INITIAL OFFER: _____

STAGE OF LITIGATION (check all applicable boxes):

<input type="checkbox"/> Very early - little or no discovery	<input type="checkbox"/> Discovery cut-off date set
<input type="checkbox"/> Discovery in progress	<input type="checkbox"/> Final pretrial order date set
<input type="checkbox"/> Discovery completed	<input type="checkbox"/> Final pretrial order filed
<input type="checkbox"/> Dispositive motion pending	<input type="checkbox"/> Trial date set
<input type="checkbox"/> Dispositive motion denied	<input type="checkbox"/> Other: _____

JUDGE'S COMMENTS: _____

the public when the article was published in 2004, there is no reason it could not be. It is an example of a pilot program (principle two), that could be made available to the public without compromising any privacy interest (principle four).

Websites for prospective jurors. Many judicial districts maintain websites for prospective jurors. These vary in terms of the information provided and how well they provide it. The Justice John Paul Stevens Jury Center at Chicago-Kent has undertaken a state-by-state, district-by-district study, and the goal is to share with state courts a template for creating an effective website that provides information for prospective jurors. The barest websites provide very practical information like where the court is located, how to get there, and where you can get lunch nearby. Some websites provide more information about the role of the jurors, such as the Massachusetts website shown here, and even include orientation videos. This is an example where moving online is a benefit (principle three), compared to the old fashioned, always-out-of-date, and very expensive juror handbooks.



[Websites for prospective jurors] is an example of how moving online is a benefit, compared to the old fashioned, always-out-of-date, and very expensive juror handbooks.

Public advocate. State courts could create a public advocate, if they don't have one already, who serves as a liaison between courts and citizens. There are several possible models for this: the person who addresses pro se litigants in federal district court and advises them; the judicial press officer in the U.K.

Supreme Court who explains the court to the press; or the self-help desk that Chicago-Kent maintains at the Daley Center in Chicago, where volunteer students work with pro se litigants, taking them through online forms question by question. This is an instance where face-to-face communication is more effective than simply providing an online form (principle three).

State court apps. State courts could reach out to the public through the Oyez Project at Chicago-Kent, which is a multimedia archive devoted to the U.S. Supreme Court and its work. Oyez is currently being adapted for state court proceedings. With the help of a grant, it is now working with the Texas courts to develop an app that would allow members of the public to have easy access to the public proceedings of Texas courts. The public

State courts could create a public advocate, who serves as a liaison between courts and citizens.



could tap on an app and go to a case in state court and see the party names and abstract, a link to an audio or a video of the oral argument, as well as the transcript. It would be one-stop shopping. Other states can see how well it works and follow (principle two). Also moving online in this case (principle three) means that all the case information can be found in one place.

Using social media. Courts need to reach out to the next generation, to my niece Emily and her peers, and use the forms of communication that younger citizens use. Some state court systems like Connecticut and Hawai'i have social media accounts, and they can use them to share news and information. Both use Twitter to announce news and arguments and opinions. State courts can use social media to communicate with the public, and the public can use social media to communicate with courts. This two-way communication would engage citizens and allow them to give their input on court practices and procedures for the 21st century.

[Using social media] would engage citizens and allow them to give their input on court practices and procedures for the 21st century.

In sum, courts have much to gain and little to lose in trying to reach out to the public in a meaningful way. Courts need to do this in order to have a citizenry that understands what courts do, how they work, and how citizens can participate. It is particularly important to young citizens to receive this education. Courts need to develop ways to reach the next generation, like Emily and her peers, even if the ways are new to judges and involve technology and innovation that depart somewhat from court traditions. Thank you.

COMMENTS BY PANELISTS

RONALD HEDGES

Good afternoon everyone. I was the United States Magistrate Judge in Newark, New Jersey for 20-plus years. As we started talking about public access and accountability, I recalled that, when I first went on the bench in 1986, two old guys sat in the back of my courtroom every day. After about a month, I asked them what they were doing. They said, “We are retired. We have nothing else to do. We are going to walk around the courthouse and see what is going on. We like to hear what you say.” *There* is public outreach. And the problem is we cannot do anything like that just because of the volume of information that is out there and everything we can and we cannot do.

I just want to offer a couple of caveats in everything that has been said today from my point of view, because I spent most of my life managing litigation. Number one: As much as we talk about trials being public events (and they are), they are really private. Most cases any of us see affect two people with some private rights and maybe someone has an interest in seeing how that is dealt with, or, if it goes to a jury, what a jury does. But I really think, as public access goes, instead of listening to a stream, which anyone could do, we are talking about

I think the biggest challenge you are going to have as judges from now on is managing the technology that you are going to be faced with every day.

deciding the cases that are the big ones that people might have an interest in. Frankly, that is beyond our control. That is in the control of the press, when the press talks about some case that may be coming up, or an attorney goes out and talks about it, or it becomes a *cause célèbre* for some reason.

When we’re talking about unintended consequences and trying to incrementally increase technology, I guess the question is how a court institution can decide what the public would be interested in seeing. And if we live in a world of limited resources, what can a court, or more likely a court technology *staff*, have to do with that? The alternative is to stream everything all the time. I don’t know if that is a solution for anything, given the proliferation of media that is out there every day.

How many of you were trial judges before you went on the appellate bench? How many of you were ever presented with a proposed settlement by parties and refused to take it, telling them they had to go to trial? I see one hand. I am just curious because I listened to everything this morning and I heard all the discussions about the need for public trials and public proceedings and the like. I am wondering, if that happened, if the Supreme Court reversed *Concepcion* next year, and you were inundated with another whole set of trials, what would you do with them? You personally would not do anything, of course, because you are appellate judges, but what would your trial courts do?

I asked a question in one of the discussion groups today about how backed up your courts are. One-third of the judges said that their trial calendars were incredibly backed up. I am thinking about unintended consequences in the real world and wondering how you are going to be able to deal with all this if it happens. But let’s leave that aside and talk about a couple of other things.

Professor Marder talked about social media. That is an incredibly interesting area. How many of your courts have websites? Anybody have a website? How many of you blog? There are a couple of bloggers out there somewhere. How many of you have ever become “friends” with attorneys who appear in front of you—friends on the Internet, blogging? I think the biggest challenge you are going to have as judges from now on, quite frankly, is managing the technology that you are going to be faced with every day. Professor Marder mentioned apps a minute ago. Every day there are multiple new apps.

I spend time speaking about other things, like electronic health records. I don’t know how many of you follow this issue, but there is a daily proliferation of media that is going to track your health information constantly, give it to other people and send it around. This is one of the issues I think we are going to be facing with courts going electronic, as was mentioned before: how are we going to deal with all the information that is protected by HIPAA, for example, where courts will normally enter protective orders, at least for discovery? How are we going to deal with that when we start streaming everything and materials are open?

If I am a citizen wanting to just listen to things, or read a docket . . . why can’t it just be available to me on the public setting?

One of the biggest problems I have on the federal side is I cannot just dial up a docket without registering into a system. If I am a citizen wanting to just listen to things, or read a docket, why should I have to go through that? Why can’t it just be available to me on the public setting—somewhere to look at information? In other words, why can’t I be an anonymous looker at anything that happens? If we are talking about public accountability and the like, I don’t know if that is something to be thought about or to look at.

KATHLEEN FLYNN PETERSON

Just as a moment of privilege, I am going to ask Justice Toal to share a story with us that is so timely. A number of years ago, Justice Toal was a member of the South Carolina Legislature and something she did relates to the recent events in South Carolina. I think it merits sharing the story.

HONORABLE JEAN HOEFER TOAL

This has been a very difficult, and in the end a very poignant, moment for all South Carolinians as we have suffered the loss of life in the assassinations at Mother Emanuel AME Church, and then made the decision to remove the Confederate Flag from our State House grounds. Forty years ago, I was a freshman member of the South Carolina House of Representatives. I had the honor of co-sponsoring, with a proud ex-Marine, my delegative member Kay Patterson (one of the first African Americans to serve in the House in modern times) the very first resolution to take that flag off the state capitol dome. He and I had tears in our eyes as we watched the governor sign the bill on Thursday, and a lot of smiles. It didn’t take us but 40 years, but we got it done.

(Applause.)

There is no doubt about it that state courts are where the rubber hits the road with these very broad ideas of public courts, public records, public access and public trust and confidence—all the amalgam of the rule of law in this country.

I must say that in the practical world of public access to the courts, transparency and public outreach is something many of us do very well. We start with schoolchildren. Most state courts in this country, have some

State courts are where the rubber hits the road with these very broad ideas of public courts, public records, public access and public trust and confidence—all the amalgam of the rule of law in this country.

pretty well-defined public outreach programs. My court—the Supreme Court of South Carolina—has something we call (and I am sure the Pound Institute would like the name) “Class Action.” It is a program where high school and junior high school students read our briefs and cases, and make an appointment for a school class to come to the Supreme Court and hear the oral arguments. When the oral arguments are complete, they interact with the court and we spend about a half an hour on the bench responding to questions from these students.

Public education about the court system—Sandra Day O’Connor made it her life’s work when she decided to retire. She thinks it is foundational to the continued vitality of the rule of law in this country. In an age where civics education is so muted, where it is not even required in many public school curricula around this country, Justice O’Connor, with the caché that her importance in this country can command, decided to hold a conference to talk about what we can do about civics education. As the result, she teamed with Steven Spielberg and George Lucas and created a program called “iCivics.”⁶ Now there are nine different web-based games that can be played by students to learn about their government with the use of avatars and all kinds of wonderful things on this website. They can play the role of attorneys in litigation; play Supreme Court justices hearing cases; play members of the General Assembly or of the governor’s staff. It is an absolutely amazing way of learning how government works.

I got so excited about it that I agreed to be Justice O’Connor’s first pilot in South Carolina. I have a full-time master teacher on my staff and she goes around to school districts all over South Carolina to embed in the curriculum this wonderful iCivics tool with a complete package of teacher-training devices. Kids love to play video games, as we know. This thing is fun for them, but it also is a way of improving the pedagogy. The teachers can start to embrace a new way of teaching that involves effective use of online and video devices to set a

Open courts? Yes. Open *records* is a different situation, where there are a lot more very tough issues that are not easy to decide.

learning curriculum that is very interactive with the student. We are doing this all across the country. I am not alone in this.

I had Justice O’Connor at the Conference of Chief Justices a couple of years ago, and we now have iCivics programs in every state in the country. There are also many other devices that are used: institutes that bring teachers to the court during the summer time to teach them how the court works and to involve them more in disseminating that kind of information.

What do we do with the courts themselves? Public funding is an enormous problem, Professor Marder, with the practicalities of how we could open up our courts more. On the appellate level, many of us now video-stream our oral arguments. That is not an easy thing to do. You cannot just do it with YouTube. We partnered

with Educational Television in South Carolina.⁷ In Massachusetts, they partnered with Suffolk University Law School to do the same thing.⁸ But you have to have some kind of technical ability to video-stream your arguments in a professional way to have them really be available, and archived on your website.

There is not a state in the country that does not have, at the state supreme court level, a very active website. They are usually the portal for accessing court records, because in the modern era, many courts now have a

We, as courts, you and I as appellate court judges, are going to have to make some tough decisions about what we allow and what we don't allow.

web-based ability to access their records. In fact, some of our courts, when we automated, came to it so late and were so poor that we did not have the ability to automate by big mainframe computer systems with expensive licenses for the kind of software you would need. So we automated it on the Internet. South Carolina trial records are entirely automated that way. Our appellate records are

now that way. And the crown jewel will be electronic filing. Those things cost money, but the web is the portal through which the public can have real information about what the cases are and how the system works.

But the privacy issues are tremendous, and particularly so, and part of our responsibility is in areas that the federal courts have nothing to do with: probate matters, child matters, family matters and other things where privacy is a huge issue, and where somebody has to do redacting. You cannot just put the information up there. In our electronic filing system we are going to try to put the responsibility very much on the attorneys. But a third of family court matters now are being litigated by people *pro se*—self-represented. There are enormous issues in a very practical way about how you make all this court information available.

Open courts? Yes, you have some people who close courts, but it is pretty rare now. Open *records* is a different situation, and that is where there are a lot more very tough issues that are not easy to decide. But I come back from transparency to the first part of this program, where we have to build on much of what was said this morning.

Arbitration—particularly post-*Concepcion*—is going to be a very difficult thing for us to navigate in a practical way, because there is a big difference between cell phone cases and other kinds of cases. I wish Justice Scalia hadn't had the ability to set the rules for all of us on the back of cell phone cases, where most of your disputes are probably \$30 disputes. If you had the ability to interact with someone on the web or by telephone, you could probably straighten out that data-roaming charge that was wrong. In a practical way, courts are not very adept at giving good practical help to anybody about a dispute that involves a small amount of money. One size does not fit all. Under a system of "small print" contractual provisions mandating arbitration, we have a spate of closed door proceedings that are now impacting nursing home cases, medical malpractice cases, and other cases of the like. That is a different situation. We, as courts, you and I as appellate court judges, are going to have to make some tough decisions about what we allow and what we don't allow.

In 2004 my court, in partnership with a very courageous Federal judge, Judge Joe Anderson, for whom I am subbing today, changed our rules about secret settlements to put some brakes on the idea that you could shield everything from public view. The members of my court will tell you we have had petitions since that time to depublish our decisions, to sanitize our records, because the parties want to settle and they want to erase the

record. We can stand up to that and simply say, in our jurisdiction, “You can settle. If you don’t want to enforce it in the court, I suppose you could settle very secretly and shield what you have in your files, but you cannot touch our public records. Our public records are just that: public.” We can do a lot about that.

You can settle. If you don’t want to enforce it in the court, I suppose you could settle very secretly and shield what you have in your files, but you cannot touch our public records. Our public records are just that: public.

Maybe this is kind of fussing with my hosts and hostesses in the Pound Institute, but I wonder sometimes whether the class actions which yield little for individual consumers and millions of dollars for lawyers, have killed the goose that laid the golden egg for consumers, with what has happened with our mandatory arbitration. We, as a profession, have got a little blood on our hands, and the Supreme Court has gone so wild in this area, and business has gone so wild—because, again, one size does not fit all—and perhaps class

actions over very small amounts of money, where a lot of money is made, have hurt us a little bit in terms of this whole contract issue that involves arbitration and ultimately public resolution of disputes.

Public access by social media is another very difficult problem, Professor Marder, for us as judges. We don’t think it is wise, and it may not even be ethical for us to “friend” lawyers who appear in front of us. We have to do some very hard thinking as judges about how we use social media, because public trust and confidence is very undermined. There is no way to explain that to a litigant. They just use that term “friend,” because that is what Facebook uses for access, but really we are not friends. Tell that to somebody that is coming in your court with a real live controversy and says, “I cannot get a fair hearing, because that judge is a friend with one of the lawyers.” There are some dilemmas there.

There is wonderful access to be gained in this new world of technology. Fairness versus open courts is always a balance. The commitment of the American people to funding our precious system of the rule of law, the real underpinnings of social order and the social compact in this country, is really a balancing act. Thanks for letting me comment.

JOHN PARKER SWEENEY

I want to thank the Pound Institute for inviting me. Any issue worth discussing has at least two sides. One of the great things about having both DRI and AAJ in the world is we always seem to come up with two sides of every issue.

We have, as you know, our own program, the National Foundation for Judicial Excellence. We get to meet with, as Pound Institute does, about 10 percent of the state appellate judges every year. It is a great experience for us, as I know it is at Pound.

I stand in humble awe of all of you who have taken the robe. I will be the first to admit that I lack judicial temperament. My former law partner, Alex Wright, who is one of our distinguished senior jurists in the Court of Special Appeals in Maryland, does have judicial temperament, and he has it in buckets. I don’t. I am an advocate. That is what I do. A man has to know his limitations.

I could not find another side of the issue in Professor Marder's excellent paper. It is really hard to argue with anything she says in there and the approach that she suggests, which is sensible.

There is an extraordinarily powerful reason why you need to do a much better job of connecting with the American public about what it is you do and why it is important—your very survival depends upon it.

I am here to suggest maybe you ought to pay *even more* attention to what she has to say. First of all, there is an extraordinarily powerful reason why you need to do a much better job of connecting with the American public about what it is you do and why it is important—your very survival depends upon it. Is anybody having trouble with their budgets lately? Is anybody struggling for limited state dollars? Having trouble being heard up at your legislature?

You are now competing in a world in which social media is defining the debate and attracting the attention of the decision makers. Worry about the law of unintended consequences. I will throw in Murphy's Law too. Stuff you cannot possibly imagine is going to go wrong when you innovate.

But today's topic might as well be called, "How can the courts respond to disruptive innovation?" I am personally connected to some of the greatest disruptive innovations of the 20th century. I was born in Los Alamos, New Mexico in 1950. My dad ran back and forth between Los Alamos and the University of Chicago following Enrico Fermi, jotting down formulas, going back to a room where there were 100 mathematicians and mechanical calculators, unbundling these formulas, rolling up the calculations and giving the results back.

There was a little company called International Business Machines, that made typewriters. They found out what he was doing. The Los Alamos Scientific Labs wanted something a little more sophisticated than a room full of guys pounding away on adding machines. It might as well have been abacuses, as sophisticated as it was.

My dad went first to Poughkeepsie, and then Armonk, and worked on what became the first big mainframe computer called the STRETCH system: the IBM System 7030. They made three units initially. One went to the Los Alamos Scientific Laboratory. One went to the National Security Agency (NSA)—and you know what that evolved into. And one was sold for commercial use.

I remember standing in 1959 in a room about this size in which one of those was located, and it filled the room. It filled the room. The central processing unit alone was 31 feet by 8 feet by 15 feet. Today, I have more computing power in my Apple Watch than was in that whole room. That is the disruptive innovation.

Now did Oppenheimer know when he worked on the atom bomb, in hopes to end a horrible international conflict, that it would lead to the nuclear terror that we've lived with since?

The super computers that were built in Poughkeepsie back in the '50s, and went into government and academia and commercial use, became the bones of the Internet. Today the Internet rules our lives in a way that Marshall McLuhan predicted, but he never really understood how enormous the change would be and how quickly it would come.

If you don't figure out a way to balance the public access with the pluralities of interest and confidentiality, you are going to fall behind.

I have been practicing law for 40 years—don't let the baby face fool you. I am pretty old. In that period of time, I have gone from courtrooms that had no technology other than perhaps some lights and a stenographer with a pad of paper doing Gregg Shorthand—not even microphones—to the world today. The other day I got on my computer and I watched former Solicitor General Paul Clement present an en banc argument in the Ninth Circuit, live streamed on their web page.

The consequences of opening your courts in the age of information, where everything flies around instantly, are enormous. But if you don't figure out a way to do it and if you don't figure out a way to balance—as I heard it put so beautifully by our host Chief Justice Hesler—balance the public access with the pluralities of interest and confidentiality, you are going to fall behind.

We talked a lot this morning about arbitration, and I am not really here to harangue about the glories of alternatives to class actions or anything like that. Nor am I here to quibble about whether we should seal a record based on good cause or on compelling circumstances. In a group like this, you should be looking at more serious things like your continued existence, because if you don't compete, you are going to be irrelevant. Like the news media, you are struggling—and you are the best in the business. I read the news media every day, but they are struggling, and so are the courts.

Private arbitration, mediation, other alternatives? As a trial lawyer, I deplore the disappearance of the jury trial as the primary means of resolving civil disputes. But we all let it get out of control. The discovery process has run wild. Most litigants cannot afford to discover a case to trial.

We cannot let the need for greater public access overcome the private interest in confidentiality in certain circumstances. It is your awesome task to balance that.

As a trial lawyer, I deplore the disappearance of the jury trial as the primary means of resolving civil disputes.

DRI strongly supported the amendments to the federal rules that are going to go into effect in December that require proportionality to be considered in discovery. It seems odd, doesn't it? Aren't the defense lawyers the ones who have been accused all these years of dragging things out with unnecessary discovery? DRI and every other defense organization, including my brother Matt Bailey's organization, went down to the Federal rules committee hearings, and we said, "Enough! Proportionality should be considered in discovery disputes. Discovery is out of hand. Our clients cannot get to trial."

Everybody tells us we have the deep-pocket clients on our side, but our clients cannot afford to try cases. If we cannot, nobody can. I submit to you that if nobody can afford to try cases, what do we need you all for? Because all you do are appeals.

I was over in Europe two years ago. You will recall the Eurozone was struggling then, and frankly they are struggling almost as much now. The UK lawyers were saying, "The courts are going to get out of civil disputes." They have no constitutional right to jury trials over there. They said, "We are going to keep the courts for criminal work, but we cannot afford to provide public courts for resolution of private disputes."

Could that happen here? You bet it could. Let 2007, 2008 roll around again. You will have people like Ted Cruz up there, saying not only that we are going to recall the Supreme Court. Why don't we just recall all our judges and go to private arbitration for civil disputes? The next thing you know, somebody will think it is a good idea because it saves some budget dollars, and we're off to the races. You need to compete in a world of hot media, where everybody wants to see—live—what is going on in the world. But you are also going to have to balance the interests of private litigants.

You need to compete in a world of hot media, where everybody wants to see—live—what is going on in the world. But you are also going to have to balance the interests of private litigants.

One of the most seminal cases since I have been practicing law was *Roe v. Wade*. Would that case have been taken all the way up to the United States Supreme Court if Roe had been forced to use her real name and be identified and become part of the public debate surrounding that issue? Instead, the courts allowed her to proceed under a pseudonym, and the law was changed. We cannot let the need for greater public access overcome the private interest in confidentiality in certain circumstances. It is your awesome task to balance that.

PATRICK A. MALONE

Thank you, Kathleen. I want to riff briefly off of something Chief Justice Toal talked about, and that is the silence that happens at the end of so many cases, which I think is often dealt with too casually, and has bad consequences for not only the litigants, but courts and our entire civil justice system. That is the process of secret settlements, which involves, I argue, silencing, shaming, and isolating the plaintiffs. Let me just mention three names to you.

Stella Liebeck had the misfortune one day in a McDonald's drive-through lane to spill a cup of coffee in her lap. She won her lawsuit. The judge cut down the punitive assessment because he thought it was too much. It was one day's profit of the company of McDonald's. She then settled her case with them and she agreed that she would never speak about it again. That opened the door for her to become the poster child for claims about ridiculous litigation, because no one could fight back and say, "Wait a second. What really happened to me was that this company heated their coffee so hot that it was like a napalm bomb and you could not even put it in your mouth, much less your lap." That is Stella Liebeck.

Another name I want to give you is Sue Sheridan. Sue is the mother of a little boy who suffered a condition called kernicterus when he was born. It is on the list of totally preventable so-called "never events" in hospitals, meaning it should "never" be allowed to happen. Kernicterus is brain damage from jaundice, failure to treat jaundice. There are very simple ways to treat it. It is on the list of "never events," along with such events as the hospital nursery giving the wrong baby to parents, or a surgeon cutting off the wrong limb. Sue Sheridan settled her case confidentially for her little boy. Years later, she felt bad about it, and she decided to speak out, and she gave an interview to *USA Today*. Suddenly, she started getting these phone calls late at night from women who said, "I cannot tell you my name

The process of secret settlements involves, I argue, silencing, shaming, and isolating the plaintiffs.

and I am not even sure I am allowed to speak to you, but this happened to my child, too.” She dealt with people who were absolutely terrified, because they realized after the fact that they had signed an agreement that said, “If you talk in public, you give all the money back,” as so-called “liquidated damages.”

Another name that is in the news this week is Andrea Constand. She sued a man ten years ago and then settled her case with him. Just this week portions of his deposition in that case were released to the public. It was actually released (and I urge you to look this up online) because of a motion for sanctions by the plaintiff’s counsel for over-the-top deposition conduct of the lawyer defending the deposition. It is a 66-page motion that is larded with all kinds of quotes from the little bit of testimony that they were able to extract in between all the objections of the defending lawyer, including the quote that was in all the newspapers, which was that this man had purchased Quaaludes with the purpose of giving them to young women to have sex with him. His name is William H. Cosby, Jr., also known as Bill Cosby.

Ms. Constand’s case was sealed by a federal judge for nine years until this past week, when the Associated Press went to him and said, “He is a public figure. There is public interest here.” The judge invoked a kind of hypocrisy rule and said, “This man seems to be saying one thing in all of his public appearances, but maybe acting a different way in private. I am going to release at least the deposition quotes that are in that motion.”

My take on it was, “Wait a second. What about the other litigants who wanted that evidence that they were blocked from getting, where he made some damaging admissions despite the interference of his lawyer?” For many years, it was sealed off from the public.

You might say, and many people do say, “These are grown adults who are entering these agreements. Not only are they completely voluntary agreements at the end of the case, but they are advised by an attorney. What is the beef?”

With secret settlements, it is predictable and highly foreseeable that collateral harm will occur to people other than the participants who enter into these agreements.

I was trying to think of an analogy, and I was imagining maybe, as ludicrous as it sounds, piloting a group of judges here in a car with me, a rental car, and announcing to everybody, “We are going to drive to Québec City at 110 miles an hour. Anybody who does not want to take the trip at that speed can get out of the car, but those who stay will have some fun. We could get to the end of our destination perfectly fine despite some hair-raising turns here and there.” But then when we pulled up at the end and the highway patrol officer pulls us over and says, “I am sorry. You were clocked at going a ridiculous amount of speed.” Do we then say, “Everyone here in the car agreed to that and we haven’t hurt anyone. What is the big deal, Officer?” Of course not, because plenty of people outside the car were put in harm’s way, without any agreement by them.

With secret settlements, it is predictable and highly foreseeable that collateral harm will occur to people other than the participants who enter into these agreements. Let me just tell you how it goes down from my point of view as a plaintiff lawyer. This happened to me hundreds of times, until I finally got wise and put out a letter in advance of settlement negotiations saying, “We will not agree to any secrecy except for the sum of money.” Why is that? Because my clients have an interest in keeping prying eyes from knowing how much money they received in the settlement. But anything that has happened on the public record stays on the public record.

Now what happens to most lawyers on the plaintiff side is that they agree to all the terms of a settlement, and then all of a sudden they are told, “Just one last thing. There is this confidentiality language in the release. We just forgot to tell you about that.”

What we need is some recognition from our courts that there are some adverse consequences here to the public from secrecy in settlements.

When I have gone around the country talking to plaintiffs’ lawyers about why they have to resist this, I mention the “marshmallow test,” which was developed by a famous psychologist at Stanford named Walter Mischel. He tested children on their ability to sit in front of a single marshmallow, with a promise that they would get two marshmallows if they just waited until he came back in

the room. Some of the children, and many plaintiffs’ lawyers, are not able to resist that marshmallow that has a number on it and is smelling awfully good. It has just been toasted to a nice brown.

What do we need? What we need is some recognition from our courts that there are some adverse consequences here to the public from secrecy in settlements. We need individualized consideration of whether courts will be complicit when lawyers come to judges asking for approval of secrecy or sealing of a record. We need rules like the rules that Judge Toal mentioned that they have in South Carolina. Thank you.

RESPONSE BY PROFESSOR MARDER

First, I want to thank all of you for your comments and insights. As you prepare to go into your small groups afterwards, what I would like you to really talk about and tell me about are the things that your courts are doing in terms of reaching out to the public, because even just from listening to the comments here, I have gotten more ideas about ways courts are doing things that don’t necessarily make it into publications or the press.

The other thing I want to do is learn about your concerns, because of course you are in the trenches. You are in the courts. Your experiences inform my research and my writing.

I did want to comment on some of the particular suggestions that were raised. One is, “How do we know what social media the public wants courts to use?” One way is to actually ask them. That is the virtue of social media. You can get a response. Another way is that you can study what people use. For example, a number of state court websites have audio and/or video of the oral argument available. Are there hits on the website? Are people using these things? How long are they staying on for? What are they watching? We can be informed. We don’t have to guess. This is done just by studying the hits. It is not invading privacy. This is a way of actually finding out what people are using and how they are learning.

Even those justices who are reticent about talking to the press will talk to schoolchildren. That is one area where courts can do and are doing something.

I thought Judge Toal’s suggestion about the classroom outreach that judges do is a great one. I can tell you also that the U.S. Supreme Court justices do this. While our debate was focused, over lunch time at least, on cameras in the courtroom and cameras in the Supreme Court, and I understand why that is a focus, there is

outreach going on all the time that we don't see. Those of us who worked in the court did see justices doing that work that Justice O'Connor later did with full force, like meeting with school children, talking to groups, and trying to explain to them how the Supreme Court works. Even those justices who are reticent about talking to the press will talk to schoolchildren. That is one area where courts can do and are doing something.

There is a tension between privacy and wanting to preserve some confidential materials and making sure that cases can go forward.

I think from some of the other comments that came about, you understand that there is a tension here. There is a tension between privacy and wanting to preserve some confidential materials and making sure that cases can go forward. Sometimes they need some privacy. But there is also the need for outreach and for publicity, especially with finished opinions, published opinions. The question is how

to strike the right balance. I did not propose any one hard-and-fast rule. I tried to give ways of moving forward slowly toward a good goal, which I think is transparency, understanding that it is not met by hard and fast rules. It is not always met by doing the easiest thing. The questions I offered are a way of trying to think more deeply, to proceed with care, but to proceed nevertheless.

I want to ask you to share with me your experiences because I am sure that your courts are doing things. One of my principles was that we can learn from pilot programs and we can learn from each other. That is what I hope we will be doing this afternoon.

QUESTIONS AND COMMENTS FROM THE FLOOR

HONORABLE EILEEN C. MOORE, CALIFORNIA 4TH DISTRICT COURT OF APPEAL.

Several years ago at a judicial conference, the discussion was about whether or not we should have video recording of proceedings in trial courts versus court reporters. At the time in California, we did not realize how strong the Court Reporters Union was. No longer do we discuss that.

But at any rate, they showed us about 20 seconds of a woman judge being somewhat short-tempered with a self-representative litigant. It later turned out that the entire day had been videotaped and that judge showed understanding, kindness, patience, good temperament throughout the day, but this 20 seconds was about a quarter to five in the afternoon, and the judge had instructed the self-represented litigant to make a certain list. And the litigant just refused to do it.

All I could think of when I saw that 20 seconds and realized how it was taken out of context was not what we heard at lunch, that the Supreme Court may be afraid of being embarrassed by Jon Stewart, but that if that judge were opposed in an election, it would only be that 20 seconds that would be shown in the campaign ads. It would not be the entire day of patience and understanding and kindness. So I was just wondering how elections play into this openness and if the professor would respond in some way.

PROFESSOR MARDER. That is a great example. I do think that it is important to ask whether judges are being elected or being appointed, because one of the arguments that gets made for the federal courts is that the state courts have been doing this for a long time without any problems—having cameras in the courtroom. But

I do think state court judges have a different concern and a different interest. In some instances, it can be helpful to be video-recorded in court because then the public gets to know you. The video shows you in a good light. If you have to campaign, if you have to be elected, you want to be known. Whereas federal court judges don't have that interest, don't have that concern. They don't need to be known once they have been appointed. I think one reason we have this disparity between how the state courts have gone and how the federal courts are going in terms of cameras has to do with the different systems of appointment versus election of judges.

CHIEF JUSTICE TOAL. Professor, I just have to weigh in a little bit on the other side of that. Let me tell you something. Those life appointments don't insulate federal judges from preening and prancing. You can start with the U.S. Supreme Court itself. The fact that they are elected for life does not keep them from preening and prancing, whether it is in writing or in some of the speeches they make. I don't buy that.

I will tell you in the practical world of televising court proceedings, we are darn lucky in state court if we have some entity that would like to televise us, because we don't have the money to pay for it. That is for sure.

In my state, the judges are in control over whether or not and under what circumstances a TV network is going to televise the court. The Chief Justice-Elect of our court, Costa Pleiciones, presided over some of the most difficult trials in our state, and he made some good, wise judgments about when to televise—for instance, the Susan Smith case in South Carolina, where the mother drowned the two children and then made up this story that some African American had stolen her children. The trial judge there did not allow a good deal of that trial to be televised because it was being tried in a very small town where he was fearful he would not get a jury if the trial were televised. The community was so upset and fearful and divided about this thing. That judge made a wise decision.

I have never seen a judge in my state make a decision [about whether to televise a trial] on the basis of whether they were going to get reelected.

I have never seen a judge in my state (and we have had a lot of trials, televised by everybody from educational television to the commercial outlets), I have never seen a judge in my state make a decision on the basis of whether they were going to get reelected. Let me tell you, the question of whether it is a legislative election, or gubernatorial appointment, or public election is still all very political, but they make the right decisions, in my experience.

RONALD HEDGES. Let me just follow up with one question. It sounds from your question as if you are suggesting that there might be situations when a trial judge wants to censor what he or she decides to put out. Is that correct? You are looking at what you are putting out instead of doing a stream of everything.

JUDGE MOORE. Not at all. In fact, on the appellate court I enjoy a retention election. But if I were in a state where I had to worry about that 20 seconds being used against me, I think that I would be in fear the entire day when that camera was on me. I am just wondering if there is any kind of data.

CHIEF JUSTICE TOAL. That kind of stuff has been used. The sound bites have been used. I know of three colleagues of mine who had very tough reelection campaigns and one of them snoozed on the bench one time and all the brilliant questions she answered was not what was publicized—just that little snooze incident. She survived it. That is just part of life.

JOHN PARKER SWEENEY. May I just add something? It strikes me that the fear that many judges have about being misjudged by the public based upon just too narrow a snippet of an experience in a particular day, obviously is something shared by most of our politicians both in the Executive and the Legislative Branch. They have learned to live with it.

Just consider that the public that is going to be looking at those TV snippets of you is the same public that sits in your jury boxes and decides the cases based on the evidence. I have a lot of confidence in them not being misled .

Frankly, you are all human beings and you are all imperfect. You will have good days. You will have bad days. But just consider that the public that is going to be looking at those TV snippets of you is the same public that sits in your jury boxes and decides the cases based on the evidence. I have a lot of confidence in them not being misled that way.

PROFESSOR RESNIK. Let me offer a mixture of a question and a comment. I am struck about the need to aggregate and disaggregate issues. I think we need to distinguish questions about whether to stream the Supreme Court and intermediate appellate courts, as contrasted with lower courts, and to consider having different tests for when to do each level. The imposition (or pricing, if you will) on individuals who are witnesses and jurors at the trial court is not the same as for those who are judges and lawyers in professional roles at trial or appellate levels. That is a sort of disaggregation that I suggest.

On the aggregate side, the Consumer Financial Protection Bureau just reported that, contrary to Chief Justice Toal's reports on consumer class actions, such aggregate proceedings provided a good deal by way of remedy that arbitrations do not. As we discussed this morning, virtually no one pursues individual arbitrations for low-value claims. If there is going to be private enforcement of the law, as compared to public enforcement of the law, one must have aggregation; absent class actions, you cannot proceed. And to the extent that we want to distribute the authority across the public and private sectors (which does not preclude regulating misbehavior of lawyers, whether they are working for individuals or aggregates), one has to rely on aggregation, on class actions.

I just wanted to tie some of the comments together. I agree with John Sweeney. The courts really need to worry about their future. Further in bringing up a comparison to Europe at lunch time, Adam Liptak talked about how the U.S. has often made court records more available than do other countries. But to have such records, one has to be able to go to court and bring cases.

The U.S. has often made court records more available than do other countries. But to have such records, one has to be able to go to court and bring cases.

Europe's view of consumer arbitration is that it cannot be used to preclude access to courts, but rather that it should function as a supplement to courts. Consumer ADR, "CADR," is explained as augmenting access to courts. And one of the parts of the conversation we have not had today is how to create more ports of entry to bring claims, and that doing so need not preclude other ports of entry. Under Article 6 of the European Convention on Human Rights (and under Article 47 in the

more recent treaty⁹), individuals have a right to an effective remedy. For example, an online dispute resolution system was challenged in a case involving Italy; the European Court of Justice held that Italy can require online dispute for wireless providers, but with limits. The rule could not be applied to those without computer access, and using the alternative process tolled the time for filing in court, and after that process, one could still go to court.

I think what we have been talking about is zero-summing. You either have no class actions or you have all class actions. You either have all TV streaming of court proceedings or no TV. You either have arbitration or courts. And if we are going to do what John Sweeney properly calls for, and Nancy Marder's paper is about—is asking us about how can we move courts forward to the 21st century—one has to think about how one can add to the repertoire rather than cut things out, and how to see one avenue as not precluding the other.

If we are going to . . . move courts forward to the 21st century, one has to think about how one can add to the repertoire rather than cut things out, and how to see one avenue as not precluding the other.

Notes

¹ U.S. Dep't of Justice v. Reporters' Comm. for Freedom of the Press, 489 U.S. 749, 762 (1989) (Stevens, J.).

² See <http://www.illinoiscourts.gov/>.

³ See <http://www.judgejudy.com/>.

⁴ Alex Kozinski & John Major, *Jurors on Film: Why Putting Cameras in the Jury Room Is Not as Crazy as You Think*, 99 JUDICATURE 7 (2015).

⁵ Morton Denlow & Jennifer E. Shack, *Judicial Settlement Databases: Development and Uses*, JUDGES' J., Winter 2004, at 19.

⁶ <https://www.icivics.org/>

⁷ <http://scetv.org/>

⁸ <http://www.suffolk.edu/sjc/>

⁹ Charter of Fundamental Rights of the European Union art. 47, Dec. 12, 2000 O.J. (C 364) 20, available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

CLOSING PLENARY

KATHLEEN FLYNN PETERSON. We are going to start our final segment of the program. At this point, I would like to turn the program over to our paper presenters and ask Professor Resnik, Professor Marder if you would like to make any final comments.

PROFESSOR RESNIK. Our subgroup apologizes for not getting to every discussion group, because we got into such lively conversations in some of them that we could not easily stop. In the very engaging conversation that was had in the last room we were able to join, there was a terrific exchange about the vast difference between many kinds of arbitration and the ideal, of human beings jointly venturing for a variety of purposes and crafting their own custom-made tailored agreements to figure out their own custom-made dispute resolution systems. That's not the focus of the criticism or the concern. Of course, there is a lot of private ordering in the world—thank goodness. I'm worried that, from the perspective of people committed to contract and private ordering, the current Supreme Court jurisprudence does not appreciate the importance of *real* contracts. The Court undermines them by lumping together real agreements with what goes into the bundle that comes with the purchase of goods and services, and deeming that bundle, provided by the manufacturer, a “contract.”

I'm worried that, from the perspective of people committed to contract and private ordering, the current Supreme Court jurisprudence does not appreciate the importance of real contracts.

PROFESSOR MARDER. I would thank everybody for their small group discussions. As I circulated around, I came in and got bits and pieces. That was a great approach, because it exposed me to so much. I think a lot of good discussion also went on after I left and before I got there. If you have outreach efforts that your courts are doing and if you want to send me an email or send Jim Rooks an email, let me know. That would be great because I would be able to add that to this paper.

Similarly, I got a lot of concerns from judges, particularly as it involves social media. I want to be very sensitive to those concerns. Again, if you feel like communicating, that would be much appreciated.

Also, if you want to get on the mailing list of the Justice John Paul Stevens Jury Center,¹ please again send me an email because I can keep you informed as to what is happening, for example, with those websites for prospective jurors as we go over the data this summer. Again, I invite two-way communication to continue. I thank you for the communication we have had so far.

LESLIE BRUECKNER. I wanted to add that another question that seemed to come up in almost every one of the individual discussions that I attended was whether arbitration clauses are essentially immune from judicial scrutiny at this point. Is that the upshot of the Supreme Court's decision in *Concepcion* and the other recent Supreme Court rulings? The answer to that is "absolutely not." The FAA does not preempt state laws, for example, governing contract formation or unconscionability. If you have an arbitration clause that is before

If you have an arbitration clause that is before you, there is always a threshold question of whether a contract has even been formed. That is still a matter of state law.

you, there is always a threshold question of whether a contract has even been formed. That often goes to whether there was meaningful assent, for example. That is still a matter of state law. If you find that there is no valid contract, the arbitration clause cannot and should not be enforced.

Beyond that, state laws of unconscionability are still alive and well. For example, if you find that an arbitration provision imposes an unfair limitation on the statute of limitations or if the arbitration agreement is unfairly one-sided, lacks mutuality, that sort of thing, it is still within your power and your authority to strike down that arbitration clause. The Supreme Court in *Concepcion* merely held that a class action ban within an arbitration clause was preempted by the FAA because, in the majority's view, class action proceedings were inherently hostile to the arbitral concept. I just wanted to make clear that there is still a huge and very important role for judges to play when it comes to determining whether or not to enforce arbitration clauses.

There is still a huge and very important role for judges to play when it comes to determining whether or not to enforce arbitration clauses.

ADAM LIPTAK. I am in a roomful of lawyers and it is the journalist who talks so much. I wanted to say maybe two things. One is that, as we made the rounds, and as Nancy was saying, you only get a little snapshot. It is also a wonderful example of laboratories of democracy of different judicial systems taking different approaches. I thought I heard two basic kinds of things. One is people who are nervous and don't want to do

The court's self-interest really ought not concern us. It is the public's interest that ought to concern us. And the public has an independent interest in seeing what is going on in the courts.

things because of imagined parade of horrible concerns. And a very significant number, maybe a majority, of jurisdictions who say, "We do e-filing. We do live streaming. We do cameras. Never had a problem." There are legitimate concerns and fears. But at some point, you look at the other laboratories and the other laboratories seem to be doing just fine with things that are good for public access.

And the other thing I want to say is to supplement a way Nancy presented the outreach the court should do. The courts have a self-interest in making sure the public understands them correctly. And that is fine. I am all for that. But I am not sure it is the right way to think about it. The court's self-interest really ought not concern us. It is the public's interest that ought to concern us. And the public has an independent interest in seeing what is going on in the courts.

JOHN PARKER SWEENEY. I don't want to stand with my back to half the group. You might throw tomatoes. I just want to reiterate how important your role is in our system of government. Part of what makes America special, and part of what makes us the envy of the rest of the world, is the ability to resolve our disputes in a fast, fair, and efficient way. As long as our court system has credibility with the public, that will continue. But in a world where the public wants to reach out and touch and see and feel all aspects of its government, if you don't greet the public, if you don't show yourself and what you do to the public, you run the risk of losing that credibility. That is one huge challenge.

Again, I don't want to get into the brawl over class actions and arbitration and stuff like that, except to say if the courts were resolving all the claims before them in a fast, fair, and efficient way, we would not be having arbitrations. We would not have alternative dispute resolution. Those mechanisms have grown up as a

necessary part of a process which does not work as well as it should, which is too expensive, too drawn out and in some instances not fair. If you are looking at the Class Action Fairness Act, why did that come about? If you are looking at the Federal Arbitration Act, why did that come about? Focus on doing what you do best, which is resolving disputes for the people in a fast, fair and efficient way. You are doing the Lord's work. God bless you.

Focus on doing what you do best, which is resolving disputes for the people in a fast, fair and efficient way.

LESLIE BRUECKNER. I think that it is a wonderful idea for the courts to do their work quickly and efficiently. I don't think that the proliferation of arbitration clauses is due to judicial tardiness. The reason that so many corporations like American Express and AT&T have arbitration clauses is because they want to block consumers from having any way to get recovery. That is the reason for all these arbitration clauses. It is so that they could have class action bans that will wipe out consumer recoveries.

KATHLEEN FLYNN PETERSON. This has been a tremendous day. We have had a lot of lively discussion, lots of points of views raised. All of this would not have happened as effortlessly as it appears it has without a great deal of work. I hope that all of you will join me in thanking Mary Collishaw, our executive director, and also Jim Rooks, our Forum reporter, for always being here and always keeping us on task to get this program organized and planned.

And a special thanks to our paper presenters, Judith Resnik and Nancy Marder. The work that you did beforehand has made this a very successful program. For our panelists and the time that you have taken. Adam Liptak, for your time and for speaking with us. And for all of our discussion group moderators, who I see scattered throughout the room. Again, thank you all. We could not have had this program without everyone's efforts.

Notes

¹ <https://www.kentlaw.iit.edu/institutes-centers/jury-center>.

THE JUDGES' COMMENTS

In each of the discussion groups, the judges were invited to consider identical pre-ordained questions relating to the papers and oral remarks. The judges devoted more time to some questions than to others, and they raised other interesting topics.

Remarks made by judges during the discussions are excerpted below, arranged according to the discussion questions. These remarks have been edited for clarity only, and the Forum Reporter did not intentionally alter the substance or apparent intent of any comments. Although some comments may appear to be responses to those immediately above them, they usually are not. Actual conversational exchanges among judges are indicated with dashes (—).

The excerpts are individual remarks, not statements of consensus. For general points of agreement that arose out of the discussion groups, please see page 191 of this report. No attempt has been made to replicate precisely the proportion of participants holding particular points of view, but we have tried to ensure that all viewpoints expressed in the group discussions are represented in the following excerpts.

What factors influence judges' willingness and/or ability to conduct public proceedings?

One of the things that discourages public trials versus private adjudication in our state is the deadlines. Trial courts are constantly monitored by our administrative office as to their clearance rate, so every case that has to go to trial represents a potential sanction for the judge—not a sanction in the sense of a monetary sanction, but you are being watched very carefully in terms of your docket clearance. The more cases you try, the worse you look.

In the appellate courts, our willingness to conduct public hearings is affected by three things: one, to enhance the legitimacy of the courts; two, it's a form of public outreach; and three, as a corollary to that, it's a way of educating our public. To deflate public cynicism, we need to be less isolated, less insular than we are. I know several judges at the appellate level who say that, "Well we can be more objective because we operate in this vacuum." That's a lot of BS.

As a defense lawyer representing corporate America, I constantly asked for protective orders. And as a plaintiff's lawyer for seven years, I constantly fought against protective orders. I'll be honest. Until today I never saw them as a way of limiting public trials. Those issues do come up before us in the appellate

courts—in fact, we have one pending right now on the language in a protective order. I think I’m starting to see this in a different light after this morning’s discussions.

In my experience doing commercial litigation before I went on the bench, it was not at all uncommon to have those kinds of stipulated agreements, and I think it would be very hard for the judge to challenge it if neither advocate is arguing against releasing certain documents. But where I found the difference came is when you start stipulating summary judgment materials or trial exhibits. At that point, I think the better judges would say you’re going to have to justify sealing anything. I don’t care about your stipulated confidentiality discovery order. Anything that gets sealed has to be justified to me.

If they agree to seal something for whatever the reason, because it’s a trade secret or whatever reason, generally I, as the judge, would not intervene. And as a lawyer, I didn’t want the judge to impose their own view on whether our stipulation was acceptable or not.

In my Northwestern state the open courts provision has been interpreted to preclude private court sessions and in camera proceedings with judges and lawyers.

A lot of times people want to buy their peace and buy the confidentiality. Should the courts be interfering with it?

In our Midwestern state we’re trying to bring these people back into the court system. We started last year with a business court. I don’t know how successful it’s going to be. We’ve had two years of a pilot program. We were hearing from companies that they’re not really satisfied with arbitration anymore, and they’d rather be in the court system. So we’re giving it a shot.

Our judges are all elected in our Southeastern state. The business court judges are appointed by the governor. Due to some interesting politics in our state, they now have to be confirmed by the legislature. That is a new procedure. Those judges typically have come from commercial litigation practices, and they are middle-tiered when they come in. These folks are taking a really big hit to do this job. Our salaries are not great.

In our Southeastern state we’re elected, and a judge has to raise money from certain interests. I wonder if judges might think, “Boy, I would love for this case to not be on my calendar because I need to raise money next year for my election.”

I’m in a Southwestern state, and I was a long-time trial judge. I teach docket management, and I have to agree that docket management is probably the foremost reason why some cases are mediated, arbitrated, etc. Sometimes the legislature dictates it, but certainly the volume of cases dictates that you manage your docket. If somebody announces to me that they have a six-month jury trial, how many cases could I try other than that case in a six month period?

I think the pressure to have alternative methods is a result of the under-resourcing of the judiciary. I think that the lack of resources we all experience at all levels of our court system, giving us more work than we can do with the resources that are provided to us, results in the docket management pressure for the judges. It results in the inclination of litigants, at least where it's voluntary, to go through mediations and arbitrations and things like that. That's different from the adhesion contracts that we're talking about, where you really have no choice. Arbitration is really a separate issue from this.

Frankly, ADR *is* trials now. The courts are the alternative. But all the ADR methods are inherently not public and therefore are deemed value-negative. The other trident prong in courts now is "problem solving" courts. We don't solve problems necessarily by litigation, and so we've been encouraged to send people to mediation under the concept that the social science literature says there's greater consumer satisfaction with results achieved in a self-determined manner, and this isn't just business-to-business. This relates to our huge domestic relations docket, the debt collection docket, the small civil proceedings. Not the mammoth ones, but the ones that are affecting whether or not somebody gets paid, gets to eat, gets to see their kids, and the things that are fundamental. So there is a general push toward non-litigation alternatives to resolve disputes, certainly influenced by cost. It's a push that's not just from the court system. It's public. The public has been surveyed over and over again and they have said the courts cost too much, take too long, and we're never done.

One of the problems I think is the way society gets information and does things now. Everybody wants an answer *now*. You get an email. If you don't get back in five minutes, you get a phone call. Everybody wants a result *now*, and wants to know what's happening. They don't want to know two years from now or four years from now. My kids won't even call me on the phone. I have to text-message them. They want an answer now, and where are they going to be 20 years from now when they're running the show? What will they want for a court system? And I think that's driving a lot of people to leave the courts, too, because they want to know next week what the result is. Our court system is not designed to provide quick results for dispute resolution. So, as a court, we have to figure out how we can be relevant in this society where everybody wants instant information. I think those are the things that are driving us to maybe look at the way we do business and change the way we do business and change the way people settle disputes.

For a number of years I was a trial court judge, and most of those years I was in the family division. One of the perennial issues that arose there was the cost of justice. You might have two pro se litigants, as we often had in the family court, or one pro se litigant and one represented litigant. As a timesaving device, you could have judges sending these taxpayers to a master, imposing on them a private cost attendant to their divorce or their custody battle—an additional cost layer for the adjudication of their matter, for which presumably they have a right to be heard in court. If we take a whole class of these cases and put them before a master as a matter of course, by rule or by practice, you've now shifted from a taxpayer-supported system to a user fee system. There's a larger issue for the whole system.

You can't try all the cases that come before you.

I think part of the problem of the lack of jury trial experience among many lawyers is that it has become impossible to try little cases. In the first five years that I practiced, I had a jury trial that I lost for \$1,250. You had intersection collision. Somebody said, “The light was green.” The other one said, “No, it was red.” Now everybody has to have experts. They’re very expensive.

There isn’t a discretionary call to be made on whether a trial is open or closed. The trials are open. The court is open, at least in my jurisdiction. The courts are simply open, and that’s the end of that. If you’ve got a juvenile crime victim, sure, there are going to be some restrictions. But short of that, the court is going to be open.

At least in our Mountain state, I don’t think there’s been an intentional attempt to reduce the number of trials. Usually it’s a matter of resources. I was a trial judge for 15 years, and we didn’t always have the time to devote to all the cases that people want to try, so we try and triage and decide which ones we need to deal with and which ones can be dealt with through some other process.

In our Midwestern state, not only do the trial courts have more work than they can do, but the supreme court adopted time standards that put them on fast track to try to keep the dockets moving. So even if they were to catch up with the numbers, they would still be dancing as fast as they could.

The decisions would always be public in my state. Everything we put out, whether we designate it as published or not, is picked up on Westlaw and Lexis as well as made available on our Internet site.

A judge who spoke to us at the tour of the Québec Court of Appeal yesterday said that they are required to publish 100 percent of their decisions—but he doesn’t think 100 percent of them are *worth* publishing.

In our Southern state, we abolished unpublished opinions.

In our Southeastern state, our trial-level business court decisions are published. Those are precedent for each other, but for no one else.

According to my state legislature, the problem is laziness. Judges are lazy, and they don’t work. They have started recording our trial court judge’s bench time. And the clerk of court sits there and monitors them with time clocks in our trial courts. Some of the judges have taken to reading everything in open court. You will come into the court. You will see the judge sitting on the bench. He will be reading, but because he is in court, they are recording his time as time spent in open court. The judge is sitting there reading a stack of briefs, because he is going to have motion hearings later. And if our legislators see us on the street dressed in casual clothes, they assume we are not working.

If there is a situation where the parties enter into an agreement, are we as judges to say, “No, you can’t do this, because our role is to make sure the public is protected?”

We have to remember that they are always accusing the judiciary of being legislators. How do we step into these different roles? If the parties want to seal records, I think we’re somewhat limited in those conditions.

I think it’s our role as a judge to keep the records open. Just because two people who are in a litigation want you to seal the records, I don’t think it’s right.

—It’s a public right.

—It’s a function of democracy.

—Responsibility.

—The public’s constitutional rights.

—It’s a duty to keep all proceedings open unless you’re dealing with minor children.

—Everything’s public unless specifically prohibited by law.

We should do the things that promote public trust and confidence. Several years ago, we opened up juvenile protection proceedings to the public and I think that turned out to be a good thing.

At least in our Midwestern state, I think every judge is willing to hold a public trial if somebody wants one. I don’t know who marketed public trials, but (1) there aren’t many trials anymore and (2) they’ve always been public but people don’t come.

In our Southern state, the trial judges that I know miss trying cases. They feel like everyone settles, everyone goes to mediation or arbitration. The attorneys’ trial skills are deteriorating.

In our Southern state, we have some case law that says you can’t seal a record by agreement. The judge has to make a determination that it’s appropriate.

Another consideration, particularly with respect to protective orders and transparency issues, is to what extent are people bargaining with the rights of a third party? An obvious example is a product defect that creates a real danger to the public. A defendant says, “Well, I’d like to keep it a secret so that we don’t have to pay most of the people that are injured in this way, and then we can continue to fight like hell to deny that it’s going on.” And in that case there’s a third party who is not represented, and that’s the problematic situation. The court ought to be aware of those third party issues. Ideally, the third party ought to somehow be represented by an actual lawyer.

What’s wrong with the truth? If, say, a car manufacturer creates a defective product, what’s wrong with everybody knowing that? That’s our job, to discover the truth.

Does the recent trend toward private adjudication provide the “effective vindication” Professor Resnik discusses?

I don't think so. If you look at the statistics, very few people will take advantage of the arbitration procedures, because they can be very burdensome, and it's awfully expensive to do that sort of thing.

When I see “vindication,” I think about the public interest, which is different from compensation for an injury. And I'm not sure that mediation vindicates.

Arbitration takes a long time and it's expensive but in our Southern state, our supreme court just ruled that all arbitration clauses must be arbitrated in-state. We do not have any out-of-state arbitration allowance. It preempts the federal agreement.

—I love mediation. Our appellate court has automatic mediation for court cases. After we screen the briefs, we mediate probably 20 percent of our cases. They are mediated in 60 days and then, if they can't settle, it goes on up to us as the judges. If two parties can settle, that's good for everybody. But it's mediation, not arbitration. And it's not mandatory.

—Our Southern state did that same thing. We basically followed Florida's appellate mediation program and have had fantastic results. It's mandatory. Everybody's tickled to death with it, and it's just an alternative that's enabled us to keep our docket moving.

—The cost of appellate representation is a great prompter of mediation. It's a great argument for both sides. “Let's get this over with.”

—We have started appellate mediation in our Midwestern state, and there's a strong push for it.

I don't like arbitration. I hated arbitration as a trial attorney. But isn't the question more about whether the parties know what they're getting into? Do they fully understand what arbitration and mediation are? And if they want to get into the arbitration, should we allow them to?

I think there's a misconception that arbitrations always happen very quickly. When I was in private practice, I had some that took two, two and a half years before you got an arbitrator. It's nonsense that it's a lot faster. And as a judge I'm sorry to say that an industry has been built up where judges are funneling cases to their retired comrades, who are charging very high fees. So you're not saving money on the plaintiff's side, and it's not happening very quickly. So I don't see arbitration as any savior of the system.

I don't think anyone with a \$35 beef with AT&T is going to be any more likely to pay a civil filing fee and go to court and have it out than they would be to go to arbitration, pay that fee, and have it out. I think it's been overlooked in our discussion that 99.9 percent of those kinds of things are resolved by me calling 611 and saying “I'm unhappy with this charge on my bill.”

I don't really agree with the notion that the cell phone document isn't a contract. All contracts have some provisions that are take it or leave it. And I think in the Verizon case if there were really a situation, if there were a marketing advantage to be gained, a company could say, "We offer a cell phone contract that doesn't restrict your right to sue us if we do something wrong". I just don't think the public generally cares that much about that particular right in the context of a cell phone. Having said that, those provisions clearly are intended not to steer people to arbitration but to prevent them from bringing claims at all. So I don't think they should be enforceable.

Even where I think arbitration is best and provides "effective vindication," I see from Professor Resnik's paper that it has downsides. I started out my career doing a lot of securities industry arbitration which is considered kind of the model. It's overseen by the SEC. It's overseen by the Government Accountability Office. I did it on the defense side for years and then I flipped and did it on the plaintiff side. I thought it worked well on both sides. But, having read Professor Resnik's paper, one thing that comes of it is that you have to be a specialist to do it. And it does prevent a body of law from growing. So there's very little case law on customer disputes with brokerage firms, because it's all getting resolved in arbitration. So I think those are downsides even when it works well.

I think the question for just about any long-form proposal is, "What's going on here? Is this a proposal to try to make the system more active, more economical? Or is somebody trying to tilt the playing field?" Professor Resnik made a pretty compelling showing for the proposition that arbitration is tilted in the playing field.

The answer to the question is, "It depends." Certainly the categories that Professor Resnik talks about, the types of cases she talks about help to support the points that she makes. But when you're talking about family law and the need to resolve those issues in a way that's not destructive of the continuing relationship between the parties, and to get the parties quickly on their way, then the observations that she makes don't apply to these.

There are two questions. One, it has to do with arbitration's remedial affect, and the other with its deterrent effect. As a practical matter, even if all the people who are being sent to arbitration came to state courts, they'd come pro se and you'd still have a giant and a fish. So for the civil *Gideon*, it's pretty much the same. As to the deterrent effect, it is eviscerated. Knowing that certain behavior has either been sanctioned in a positive way or sanctioned in a negative way would add this deterrent either as a market force, but we don't get that because of confidentiality. But in terms of remediation to the individual litigant, because of the pro se likelihood, I don't think it makes a darn bit of difference if they go to an arbitrator and get snubbed or if they come to us and get snubbed. There must be a nicer way of putting that.

"Privatization" was used this morning to mean a lot of different things and I don't think they were all accurate. If by that you mean these arbitration clauses of adhesion, I would agree they are, unfortunately, very, very dangerous. But I think the rest of what they were calling "privatization" is a

much closer question. There was an underlying assumption this morning that, for example, a jury trial is the only manifestation of the court being a public court. I don't buy that. But I do buy the idea that when people have no right of access to the courts, we've done ourselves wrong.

The greatest danger is with the class actions, because how many people are going to court over \$30? Very few. They'll just get a new mobile phone plan when they can get out.

I don't think all cases, all disputes belong in the courtroom. One of our areas of jurisdiction is domestic cases, so we get a lot of very salacious disputes—divorce cases, sometimes cases involving young children. One of the things I remind the litigators is, “You do realize that we are going to be required to publish a written opinion that sets out the facts in this case, and we will put that online where anybody can access it. Do you want to perhaps talk to your client a little bit before we proceed with oral argument?”

—There's a public aspect of vindication. If citizens see that people can go to court and have fair hearings and receive justice, or some kind of resolution, in a democracy that kind of vindication is extremely important for the trust that our system is working. You can ask yourself if the public trusts the court system today, and different people might give different answers.

—I think you'll get a resounding “no” from the public.

In all this discussion about cost, we forget that it is arbitrary. It's designed to be—there is no review. As appellate judges, we have to justify that each individual case complies with the rule of law. When you go to the arbitrator, you lose that and you ought to lose it, I think. In other words, if two oil companies go to arbitration, and then come to court and complain about what the arbitrator did, I think that is complete rank foolishness. They chose that system, let them go live with it and die by it. They say they want the arbitrator and then they run to us and say, “Oh, what a bad deal I got from the arbitrator, because he didn't do this, this and this.” And I believe we've kept arbitration on life support by allowing people who have submitted to it voluntarily to come complain to us, and we look for all these reasons to take them off the hook. We ought to leave them on the hook.

I'm not sure that arbitration is necessarily the be-all and end-all. I think it is faster. I'm not sure it's necessarily less expensive. I mean we are starting see more and more appeals where they disclose the cost of the arbitration in saying that, “My client, who has no money, can't afford \$50,000 in arbitration fees.” I think at the end of the day the real problem is one of access to the courts.

“Effective vindication” of what? Effective vindication of private rights, or of public rights and interests? I'll give you one example. There was a lawsuit against the Nitro-Lift company that involved an issue of public policy—whether or not an employment contract violated an individual's right for future employment. A state supreme court wanted to rule on whether the contract was enforceable. But the U.S. Supreme Court took about three weeks to issue a *per curiam* decision saying that whether or not the contract violated public policy was going to be up to the arbitrator to decide. Public policy issues

often start out as disputes between two private people, and sometimes not over a lot—maybe a buck, or \$10. But we are now in a position in which even to determine whether or not a particular contract violates core public policy is going to be left to an arbiter. And I think that's intolerable.

What we're seeing in our court quite frequently now are arbitration agreements that are contained in collective bargaining agreements. So police, teachers, city employees—they're stuck with going through the arbitration process.

—When I was in private practice for 35 years, I used arbitrations all the time. I loved them. I used the AAA. I got to pick my judge and I was a plaintiff's lawyer.

—What was the filing fee?

—It was outrageous. What is the cost of discovery in public courts? I got to go to trial all over the country and arbitrate. I didn't have to hire local counsel in most jurisdictions. I could go in and arbitrate it. I'd be there for three or four days. I just loved it, because it was overall cheaper and I didn't have to hire some 200-person firm and be looked at as an economic opportunity, and pay a fee of \$40,000 or \$50,000 for a simple contract dispute and go through discovery and motion practice in a foreign jurisdiction. Have you ever gone to New York City and tried to litigate? What a nightmare!

—What kind of cases were these typically?

—These were contracts for stock promotion, and they involved securities. They were complex. Defense lawyers are very much into bogging plaintiffs down in a procedural morass, and they're very good at it. And state courts are the ideal forum for that thing as opposed to arbitrations.

Our Midwestern state's supreme court will uphold any arbitration clause against anybody. It is really great for the big corporations. It leaves the little guys very little remedy.

We can do a lot of what arbitration does in court. If I were to tell my trial court judges, "You will not be reversed for errors of law or errors of fact," that might affect the quality of their work. But that, of course, is precisely what arbitrators are told. I am concerned about the quality of arbitration. I am concerned about the loss of the common law infrastructure that arises from too much arbitration, because it means we don't develop our common law. I am concerned also about the loss of support from the business community and the wealthy community. I don't want our courts to become like some community schools, where the wealthy go to private courts and the rest of us go to public courts. That is why I am not at war with arbitration, but I am wanting to *compete* with arbitration.

How do we appellate judges know, when we don't participate in any of the arbitration proceedings? We don't really know the answer to that question about whether it provides effective vindication. Certainly, it does for the prevailing party.

The big fight we see at the appellate level is if someone does not want to go to arbitration and they are obviously trying to fight it. My impression is that, if both parties buy into it from the beginning, they are

much more likely to feel that they have been vindicated. On the other hand, we have, “My mother was in a nursing home. She died. Oh my God! I did not even know we agreed to arbitration. What is this? I want my day in court. I want a jury of my peers!” I think it matters a lot whether there truly has been bargaining power, and a buy-in from both sides prior to the litigation, as opposed to the contract of adhesion, where it comes as a surprise that arbitration is in there.

In our state we have a lot of common law and statutory law on arbitration agreements, about whether an individual was aware or not aware. When you see the cases, it is amazing that people didn’t realize it was there. And then it gets to court. I think that most people end up signing all these agreements and don’t realize they have agreed to that, no matter what our statutes say, no matter what the common law says about big print, bold print, whatever.

In our Southern state, one of the areas we see so much with this, and I think it is sad, is our nursing home cases. You are taking your elderly parent into a nursing home, and it is never a lovely day. There are always horrible things going on, and they shove this arbitration agreement in front of you. A lot of these people are uneducated. You just sign whatever is in front of you. Then something horrible happens and you go to court. Then you realize you’ve agreed to arbitrate. I don’t think they have ever felt like they have been heard. They just feel like they are another number, a statistic. I don’t think anybody walks away feeling good about that at all.

—I’ve been a member of the American Arbitration Association’s panel of arbitrators since 1991. I’ve participated in hundreds of arbitrations, both on three-arbitrator panels and on single-arbitrator panels for a wide range of consumer contract and labor law issues. There’s been a change in arbitration in the last 10 to 15 years. We started out where you normally saw a commercial dispute, for example, over the purchase of an automobile dealership or where you had clearly commercial parties on both sides. This tendency to require arbitration in consumer agreements is fairly recent, particularly in medical matters.

I’m bothered by the fact that many times you’ve got unequal players. That is bothersome. You’ve got unequal players, and it’s not an arm’s-length transaction where you’ve got two truly equal people who are negotiating. But at the same time, if they go into that process and they hammer out some kind of agreement that we may think is a bad agreement, wasn’t that their decision?

I think this business of arbitration and mediation is actually being brought on by the legal profession itself. I’ve only been licensed to practice for about 45 years, but when I started practicing, lawyers—courtroom lawyers—went to court and tried cases. Now there’s a tremendously greater number of lawyers, but there’s a *very* small number of lawyers who can try a jury trial.

Arbitration may be effective in a particular case or ineffective in a particular case, but I think the key question is what’s the effect on the justice system, and on stare decisis, res judicata, etc., for future cases? Providing openness, letting people know what the courts are doing, being able to figure out if there’s discriminatory impact—without a track record, you can’t figure out any of that stuff.

I don't have any problems with keeping private litigation private, but I think it points out a fundamental failure by courts to be effective instruments for providing justice to most people, because we've priced ourselves out of the market in a way by increasing fees, by making it too complicated, and not providing the alternative system which private litigation has provided.

I don't believe arbitration provides vindication. I don't believe it provides guidance to the public. I don't believe it follows the rule of law. I don't believe it's to the benefit of the court.

Private adjudication is sort of like an oxymoron.

—I think the purpose of the system is to solve problems between two people or two whatever it is. And I've spent a lot of time writing the case and I've gotten colleagues to finally sign on, and lo and behold, all of a sudden they want to settle. What are you going to do? I sign off all the time because my job is merely to move that case through the system. And another one then comes on. My job is to facilitate, to keep people from warfare between each other. And I think that's the job of a judge, and the job of an appellate court—not to second-guess the litigants.

—And your opinion is just destroyed.

—Just destroyed. Rip it up and say, "That's too bad." And there's eight or nine other cases back behind us that are going to be settled because otherwise this is going to be case law. I haven't had it happen, but that's when I would think about saying, "No, I'm going to issue the opinion anyway, I don't care what you say."

I think it depends upon two factors: first, whether the alternative dispute resolution procedure is fairly negotiated between the parties, although 90 percent of them are now contracts of adhesion; and second, whatever the ADR procedure is, does it comport with minimum due process? There have to be some minimum due process rights, like the exchange of some basic information. And if it fails those tests then it's not effective vindication.

With a lot of arbitration, there may be some who have an ulterior motive to avoid jury trial. But it seems to me it is driven substantially by cost and delay. Until we can wrap our arms around that, arbitration is going to be an avenue that is going to be pursued—that and other alternative dispute resolution methods. Generally speaking, I think it is just a question of cost.

If somebody has a legitimate complaint about their cell phone bill, they could probably go to their state attorney general. And our state's attorney general is always very active in pursuing consumer problems. We have a consumer protection bureau in the AG's office. Our AG is getting ready to run for governor, and one of the things he is going to run for governor on is how much money he has gotten back for consumers in situations where corporations have treated them unfairly or overcharged them. The AG can sue, but the consumer class action has been defeated. The attorneys general have gotten some really good settlements.

Trial lawyers also are generating arbitrations. They are going to the arbitrator on different types of cases, commercial cases, even personal injury cases. We, the judges who would like to keep it in the courts, when we retire a lot of us are going to be looking to be arbitrators. So there's a whole engine driving this as an industry.

—Do we really think it's a satisfying response to say you don't have to have a cell phone or you don't have to have a credit card?

—No.

—It's an inaccurate statement?

—Perhaps a better response is, "Well, if you think that should be tried by a jury, start your own cell phone company, or start your credit card company. It's an illusion to believe that the only people in this world that are able to create corporations are anti-consumer, conservative Republican people. They are people just like you and me, and I represented corporations when I was a lawyer and there were people all across the gamut. So what they ultimately realized as business people is that this is the cost of doing business, this is the most efficient way of doing business, to have these type of provisions. So if there are people out there who think we can somehow manage our costs and yet still have trial by jury in that open process and let out all of our dirty laundry, well, have it. You won't survive very long in business, but give it your best shot.

—And can the courts handle that? Can the courts handle 6,000,000 \$15 disputes?

In our Southern state, most of the arbitration cases that we're seeing are nursing home cases.

Do you think courts should oversee private arbitration outcomes? Would it be feasible for your court to do so? If so, what degree of deference should courts give when reviewing?

I cannot imagine transforming trial courts into appellate courts to handle arbitration.

I don't think we can just wash our hands of the whole process. At the same time, I don't think the pendulum should swing so far that we're actually doing some kind of appellate or quasi-appellate review of the actual arbitration outcome. I think we're in the business of fairness and I think the courts ought to be doing more to make sure that arbitrations are happening appropriately and fairly. But not every \$5 beef between ATT and one of its customers.

In our Southwestern state, we have a whole body of legislation dealing with the reviewability of arbitration awards. It's quite a process, and it's all statutorily set out—what we can do with it as appellate judges. We don't mess with it too much.

If parties voluntarily agree to arbitration in a contract, and that was their choice to have an alternate dispute resolution, then it would really undermine that theory if courts were then able to review the outcome.

It's actually not even correct to call it review. What we're doing is entertaining a collateral attack on the nature of the proceeding but we're not reviewing what happened at the arbitration.

Our state has a huge private industry of retired judges who act as private arbitrators and mediators, and they recently did come forward with a proposal for a statutory change to make arbitrations directly appealable—just like a regular case—to an appellate court. And the judges would be like a private court for rich people. If you can afford to have arbitration, then you can afford to have appeals. The sitting judges really didn't like that.

If the focus is to have more jury trials, why get the courts involved in doing arbitrations?

Like everything else that appellate courts do, in our Southern state we have a responsibility to make sure that due process was given in the arbitration process—that they follow their own rules and applicable general arbitration principles. In terms of whether the award was just or not, that's generally out of our hands, the substantive part of it.

I think arbitration is a reflection that defendants largely control the process, be it in court or through arbitration. Even in settlement, the defense always has the option of putting money out there and settling the case. The plaintiff can't force that. But the defendant *can* force arbitration. It's harder for the court not to enforce a contract, but I don't see that that is the role of the courts—to force by rule, forcing an advantage on the defendant.

I think it's a good idea, but it would be very hard, because when you've got a trial court decision that comes up, the rules of evidence applied. They were applying the law. Arbitration has always been a little looser, so it would be like having to review decisions by really bad trial court judges all the time.

What are the rules? That's the problem—there are no rules. In our Southern state we review only the authority that the arbitrator has, and if the arbitrator exceeds that authority and decides another issue, then that's out.

Except for wanting business cases to come back in, which I think is an issue in every state, we can't handle more cases. And the legislature is not giving us more judges, more courtrooms. So listening this morning, I kept thinking, "Who is going to handle these cases?"

I think our role in a state court is really very limited to whether or not the FAA applies. If it doesn't, then you don't have to enforce the arbitration. And I guess in the insurance area some states, including ours, have said that arbitration clauses in insurance contracts aren't valid because it's unconscionable, because the FAA can't reach those. But I think as a state court judge you're very limited in doing it because you have to follow federal precedent.

—Well, for one thing, the way we interpret it, arbitrators are not required to follow the law, so how are you going to reverse it for not following the law?

—Our state's law seems to be very clear that we cannot review whether the arbitrator follows a law. If there's fraud, yes. There's a statute that gives the grounds for the courts to review arbitrators and there are three or four different grounds, including fraud.

I don't know how we would.

If it is court-annexed, would that make a difference? If the court creates the process, then maybe they inherently can regulate it.

We're spending a lot of time on private arbitration cases that under law aren't supposed to be part of our caseload.

A lot of the rules that we're bound by for reviewing these things came out of labor arbitration. And those are the same rules we apply in consumer arbitration and the other things. But there were a lot of reasons why labor disputes were going to specialists, and you give great deference to those kinds of disputes.

—That would be wonderful. It is the hybrid that Professor Resnik described—the private/public kind of thing. I think it would be terrific if courts could have some oversight over arbitration, but I don't think it is currently allowed.

—That is part of their agreement—that they don't appeal.

—It is a tough hurdle to overcome. If you agree to binding arbitration, there is jurisprudence about what can be done on appellate review. It is narrow, but we have it.

How can courts and the public discover the truth and protect the rule of law unless arbitration proceedings are transparent? It may be impossible to halt the trend toward arbitration, but it may be possible to make the proceedings more transparent.

Do you agree that the curtailment of public court processes described by Professor Resnik is unconstitutional? Do you think it denigrates the rule of law?

—It's constitutional, but I think it's shameful.

—I think it's unconstitutional.

—I'm starting to think maybe we should take a real careful look at that.

Even the Supreme Court rulings are unconstitutional.

I think the most troublesome aspect is this movement away from a real contract to a "thing." That does seem like it's the most troublesome, but if it really is two parties agreeing to resolve their dispute in a private way, I don't have a problem with that.

I thought Professor Resnik's focus was more on keeping things from the public. I think this question relates more to keeping things out of the public view, whether or not that is constitutional. Having non-public court process, is this constitutional? And does it denigrate the rule of law? I don't know whether it's constitutional or not. It certainly seems inconsistent with the concept of these public forums that we have in our system of government. But more importantly, I think it's destructive of public confidence in the judiciary. The public suspects we're up to something. And the less they know, the more suspicious they are. I think for the most part it is destructive of the rule of law for us to do things in secret.

I think if two people, of equal bargaining power, enter into an agreement to arbitrate and want to keep it secret, and they want to hire their own judge or their own private mediator, that can't be unconstitutional, because there's no state action enforcing it. So that is probably okay. The question is, what about the people who don't have any bargaining power, and the public can't see it? I don't know the answer to that.

A resounding "Yes." My comment is that it's totally unconstitutional.

I'd like to see that constitutionality question briefed and argued in my court.

I did defense work, and I represented doctors and hospitals for 12 years. I was a member of DRI for 12 years. So it's not like I was a plaintiff lawyer my whole life. But here's what's occurred in the 30 years that I've been practicing law: If I'm an elderly person in our Southern state, and I want to bring a medical malpractice case, I have to first file a special motion to open the records on the medical issue. And then I've got to give them notice. And then when I file a lawsuit I have to file an expert witness report within 100 days, or my case will be dismissed. There's no discretion. That means by the time I file this lawsuit, it's like Mr. Cooper said, we've invested \$50,000 on this case. But there's a damage cap in a suit against

a doctor of \$100,000. If you're elderly and don't have any economic damages, or you're a youth, that's limiting access, and I can't bring my claim. And you are the poor who can't afford it—the young and the elderly.

—Why is workers' compensation constitutional?

—Because it's in the constitution—it's in the state constitution in our Southwestern state.

—It's not in ours.

—It's in our Midwestern state constitution, and it's been ruled constitutional. So has no-fault insurance for autos, because the theory is there's tradeoff. You give up your right to jury trial, but in its place you get a very well-defined system of benefits that is not based on fault, but is based on need, in some ways. And your benefits are paid promptly. There are very limited rights of appeal because the system is supposedly designed to help the injured worker. So that's why it's a tradeoff.

Even if it's not unconstitutional, we as judges who work on court rules and work actively on the procedures in our courts and what they should be, should advocate to eliminate such ridiculous roadblocks to getting access, especially when you're dealing with children. I'm shocked by that.

The Supreme Court said it isn't unconstitutional. I'm sure they're waiting to hear my final word on this matter. But until then, I'm required to follow the law as they see it.

We do not give advisory opinions on the constitution.

I do think that the hybrid system that we have created really does have constitutional implications. Perhaps I am in the minority in feeling this way. I understand the default system that we all have, in which we exercise our judicial power, which is really the only constitutional power we have in most states in pursuit of the rule of law—to decided cases. I also understand the alternative system in which we try to expedite a result. We are basically uninvolved in that process. But I don't understand the system that we have today, this hybrid system, in which judges sit and review decisions, in which the law of my state, as to which I am a custodian, has been badly distorted.

I view this discussion to some extent as analogous to public schools versus private education. I'm a big believer in public schools. It's another government responsibility, just like the public courts. My kids have all gone to the public schools. I really strongly believe in them. I would never take away anybody's right to go to private schools. But we're hearing from Professor Resnik about judges encouraging the litigants to try to reach agreements resolving their disputes. I'd be aghast if, in the public schools, we were saying, "Well, you all really ought to send your kids to private school, because they're going to get a better education there." I think we should not be doing anything that undermines the primacy of the public court system.

I'm from a Middle-Atlantic state, and I do agree with Professor Resnik that it's unconstitutional. I do think it denigrates the rule of law. As an appellate judge, I think I'm boxed in by the rules that say what my standard of review is. So whether I would ever even reach that question in a decision is something entirely different. That being said, lawyers and judges themselves have problems understanding what arbitration agreements are.

As of about five years ago, our Southern state had a very robust consumer protection act. It had a catchall phrase for people who ordinarily would not be able to hire lawyers. And the legislature rewrote and took everything out of that and vested it totally in the attorney general's office, which had a way of eviscerating it. When I look at that, and when I look at this move toward mediation and mandatory arbitration and so on, I do get very concerned that the cards are really stacked in favor of business and tortfeasors. And when the legislature gets involved, I know it's no longer totally a judicial issue, but we can't turn a blind eye to that either.

Does the courts' commitment to stare decisis reflect a judicial responsibility that goes beyond the immediate litigants, to public justice in the larger sense? If so, how does your court carry out that responsibility? Does that responsibility change if the litigants want to keep their dispute resolution secret, and perhaps the very fact that there was a dispute?

I wrote an opinion on two rich people who were having a battle, and they sealed the record. I looked in the record, and there was nothing in it. So I set forth our Western state's rules in an opinion unsealing the record, saying that there had to be a hearing on every one. It went to the supreme court, and they depublished the opinion. When they depublish an opinion it disappears off the Internet. You can only find it on our court's website. So I don't know what to do about it, but Westlaw needs to change their procedure. My opinion needs to turn into an unpublished opinion and still stay on the Internet.

Regardless of what type of case we're talking about, the more cases that don't make it to the trial process and don't end up on appeal, obviously are going to short circuit any kind of development of the law. And I lament that across the board.

In our state, litigants were settling medical malpractice cases. The settlement agreements said, "You will not reveal any of the reasons or circumstances or what occurred," and all that, although it was already in court. The trial judges were sealing the records. One doctor has been sued five or six times, and all of a sudden it is never known to the public, and it should be known. Our supreme court issued a rule that malpractice settlements would not be sealed.

In our Southern state our legislature is surprisingly conservative. But in the last legislative session earlier this year, a bill passed and has been enacted to circumscribe the trial court's ability to seal records, because they were very annoyed with over-sealing of the records.

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- The court clerks are very much against sealing records, because there is a lot of work that they have to do in sealing documents. You get these big stacks of documents.
 - They have a powerful lobby.
 - They are tough. “Don’t seal that, Judge. Don’t do it.”
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One thing that we’ve had a few times is that we’re exchanging drafts, and it takes a little bit of time after the argument, and we issue a decision. And in the interim the case is settled, but the lawyers have not told us about it. So we have issued a decision. It’s public. And then they come to us and say, “But we settled the case.” We say, “Too bad. You didn’t tell us. It’s an official decision. We’re not going to withdraw it.” And they may not like it. It may hurt them in their settlement, but that’s too bad. I don’t know if anybody would say, “Okay, settlement is a private matter. We withdraw our decision.”

Do you think we have a tendency, as an institution, to sort of over-seal and over-sequester because it’s so labor-intensive to have to go through the material item by item? We just seal the whole dang thing and be done with it. That takes a lot less clerk time and judge time than it does to systematically go through and figure out, in an appellate process, what’s going to go in the public record, what’s going to go in the private record, and which references to people and private information should be redacted.

- The whole protective order thing is a major takeaway, too, because the rule speaks to trade secrets or something that’s embarrassing. But it’s not a trade secret if you have this correspondence within the company admitting to problems. Why is that a trade secret?
 - It’s the rich. The rich seal things.
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If there’s an over-sealing movement, which there is, it is generated by the litigants, primarily the lawyers. That’s true in family court, that’s true in these public safety debates, and I think that if you look at it from a court standpoint, the court could say, by rule, “If you give us a reasonable differentiation between what should be confidential and what’s not, we’ll approve it. If you don’t, we won’t approve anything, nothing will be sealed.” And the discussions will be straightened out in private offices before they get to the courts.

I was a trial judge for 18 years, and I have to admit that many times it was just easier for me to let them seal it than to fight about it. But now I’m on the court of appeals, and I’m one of those bastards that I always complained about. I’m no longer looking at a case that I set up. We have cases in front of us now that other judges set up, and the exhibits were sealed below. Nobody thought to unseal the exhibits, and now the case comes up to us, and I’m working on it, but I’m inclined to send it back and say, “I can’t review this decision, because I don’t know the basis for the decision.” And send it back to the trial court and make them decide whether to unseal the record or not.

- Do any of you depublish cases?
- We have depublished cases of the court of appeals on occasion.
- Our supreme court depublishes court of appeals cases without reviewing them. Then they are gone. It is like they don't exist.
- Does your state distinguish between the precedential value of published versus unpublished?
- Unpublished is just persuasive. Published obviously is binding.

Does your court (or court system) have an organized program of public outreach? A person in charge of outreach? A public advocate? A budget for outreach?

- In our Midwestern state, we don't have any funding for that. We don't have a public outreach officer. It is sort of done on an ad hoc basis. What we do have is the state supreme court's public information officer. We utilize his services from time to time.
- I'm on the intermediate appellate court for our Southern state. We are a statutory court. The state supreme court—the constitutional court—cannot sit outside of the state capitol. Our court goes around the state wherever we are asked. We don't have a budget for it, either. Whatever the entity is that wants us to come has to provide whatever we need.

In our Mid-Atlantic state, we have a court information person who will communicate with the public on behalf of all the courts, the trial courts as well as the appellate courts. That office would mainly communicate with the public and with the newspapers about a particular issue or a particular case. We also have something called the "access-to-justice commission." I guess that has been in existence now for about seven to eight years. It is a very large organization. There are politicians who are part of it as well as judges and lawyers. They are looking at ways in which they can make the courts more accessible to the public from the trial level up. We also have what is called the "people's law library." Through the state law library, there is a computer system where the public can go online. It shows how to file forms, what forms to file, giving them information about contract suits, tort suits—basic information that the general public would not necessarily have or have access to. They can get a tutorial and talk directly with librarians about legal problems. We try to draw a line between legal advice and legal information. What we are giving is *information*.

Those of you who have public information officers have a real luxury. We don't have such a person. For our supreme court, the president of the bar informally fills that role when there is some criticism of us. We do have a teacher who is also a registered nurse, and a teacher who has spearheaded our in-class program. At least once a month, we hear a case before groups of students from high schools or technical schools around the state. They may have studied the briefs. They do interact with us sometime after the case is over, and they ask a lot of very trenchant questions.

If you have Rotary or Kiwanis or groups like that, they are always looking for speakers and there is no reason why we as judges aren't out there in those civic organizations giving programs about the court.

You've got to have somebody with institutional responsibility for sustaining it because it's a constant effort. One of the other things we do is regional town halls. We get together a bunch of judges and administrators who go out and talk to minority communities about juvenile courts, and do questions and answers. Notify all the local organizations. It helps a lot.

It seems to me that every jurisdiction does this stuff. We've all done this stuff our whole careers. Everyone at this table has a story to tell about stuff they've done like this, but it really hasn't mattered. We haven't made a dent in this, to be honest with you. The public's perception of the judiciary still is not really very good. Until we start teaching civics in the schools as a required course again, we are kidding ourselves. There's not enough of us to go around or enough hours in the day to do our work and do this too.

I would say that a new development in some states that has given the judiciary a lot of positive exposure recently has to do with the specialty courts that we've established: the veteran's court, the environmental court, the drugs and mental health court. Every one of those seems to be an engine for positive publicity with the community. And the mental health court is such a fascinating new animal in terms of the different branches of government, because the presiding judge meets with a representative of the executive branch, the Mental Health Division of the state has a representative there. We're working continually with them before we ever enter a sentence.

I'm a justice on the supreme court of a Pacific state, with nine justices covering the entire state. All of our filings are public. All of our arguments are televised and have been on public television for about the past 20 years. Traditionally the court sits in the state capital, but there are three terms a year outside of the capital. The capital is in the urban portion of the state, so we try to get out to the rural portions of the state. Our budget for that was cut back in 2007 or 2008, but we picked it up again. We also have commissions of our court that do their own outreach and educational things across the state. Not coincidentally, probably, all of our judges are elected.

In our Mountain state, we don't have a budget. We don't have a court information officer. But we have a court help program that is for people trying to represent themselves in court. We use AmeriCorps VISTA volunteers to do that. They ride the circuit and may spend one day a week in various communities. That program has been around for about six years, and we've have had over 50,000 people visit. We also have performance measures. The state supreme court actually does surveys of all judges, law professors and appellate lawyers on our performance every two years. Both the trial courts and the supreme court have quarterly performance measures about timeliness and decisions, and how current we are. It really helps our legislature evaluate how we're spending the money, and I think it has helped give the court a little bit more to talk about.

We do all the court-on-the-road stuff at night. We do it during the day at the law schools.

Working folks are not going to come during the day to see us do an argument, but they will come in the evening. And we do it in high school auditoriums, so we do it in conjunction with the high schools. Originally we got some complaints from legislators. Well, this costs a lot of money, even though we're staying overnight at the \$55 state reimbursement limit at a Super 8 Motel. So we invited the legislators to come and made sure if it's in their district, they're all invited, and they like that. And we get the Chamber of Commerce involved. And we usually have 200 to 400 people at any given court session. Very successful. And I guess the last thing we do is, we pick the cases very carefully. We do two cases in an evening, and we try to get local cases, but even more importantly, cases that are accessible with public opinion, that you do not have to have any legal background to understand what's going on.

In our Mountain state, if we're holding oral arguments in a different community, a member of the law school faculty will come and give an introduction to the case. It's really nice and it helps the law school too.

We have done a couple special events. When the Boy Scouts and the Girl Scouts each celebrated their 100th anniversary there'd be campouts on our capital grounds. And we had like 3,000 Boy Scouts and over 1,000 Girl Scouts. We held mock court sessions there, and we had the attorney general to argue the cases: a school backpack search case, a rape case, they all got to make a comment to the judge after hearing it and saying how they thought they would rule. We have a huge amount of information on our website. We have information on all of our cases.

The women lawyers in our Midwestern state are a very, very, very vibrant group, and they do more outreach than I think any group I've ever come across. They call on judges all the time to join them in their outreach to kind of share the glory. It's a good organization. So partnerships work well.

—How many kids do you know who are in high school, and you tell them, “I want you to take this political science course,” and they say “Whoopee!” I taught part-time at a state university for 20 years—three classes, several thousand students—and I had to make my questions real simple. I wasn't teaching brain surgery. I would use multiple choice questions, like “How many senators does each state get?” About 50 to 60 percent of the kids have no earthly idea. Now, I suspect if you go to the state legislature, likewise most of them have no understanding about how the court system operates, the role of the courts, other than to say “I think you win or you lose.” They would have no idea about standards of review, nothing. And I promise you they don't know what certiorari is.

—And they don't want to know.

—They don't need to know.

I think most of the judges on my bench just do it. I'm Catholic, but I probably go to more Baptist churches than some Baptists do. Every Sunday you'll see me in the church. That's not because I'm running, because I'm not going to run. I just got involved in that. You go out, and people see you, they touch you. But where do I draw the line? Do I have to go to two churches every Sunday? When we're talking about public outreach, what do you have to do? I'm not going to discuss why I made a ruling with somebody on the street. I just made the ruling. Otherwise we're going to get into some discussion, and it may go someplace that I don't want it to go. So I'm not going to discuss that with you.

We have a public information officer, but she serves all of the courts in our Midwestern state, both trial and appellate. But our court of appeals goes to college campuses around the state twice a year and holds oral arguments there. The supreme court does the same thing at the law colleges. But we have started doing the undergraduate institutions and will hold a day of oral arguments there. We have a lunch with selected faculty and students, and we do question-and-answer sessions. After each argument session, we'll have both panels present. So it's our way of public outreach and education for the undergraduate folks. We also invite area high schools, and we coordinate that with some other programs. But we have no budget.

Our court has done TV commercials and ads. We convinced the local TV station to do them for free, and we highlight what our court does as an appellate court, and we also focus on some of the good things that the judges and employees are doing for the court system generally and for the community. Also, on our website we have a pamphlet for pro se litigants and for lawyers who are inexperienced in appellate practice. You'd be surprised at the number of really good trial lawyers who make really fatal mistakes at the appellate court level. So we have this pamphlet on how to do it, A-B-C-D.

- I'm Facebook friends with appellate judges, so I know that they maintain Facebook pages. As to trial judges, I do not know, because I do not "friend" anybody other than my seven brothers and sisters, 15 nieces and nephews, 17 great nieces and nephews and two great-great nieces and nephews.
 - You've got a big enough family to have fun with just them.
 - I have a couple friends that are attorneys, as I indicated. One of my Facebook friends is my former partner, and I may have two or three of those that I know that if they appeared in front of me, I would recuse myself anyway. And I don't "friend" politicians, because I don't know what they're going to say. And some people that I was friends with I "*unfriended*" because I don't like what their friends said. So now I'm really restricted to family members. It's a way to communicate such a large family.
 - You're talking about personal use.
 - You can make it professional if you want to and I choose not to make it professional.
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We get calls from towns saying they want us to come. And we get calls from state legislators and the senators who want us to come. "Please put our town on your tours next year." So we've got four this year and four next year. Because of the weather in our Midwestern state, you can only go in the spring and the fall. Our term goes from September to June so we usually go in October or November, but in the election year when there are retention issues we'll go September and October.

We call it “Appeals on Wheels.” We go all over the state. So our court has a communications director and then the supreme court has a communications person and an educator who puts on programs for schools and teachers. They have a teacher workshop. We mainly do it at universities, high schools, nursing homes, rotary clubs. Anywhere they ask us, we’ll come. It’s mainly criminal cases.

—It’s always so much fun to go to the law schools. They love it. They absolutely love it.

—It charges your batteries to be around people who actually want to hear what you have to say.

My court does basically what everybody else’s does, but we just started a new program called the “Teachers’ Classroom.” It runs for two days, and it was 15 to 20 teachers who started out Friday and did the federal court all day and then on Saturday they did the state court, ending with the Court of Appeals. And it was trying to teach teachers about civics. This was the first time they’ve done it, and it was a great outreach.

Every month we have what they call a community luncheon where a judge takes a turn basically inviting members of the community, whether they are ministers or just regular people, to the court to sit down and have lunch with them. And then at some point, you do a little tour of the courthouse. It’s in our budget. And they’ve been doing it for years. Because in our Southern state everyone is elected by popular vote. It works well, and you get a chance to really interact with the public, and they get a chance to really see what we do, and in turn it helps them spread the information for us out in the community. I usually feed about 100 people—good food. Fish. A sit-down luncheon. It works well.

In our state we have a program called “It’s Time to Leave the Party.” It goes out to high schools and lets them know: If you’ve been drinking, it’s time to leave the party. There are all these things that we’ve put together through the years with outreach. Of course we have demonstrations of trials, both in the courthouse and out in the high schools. Every time you turn around, there’s another outreach program.

I think what is difficult sometimes is you get asked to speak somewhere and the students are inquisitive, and they ask questions to which you are not supposed to say what you think or believe in any sort of circumstance. It leads them to believe that you are evasive or that you don’t want to level with them. They really just cannot get through their minds the fact that we cannot comment on things we might have to rule on. I think that is a real problem. I have always seen that as a real turn-off to people, because they feel like you are not leveling with them. I don’t know what the answer to that is or how you get around that.

We have been going to schools for about 20 years. It’s not only well received, but the attorneys tell us it’s fun too. Our clerk’s office begins a year ahead working on it. We will have it in a courtroom in a courthouse that’s centrally located in the state, then bring in kids for each case so we have to have time between the cases. We spend the day there, have lunch with the kids, talk about it before and after the cases, talk with the lawyers. Then when the opinion actually comes out, the lawyers go back to the schools and they go through the opinions with the kids. It’s a lot of fun. When you go to some of the rural areas, it is the big thing that’s happening, so you get a lot of turnout there.

There are two particular things we've done that have worked very well. We actually have a theater company, and they have five original plays that they have produced about important legal matters from the Boston Massacre Trial to the Little Rock Nine. They do 18 performances a year at our court. We bring in about 125 high school students to each performance. They listen to the performance and they interact with the actors and give their own views, and then they meet with a judge, get a tour of our courthouse and I've got to tell you, it is wonderful. And this is not expensive. This is a \$30,000 item for the whole year. These are all basically volunteer performers. It's gone on for about six years now and we just can't get enough of it. The other thing we've had for about 20 years is a judiciary media committee, which is chaired by a member of our supreme court and a leading member of the media. It's about 35 people drawn from the media, from the bar and from the judiciary. And our job is essentially to work on better communication, coordination, cooperation between these two important institutions.

Our local bar association, in conjunction with the bench and the bar, has a program where they go out to the schools and they teach the 10th graders civics, one-on-one, so they are able to pass the graduation test. They go through the Constitutional amendments, and it's hands-on, and the feedback is great from the students as well as from the lawyers and the judges who volunteer their time.

One of the things we do, particularly in the African American Judges Association, is that every judge is assigned to a senator or a representative to go to lunch with them or at least visit them. It's critical in the legislative session that these legislators can put a face on the judiciary. You are just not judge, you are Judge So-and-So. We encourage that among all judges, all the time, but we have done it especially because there is an attack on some African American judgeships in our Southern state. But we encouraged that all along. Plus, out of this bad legislative session the judiciary came out great because of those personal relationships. That's the only way to do it.

—Maybe I'm blessed, because our court is so close. There are 12 of us and we're all in the same building. So you get to see your colleagues. We have one guy who came up with this idea that foster kids needed luggage. He said every time he saw a foster kid they had no luggage, so he started a luggage-collection program. The public caught on to it and said, "He's right." So now in his chambers there are about 4,000 bags, and every time he sees a foster kid he gives them a piece of luggage that he collected from the public. Then another judges will think, "Well, I've got to get on to something. I don't want to be the nameless, faceless judge in this circuit. I need to get busy in my community." So it's a blessing to have people near you—anytime you put a human face on an institution, it's great.

—A lot of the women judges in our Mid-Atlantic state are members of the National Association of Women Judges. It's a very active group of judges who go to the women's prisons and put on substantive education programs there. They get people in to talk about how to get your kids back and what to do when they transfer out of prison. There will be a day of education, and then they'll have a party for the kids. They bring in presents for the kids and toiletries for the inmates. So there's outreach to all the women's prisons in our state.

When I started as a federal district court judge 22 years ago, I wrote a letter to every elementary school, junior high, high school, community college, college and university in a 100-mile radius, which spans three different states actually because I sit in a border town. We send that letter out every year, and we have a steady stream of students coming in to our court and we've got kind of a system set up. Of course, the most popular things are the holding cells that the U.S. Marshals run. Kids love that. But they also love being in the courtroom because it's a beautiful historic courtroom built in the 1930s. About 12 years ago we put in super technology which we've kept up so all my trials are electronic. I can have three-month trials with not a single piece of paper. Kids are really into the electronics. There's not a week goes by that we don't have a class visiting. Some teachers have been bringing classes for the whole 22 years. And in jury selections, when I ask the question how many of you have been in the courtroom before, people raise their hand and I say see that many of them were in the courtroom before as a school visitors rather than on prior jury service.

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- Last month I had a great experience. There's a Catholic elementary school where about 90 percent of the kids are Hispanic, and the third grade was visiting. And of course, they ask great questions, like "Why is your robe black?" One kid asked about "that big quarter above your bench," which is the court seal. So I'm fielding questions for about 45 minutes, and told them I had time for one more question. There was a very slight, very quiet little girl in the front, and raised her hand and said, "Can girls be judges?" And I said, "I want you to know that our chief judge, my boss, is a woman." And then I took her hand and I took her up to the bench and I had her sit in my chair and I said, "Someday you could be sitting here as a federal judge," and her eyes were just big as saucers. And it's one of the best experiences I've ever had. Won't it be great some day when kids don't have to ask that question?
- At my court sometimes they ask if boys can be judges.
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In what ways do you feel your court can be more transparent to the public?

We are public servants. We are either appointed or elected. We are lawyers. We are officers of the court. We have to live by all of that. When it comes to transparency, being a public servant requires balancing. Public service is serving the public. That includes accessibility. You have to have enough wisdom to balance those factors.

One thing that we do need to keep in mind with the public transparency is that we are public servants, but we don't need to *serve up* the public. We have some mighty nasty divorce appeals that come to us. I wouldn't want everything we were doing and saying to be just put out there for the public to see. We go on road shows where the court actually goes out into the community and holds oral argument. We have children bussed in to watch it. We are very careful about what we put on for them.

We have our clerk prepare a little booklet for each of our oral arguments. The booklet includes the info on the judges on the panel and gives a little history of our court. It explains our court procedure, our court etiquette. It also includes a brief summary, prepared by the law library of the case that's being

argued. We found that to be very helpful and educational, especially in our smaller cities and counties. They really, really appreciate that. Kids come and they have access to that booklet. Prior to the oral argument, they will know what the case is about, and we will remain on the bench following the oral argument for a question-and-answer session with the attorneys who argued the case.

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- My court probably hears the fewest oral arguments of any appellate court in the country. In five years on the court, I think I've seen no more than half a dozen.
 - We hear 10 per judge per cycle, six cycles a year.
 - We very seldom hold oral argument, and even when both parties request it we're only allowed to hold it after we review the briefs and we think there's an issue we want to know more about. I think part of our theory is that the same person who wrote a terrible brief isn't going to do any better.
 - That's not always true.
 - The people who are the best on their feet often write horribly.

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- It's my view that most of the states that do have either compulsory oral argument, or do oral argument by rule in every case, it's just so the lawyers can bill. In the vast majority of the cases you don't need oral arguments. You know what the opinions are.
 - You might be right that in most of the cases the three of us agree, even before we walk into the courtroom, on what the answer is. But I can tell you that it is not infrequent that opinions are drafted differently because of the way an argument is presented, or one of the three peels off, writes a dissent that later gets adopted by supreme court, or a concurring opinion, but then it becomes adopted by the majority and reshapes the final opinion of the court.

I had the experience several times where we're dealing with some kind of sex-related crime, and then in come the Girl Scouts. We put up a notice on the website that describes what the case is about. It is kind of "Buyer beware—If you are going to come into the court, you cannot expect the lawyers not to do their job." Graphic things might be discussed. They should check first. And the public information officer always tells the scout leaders and the schoolteachers or whatever. But they need to make that decision themselves.

Something we've started doing the last four or five years that actually has worked out very well are court user surveys. I honestly don't know where we got the money to do that, but actually we train a lot of volunteers. We send them out to every courthouse in the state with questionnaires and interview settings, and they've gotten very good at it. Then we have the results, and we publicize the results, and it gets us an enormous amount of good publicity.

We've had debates about wanting to go to summary disposition on mundane cases, but we've said no to that. So we have given our answers or reasoning for everything as a matter of how simple it might otherwise be. As far as the question of transparency is concerned, I think if you give the facts and the reasons and then your decision, I think that makes it transparent for anyone.

—In our Western state, [oral argument] is a matter of right. We hold huge numbers of oral arguments. We have made people come in when they haven't asked, and if there is a timing problem, we just reschedule the case. We just say, "We will kick it over for a month or two because we want you to come in and talk to us."

—But then the people want their cases resolved timely.

—This is a public function we are performing. There may be that tradeoff. If this is going to make it work better for the process and the public result and it is a longer-term effect, then we want to have them come and participate in that.

I take it nobody in this room would suggest—and I didn't hear Professor Resnik suggest—that appellate judge deliberations after oral argument should be made public. Nobody would say that. Nobody here would suggest that, I don't think.

When you say, "The more public information the court shares, the better," I think that the caveat is that we want security, and the court wants to be able to control it. We don't want the general public to be able to control the information; we want to be able to disseminate more information and to be able to determine that it is secure.

—One of the concerns I have as we talk about this is HIPAA, because there's just so much stuff in all of our records that is actually HIPAA-protected. In our trial courts, literally everybody's signing a waiver in a personal injury case, and I did them as a trial judge. You're just signing dozens of those in a medical case. And then the record comes in and there's just tons of information that if you wanted to get it, even from your own doctor, you would have to sign your life away.

—We make the attorneys redact that, and they're liable for any damages if they fail to do it. It's the attorney's responsibility, not the court's, and we will also put a security level on it so it can't be reached by all the attorneys—only the attorneys on the case.

In attorney discipline cases we tell the lawyers not to name the lawyer who's the subject of the case. So if the attorney is exonerated it stays silent. We call them John Does, and we do those things to protect them when we're streaming live.

My state is very backwards in this regard. When people transition to a different sex, they seal their records from the time they transition into the different sex. They are sealed "backwards." If you go backwards from the time the person changes sex, you cannot get their records of anything they did before—as a female if they transitioned to male—because those are sealed off. I just don't know how any of that is going to work.

Is there not a flipside to transparency? The flipside is, while there's nobody in this room who thinks that we're overpaid and underworked, the average Joe who's working for \$8.50 an hour, or working in the trial court, says, "You make what? And you had how many cases a year?" Is there a flipside to transparency? I'm not opposed to transparency, but the more information you get out there, the more

questions you get that you have to respond to, and perhaps the more brushfires you have to put out, because of the information that you're disseminating. I know as a trial judge I did four times the amount of cases I do as an appellate judge. It was a different kind of work, but that doesn't matter to the guy making \$8.50 an hour. Our lunch speaker told us about the nine Supreme Court justices who decide 70 cases a year.

If there is resistance to expanding your court's Internet or social media presence, what is the basis for it?

- We're a court, and I don't think self-promotion is appropriate. We speak through our opinions and when we get away from that I think we make a very big mistake.
- I think you're right. We are judges and we speak on our cases through our opinions. But in our Southern state we are elected officials, and we owe a duty to the public, just as we go to talk to them in schools about careers and mentorships, or we travel around the state and go to high schools. That, to me, is a different way to put the information forward.

Some of the folks on my court are not Internet-savvy, do not know how to use it. Some of the judges don't know how to do their own mail.

Ignorance. Just not being familiar with Twitter or any of those other social media. You don't really have experience with it therefore you are not prepared to figure out how to begin that process, contribute to that process.

We had internal resistance to putting the unreported cases online. Primarily the argument was that, since they could not be cited, if we put them online, especially our self-represented litigants would cite those cases, as well as counsel who didn't know the rule. And our hand was basically forced two months ago because our local legal newspaper started putting them online. So since they had them, we said we might as well—or at least the chief judge who was running the show and telling us what to do about it said to put them online. So there was internal resistance for the last three or four years as to whether or not they should be online.

We have enacted a pretty restrictive social media policy for employees and judges. We have different tiers depending on where you are about what social media they can do and can't do, and, if they do, what kind of disclaimers they have to have on their site. Because we don't want a judge or somebody to put something on social media that will be counterproductive to what we do, or to speak for the court. It's been in effect about a year. I haven't heard a peep about it. None of the employees or judges has really complained. It's published on the website under employee stuff.

We have an officer who sends tweets, like “The court is in oral argument now,” or “The court will hearing a case in this town today,” or “The court is beginning to hear this case, so if you can, go on our YouTube channel and watch the oral argument.”

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- Our state has an ethics opinion that says if you have a Facebook page you cannot identify yourself as a judge on it. So where it says “occupation,” you cannot say what it is. It’s different if it’s a Facebook page for the “Committee to Elect So-and-So.” But there are very strict rules.
 - That sounds like your own personal Facebook page and not a court page.
 - You don’t want somebody who knows anything about that to conflict somebody out, and that’s why you have to be careful about that stuff—because people will do it. They’ll make a comment about something and say, “Now you’re conflicted out because of this, that, and the other.” You have to avoid that stuff.
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I am far less technologically open in my court and in fact I’m on the committee that’s trying to work on e-filing in our appellate courts. We’ve got three different systems that don’t talk to each other. I’ve been in a bunch of meetings with the tech people about hacking into the system. We have big-money commercial cases, and we’re talking about uploading documents, but the bar is not interested in some system that anybody could hack into. And in a high-volume court, I don’t see how you rely on everybody to redact things out. Even if you did, I’ve been told by the IT people that the hacking issue is a real concern. Only a few judges on my court are really enthusiastic about going fully online, including for internal circulation of drafts.

At my office I have three side-by-side monitors so I can have the document I’m working on on the center monitor, Westlaw on another monitor, and the case record on the third. I can seamlessly go between the three monitors. But e-filing has been in existence for us for probably 15 to 20 years. We’ve had no problems at all.

We are talking about requiring hyperlinks in all our briefs.

One state removed a circuit judge a few months ago, and the biggest evidence against him was his Facebook page. He was referring to himself as a judge, and he was marketing guns and all kinds of other stuff.

Part of its generational. There is only one person on our court who tweets and she’s on Facebook and we are resistant. We have had discussions about using iPads on the bench and we don’t use them. So we’re walking on the bench with reams of paper. I just wouldn’t think in 2015 we’d be having a discussion about whether or not we could take our iPads on the bench, with the fear being that people will think we were actually distracted and not listening to the arguments. But while I’m flipping through reams of paper trying to find a particular order, I’ve probably missed a little bit of something.

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- Social media and judges do not mix. We see many, many problems with judges on any kind of social media. I would say let the courts do it. Don't do it individually. I've seen people get in bad trouble, talking about cases, lawyers, not realizing that everything you put out there is there for all time. Just like we warn our teenagers that your future employer is going to see anything you put on Facebook, your ethics panel is going to see whatever you put on Facebook too.
 - You can't forbid it.
 - We've had complaints.
 - I don't remember a case in the last four years where a judge has gotten in trouble.
 - We had a judge talking about a lawyer in a case.
 - We say, "No, you can't friend Pat Malone or friend John Sweeny [*practitioners who were panelists at the 2015 Forum*], because I would not hear a case that you argue."
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It's really relevant, and I was really intrigued by this, because we have a state court judge who has been sanctioned for posting on Facebook. She ran a campaign on transparency. She established a Facebook page. She posted quite a lot on the Facebook page, a lot about jury service. I would say that 99.9 percent of what she posted was fine. However, she got in trouble because she had a very big media case in her court which she wrote about while the trial was going on. And she's been sanctioned, and she's appealing her sanction. And I drew the lucky straw, me and two other judges, to sit as her appellate judges to review her. And she's requested a full evidentiary trial, which normally they don't but she's requested one.

- I use Facebook quite a bit.
 - We are very much discouraged from even using it.
-

In our Southern state I think the question is one of resources. We can't get money for electronic filing. So if you can't get money for electronic filing, having Twitter feeds come out from some public information officer at the court is frivolous. We have had staff cuts over the past six years of two percent a year in our budgets, and I think they have, at one time, had up to 300 vacancies. So the idea of social media is just not even on our rating screen.

In our Pacific state the public pays for our judicial system, and for the most part they should be able to see how we're making use of their money. We have a lot of rich, old families in the state, and they used to always get all their litigation sealed. And at some point we said, "No, just because you're rich you don't get to have your records sealed." Divorces aren't sealed, unless there are custody matters. There really isn't a good reason. It's public money that we're using. It's not ours to do what we want with it.

I cannot even get my court to hold regular meetings. They did not hold a judges' meeting until five months after I went on the bench. Another new judge and I had to ask them to do it. And then the most I can get passed in a resolution is that they would make it a goal to have three meetings a year.

—I was impressed during the courthouse tour yesterday when they showed us into the room where the entire court meets for coffee every day at 11 o'clock. Every judge who is in the building has to stop what they are doing, have a cup of coffee, and talk to each other for half an hour. Just stop and make contact with each other, which is really pretty radical.

—Emails kill me.

—We have some that still won't type. Not many, but some. They dictate, and then they have a secretary. We each get two, and they're usually lawyers. I assume they use email, but they don't type.

—I think retirement is going to fix that issue.

I just leave everything open to the public on Facebook. I don't think it is any different than if I have lunch with an attorney. Periodically I am going to have lunch with somebody who is an attorney. I don't really see any qualitative difference. But most of the people that are my friends on Facebook aren't really "friends." A lot of them aren't even acquaintances. They are people who have just "friended" me.

I think social media can be really valuable, not just for an individual judge, but for the courts in general. There are so many younger people that use Twitter. Interestingly, our general counsel at our administrative office of the courts has put the kibosh on using it, which I personally think it is ridiculous. It is great for weather announcements. It is great for letting people know when the courts are going to be open. Just general announcements, if nothing else. It is great to keep people informed. I know one Southern state has a Twitter feed going down on the right side of their website. They have updated their website. It looks really good. I think that, too, is someplace where a lot of us are deficient, my state included. Our website is a relic from about ten years ago.

—We can take a virtual tour of our court house.

—We can look at every courtroom in the court building.

—I think there is a lot of untapped potential there.

One thing that's very, very important. You do not go to a Rolling Stones concert with your cell phone and take pictures, selfies of you smoking marijuana. I wouldn't know anything about Rolling Stones concerts, but there was a judge who was there, and I guess if you go to a Rolling Stones concert or other concerts, people light up joints and pass them down the row. So he just happened to get it. He took pictures of himself at the concert.

One state judicial performance commission has taken the position that if you have a Facebook page you are responsible not only for what you put on the Facebook page but for what any of your friends post and that therefore comes to your Facebook page. That's part of their campaign to discourage us from having Facebook pages: telling us, "You will be responsible if somebody sends you something crazy, even if you immediately try to take it off or get rid of it."

In our Southern state we haven't gotten there yet, but we're almost there. One of the other things that we're working on in addition to public outreach is really some "customer outreach," so that when somebody makes a filing, it goes through our electronic website. And the idea here is that if anything is filed in a particular case, by any user—any judge, lawyer, litigant, whether it be a motion, an order, opinion, whatever it is—they will get a text message to say "Something has just been filed in your case," without having to check back every hour. This will be especially helpful in high-visibility cases, where people are waiting to know what's happening.

—We would like to do Facebook, but the last time we looked we couldn't figure out any way to stop people from commenting on it.

—Do a professional page. That's what I have.

—And the kids will all laugh at you. My sons were like, "A professional page? That's like not having Facebook!" But it means that people can't write political comments on your page.

—And we haven't gone to Twitter yet, but we're looking at that. Everything we're doing we automate it so that if you do something one place, it automatically generates things. We don't have to have 20 or 30 people to keep it up.

Our opinions go out, and we do a lot of emails back and forth. What I think we're missing is picking up the phone and talking to colleagues. And so I try to do more of that if I'm in a case with somebody, but if we email we can send this and that. But we've got to get back to the verbal communications between judges, especially with two panels. We've got to get back to a little more verbal back and forth. Not that it's got to be in every case. But if you get into some details, you can cut a lot of the paperwork out.

I have discouraged the use of blogs. We do have one judge who is a part-time professor at one of the law schools, and he has a blog because he uses it with his students. Most people have got good judgment, but the concern is that you kind of get in the moment sometimes when you use social media, and you get to going back and forth about a particular issue, and before you know it you're in there talking about something on what can only be viewed as an ex parte basis—an issue within your court.

I'm the chair of a judicial discipline body, and I'm going to tell you right now to be careful what you put on Facebook, blogs, any of this stuff—especially older judges like myself. We're getting a lot of cases from texting, including "the big one"—texting from the bench about litigants before you, texting with racially disparaging or homophobic or other offensive language. They can get a search warrant for your cell phone.

—There is no computer system in the world that's immune to hacking. The biggest corporations and the biggest governments have found that out.

—In our Midwestern states, they tell me that there are several attempts to hack our e-filing system every day. They are not successful, but that doesn't mean they'll never be.

We just had a case where a juror was Facebooking with a relative of the defendant or a relative of the victim. We upheld the verdict four-three, but it was a problem.

Does your court allow audio- or video-recording of some or all of its proceedings? Do you feel the act of recording alters the judicial process? If so, how?

- We let people bring their iPhones in and videotape all they want. If the press wants to come in, they can bring that too. We came to the recognition that there's really no way to enforce a rule against it. It wasn't causing anybody any harm.
 - You never had an issue with it?
 - No.
 - In our Western state, we only in the last month or so have started to permit lawyers to bring their computers into the oral argument.
 - In our court it's prohibited. They have to turn in their cell phones when they come into the courtroom.
-

We've gone full throttle on this. We have our own YouTube channel. Every oral argument is streamlined and then archived there. We also have other videos on there, interviews with retired state supreme court justices, how the system works and things like that. We have Twitter accounts. We have Facebook accounts. We have a public media person. We do have some budget for it. We also have an ongoing relationship with the news media in the state. Last summer we updated our TV rules for the courtroom, because the press isn't the press anymore. When we first came out with the rules in the '70s we said that you could have one movie camera or one still camera. But now we just redid all of our rules, because people blogged in the courtroom and did all kinds of other things, so we had to update the rules to accommodate what's media and what's not media.

Our cameras cannot show the jury. It saves our litigants millions and millions of dollars. We don't have to transcribe anything. The appeals are instantaneous. All they do is cite a time on the record, and it's up in our court and we can look at it a day later. The old court reporter system is antiquated and horrible and it costs a lot of money.

- Our arguments are recorded on CDs, and you can buy a CD or a videotape for \$15. It's a public record. You can get a whole day's trial for \$15. You can get it that night.
 - But soon we're not going to have CD players.
 - Whatever it is, we'll change.
 - It's a lot better than having it on a piece of paper.
-

On our high court, and on the court of appeals, all the arguments are live. You can see them wherever you are, on the Internet. I do think we are all human, and we try not to have the cameras affect us, knowing that it is being videotaped. But I do think sometimes the judges' questions, depending upon

the case, are informed by the fact that they will be on camera. We should be talking about what the law is and what the precedent is, but mostly the questions are about policy. Is this fair? Is this unfair? That to me is playing to the camera, and it is not about asking the question that will forward the law.

We don't presently spend anything on the live-streaming of our opinions, but it is going to cost us \$10,000 going forward because we have come to the view that the Americans with Disabilities Act requires us to provide closed captions. We are going to start doing that in January. It is probably required by the ADA, and that will cost \$10,000 a year.

I think we need to be careful that we are not performing for the public. While they are free to come in and watch what we do, we should never alter what we do to conform to what they may deem acceptable or unacceptable. That is a real slippery slope.

—All of our arguments are streamed live on the public TV.

—Same for our supreme court. The technology is there, but no one turns it on. They tried it briefly for a little while, and no one was interested, so they turned it off. The supreme court has a complete record of its proceedings. We don't. Maybe someday we will.

Most of our courtrooms record DVDs of everything that's going on. There are very few court reporters left in trial courts. So when we sit in a trial court's courtroom as the court of appeals, we get a DVD of the argument. Any member of the public can ask for one.

—Is YouTube video streaming cheaper than doing it on your website?

—We used to do it on our website, but we have to go through the state IT people. And they were slow and bad, and we got a guy who just does it all on YouTube. We have our own channel. It's all done there, and it's cheaper and better. All our arguments from the last term are there, plus other things.

—The videos on YouTube are of higher quality than just about any others.

—We have a YouTube channel.

—No limitations on what we will or will not stream. Everything goes.

In our New England state we live-stream our arguments, and the news media can get the feed if they want to use it. Once you have the technology and the support—and we've partnered with the communications department of a major university to run the controls, cameras zooming in on judges, lawyers, judges, lawyers as the arguments go—in my view that's a no brainer, and I have no idea why the U.S. Supreme Court won't do this, but that's another story. We've had cameras in our trial courtrooms for about 30 years, and judges have a fair amount of discretion about what can and can't be filmed, but we have guidelines. If the press wants to come in it has to be a pool camera. We can't have 14 cameras focusing on us. And there are certain limitations. They can't film the jury, and they can't film juvenile

witnesses. We had a wonderful contrast this spring—two major trials, each running for several months, with major national interest. One was in state court and was all televised, every minute of it. The other was in federal court, and there were no TV cameras. People were just getting Twitter feeds from here and there. It made a huge difference. People got to watch the state court judge make very difficult decisions with respect to examination and cross examination, and I got to tell you, at the end of that trial, people really felt, “We now understand. We’ve seen and touched and felt it.” The federal trial was an extraordinary trial, but it just didn’t work—people didn’t feel they were a part of it. All the news trucks would show up at the end of the day, and they’d have stand-ups, but nobody got to see what was really happening in the courtroom.

Well, it’s hard to compete with a Chihuahua in an Easter bonnet chasing after a cat in a tutu. The Internet is so pervasive that I think part of our real challenge is that we can put all this stuff out there, but by and large nobody cares enough. Maybe the older gentleman whiles away his retirement years sitting at the back of the courtroom. But people are more interested in TV because it’s better drama. I think part of the challenge is to get people convinced that if you’ve got a couple hours to watch part of a trial it’s going to be time well spent. I don’t mean to have low regard for my fellow citizens, but I think about 15 minutes into it, they’re going to go back to watching that Chihuahua again, or the camel chasing a cow. It’s amazing the stuff my daughter looks at on the Internet: “Daddy, look how funny this is!”

—I think in the trial court it does alter the process.

—You get some lawyers who are hams.

—And some witnesses who are intimidated.

—I think some judges preen to the camera.

—The OJ Simpson case is the best example.

Let me say, as a person who tried a two-week civil trial that was broadcast on Court TV, I don’t think it affects it at all. You don’t even think that the camera is in there after a while. The only time that I got myself in trouble was when I said something (out of the presence of the jury) about a contest where the first prize is one week in a certain major American city, and the second prize is two weeks in the same city. I got hate mail from that city for the next six months!

We have always allowed recording. We have live-streaming video of all our oral arguments, and then you can go back and you can look at the archives for old arguments. It has no effect, speaking for myself at least. You forget it is there until you go back and you look at the oral argument and you think, “Oh gosh. Do I really look like that?” But other than that, it seems to have no absolutely no impact, on the judges at least, or the litigants, that I have heard of.

In what ways do the news media have a positive or negative impact on the work of the courts—and the pursuit of justice?

I spent 30 years as a prosecutor, and the media would come in and listen to a trial, and I'd read about that trial the next morning, and apparently I was in a different courtroom. The idea that the media serves as the public's eyes and ears is totally wrong. Those reporters know less about the law than the retired guy who comes in and just sits in and listens.

I think in general the media presence is good for society. I do get concerned about the mistakes, but I think it's because the media really is losing a lot of their resources to educate people and have people dedicated to the courts. In our Western state we have a federal/state courts media committee. There's several of us from the state court, several of us from the federal courts that meet regularly with the media. Every year or every other year we've held a kind of "Courts 101" for all the new media people and journalism students to explain generally what the courts do and how to get information, and explain the terminology—"Don't write 'verdict' when you mean 'settlement,'" things like that.

We talk about not arguing with the press. We made a decision. The decision should speak for itself. So the clarity in the decision is very, very important. In our Western state we grappled with our judicial information officer. We said, you don't advocate for us. Our decision speaks for us.

I'd been on the appeal court about three years when my great aunt called and said, "I would think one of these times you could see your way clear to affirm a conviction of one of these drug dealers." I said, "What are you talking about?" She said, "That's three now where you've done that." You know, "Conviction reversed" isn't a good headline. The only thing the newspaper reports is the very rare occasion that we reverse. Over the span of three years, I'm like 35 and 3 or 40 and 3 in affirmances and reversals. And it caused me to think. It's a pride thing. The newspapers are in business to sell newspapers, but I've told several reporters, "Spare us a paragraph of context. It's not going to kill you at the end of your article to mention that of the 42 criminal cases heard thus far this year by our court, all other convictions were affirmed." A public information officer can provide that context.

I think one of the real problems we have, and it may be more relevant to state courts than to SCOTUS on some levels, is the absence of reporters. In my state, when I was getting out of law school, I remember there was a court beat editor and reporters. And the reporting was great. Now, just trying to get them to cover anything is very difficult. Fortunately, there are still a few really smart folks out there who do a pretty good job. It is really thin.

You want to be first to get the story out. You don't necessarily want to be right.

My experience over the years is that the media have no good understanding of the distinction between the roles of the judiciary and the legislature. They tend to focus on how the judges with the Republican backgrounds have voted on a particular case and how the judges with Democratic backgrounds have voted on the case. And they have caused us to write the headnotes in our syllabuses much more precisely because we know that's typically the only part of the case they are going to read. That is their legacy, at least in my state.

—They analyze your decision based on your political affiliation.

—I think there are things we could do about that. I am trying to meet with editorial boards from all the newspapers in my state once every two years and sit down with them so that they get a sense of what we're doing. It is a different conversation.

Our major local paper has been hollowed out, as is no doubt happening in other states. There is not confident coverage anymore. There used to be someone whose job it was to report, and who knew something about what the legal process looked like. Now it is entirely driven by how many clicks will be generated for the reporters who are reporting.

We don't open our oral arguments to the media. The public is certainly welcome. I was concerned about that, or at least I thought about it, shortly after joining the court. Three years ago, I did not have the guts, being the baby on the court, to bring up the issue. Now, I am fourth in seniority. I might be inclined to readdress the issue at a judge's meeting maybe.

I view the organized news media in our Midwestern state as a very positive force. They disagree with many of my decisions, but I know them personally. I can talk to them at the downtown Y, and they are in a sense a counterbalance to the general kind of background noise that you get out on the Internet. I think the regular media like to cover the courts because it's cheap and easy to do so and all they have to do is pick up a decision and cry about it. It's easy coverage. But we have a terrible time getting them to come to the courts.

I think it's so easy for the media to look upon a case as winning or losing, but unless you've got somebody talking to them, they don't understand the nuances at all, and even the times that they do understand they will misstate things. Then, of course, it starts people screaming and yelling about "judicial hellholes" and all that. Good reporters—and our lunch speaker Adam Liptak is a good reporter—do their work. But most of these folks aren't Adam Liptak, and they don't have a lot of time, especially in the electronic media, where they're looking at a 15 second feed. You need a good court information officer to work with them, answer their questions, get a relationship going, so that they understand some of the nuances. Otherwise it's, "He won, she lost," and everything else is kind of just a grey area.

Other Topics of Discussion

Pro Se Litigants

It's not a level playing field. As a person of color, who fortunately has some money now, as I go into places I'm often confused for a person of color, as opposed to being a consumer with money. It's either, "Sir, can we help you?" or "Why are you here?" I take umbrage sometimes in terms of the fairness in how people are treated across the board. They are not all given the same dignity or respect. Likewise in our courtroom or courthouse, it's our pro se litigants versus business litigants, or pro se litigants versus attorneys, or in the domestic area, which is chaos and confusion—pro se versus pro se, ad nauseam.

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- I think most people are not able to afford lawyers. And for the few who are able to afford lawyers but who want to come in pro se, I don't really see a problem with that, because sometimes the lawyers aren't as articulate as they should be in presenting the case that the client knows a lot about. But we did have some "professional" pro se litigants. There are people who just like to litigate. But for the most part, these programs in outreach are designed to help people who cannot afford lawyers in cases where lawyers are not generally likely to take them because they are not worth it for those lawyers.
 - Our Southern state's largest county has a program that the bar initiated. It is a very strong online program to assist those of modest means. Of course, anybody can access it. It is basically there as a resource for those folks. I think it has been a pretty well received program that I suspect other areas will duplicate.
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Attacks on Judges

- As far as judges being attacked in the media, we have a committee of our state bar association that will mobilize in action to defend that judge. You can actually notify the committee and say, "I think this judge needs help." Even the judge can. That way the judge does not have to respond.
 - Sometimes the judge does not want help. We had a judge who was running for retention who was being targeted by a gentleman who did not like the result of his divorce. He posted signs along the way to the courthouse. The matrimonial lawyers group wanted to defend her, and she didn't want it because she just wanted it to go away. She did not want to draw more attention to the issue.
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Judicial Civility

- Think about U.S. Supreme Court decisions from the early 1950s that we read in law school. I am trying to forget them all, but did we ever read dissents like what we are reading now? It is crazy.
- In Massachusetts, it was 4-3 for same-sex marriage when the *Goodridge* case was decided. The dissents in that case were very thoughtful and very respectful. That is the case involves a very hot issue does not mean that you need to mock the first sentence of the opinion, or to refer to it as an aphorism from a fortune cookie. I think that diminishes all of us, and I think it sets a tone.

- The judiciary is always under attack, with people saying the judiciaries are political. And when we have fiery dissents like Justice Scalia's, we basically make their argument for them.
 - I am not concerned about fiery dissents. You can be fiery and respectful.
 - No personal attacks. It has sunk to personal attacks. You don't have to do that.
-

My son is a first-year law student. I was helping him with the first year jurisdictional cases. I was reading some of these cases that have come out since I was in law school, and I am glad they got around to answering them at the U.S. Supreme Court. But I was surprised in reading those cases. Maybe I am wrong, but it seems to me that the tone of the dissent has really gone downhill. I think the publicity of what we are doing does something to us. We are human.

The Rule of Law

The thesis that was advanced by Professor Resnik is for me a really poignant one in terms of the public investment, the public resource that we represent. Every year I give a talk to Chinese students who come on an exchange program, and my talk is about the rule of law and judicial independence. I start out by saying that I have been very privileged to have the job of saying “no” to the government! That is what I am hired to do, is to say to the government, “Not every time.” It is the basic task that we are given. It took hundreds of years to get to this point. I try to encourage them to believe that, although it may take a long time, their country will get there too. But the broad value that that represents and that broad collective benefit that we all enjoy is the thing that is important. What flows through all of this discussion is how to help ensure that what [the courts] get to do is maintained, because it is an incredibly important thing. And to the extent that it is diminished, that general public value is lost.



POINTS OF AGREEMENT

In the discussion groups, the moderators were asked to note apparent areas of consensus—to the extent that it could be achieved—on issues raised in the Forum. These points of agreement were summarized and announced during the Closing Plenary.

Factors influencing judges' ability and/or willingness to conduct public trials.

- Factors favoring public trials:
 - constitutional responsibilities;
 - public trust concerns;
 - the fact that the courts are open; and
 - the value of published opinions.
- Factors working against public trials:
 - docket pressure;
 - legislatively-imposed requirements for dispositions within specified time;
 - budget restrictions;
 - backlogs of criminal cases, which take priority;
 - the involvement of trade secrets in some litigation; and
 - infrequent concerns about physical security.
- Neutral factors:
 - the subject matter of the case;
 - court rules and relevant state constitutional provisions;
 - publicity v. privacy concerns;
 - perceptions of the public's interest (or lack of same) in court proceedings; and
 - the fact that everything the judge does, but not everything the parties do, is public.

Non-judicial dispute resolution in general.

- The trend toward private settlement and arbitration stems from (1) the cost of jury trials, (2) fear of class actions, and (3) fear of juries, and it's not going away.
- Most judges are in favor of public trials, but getting to trial often takes too long and is too costly, so the need to "keep the trains running on time," case management, and budget and other resource limitations demand that courts make use of alternatives.
- Courts can't provide resolution nearly as fast as other modes can. However, arbitration prevents the development of a body of case law, and for arbitrators (instead of judges) to decide what is arbitrable is particularly intolerable.
- Mediation has been a positive in terms of moving appellate dockets, but confidentiality is at the core of mediation. So courts, lawyers, and attorneys general must educate the public about the limitations of, and alternatives to, arbitration agreements.
- Even though private adjudication is advantageous for some kinds of cases (e.g. family law), non-public proceedings diminish the role of precedent in keeping the law developing.

Does the recent trend toward private adjudication provide the "effective vindication" mentioned by the U.S. Supreme Court and discussed by Professor Resnik in her paper?

- Many arbitration agreements are forced on parties before disputes arise; rights are forfeited through unequally bargained contracts; and access to the courts is lost.
- Private adjudication provides effective vindication for people of means.

Court oversight of private arbitration outcomes.

- Under current law, arbitration is valid, private, and presumed to be voluntary—and there are limited grounds (like fraud, misconduct, bias, or conflict of interest) for overturning arbitration decisions.
- Most courts are not well-equipped to handle large numbers of small claims.
- Judges consider such oversight difficult at best, considering limited court budgets, proceedings conducted under special rules (or no rules), the lack of requirements for arbitrators to know or follow the law, and the absence of public records of decisions.

Professor Resnik's argument that the curtailment of public court processes over the last few decades is unconstitutional and denigrates the rule of law.

- The curtailment of public court processes is wrong, and state courts must continue to stretch limits, asserting the primacy of state constitutions and state courts and laws, toward supporting the public rule of law.
- It may not be "unconstitutional" per se in light of recent U.S. Supreme Court decisions, but the current "hybrid" system may indeed infringe constitutional rights.
- Curtailment of public court processes does denigrate the rule of law, for instance by undermining the public's confidence in the courts.

Court secrecy.

- Lawyers on both sides bear responsibility for agreeing to secrecy.
- Sealed settlements deny the public important information relevant to safety.

Public outreach by the courts.

- Almost all of the judges' courts have some organized public outreach program. Almost all courts have websites, hold oral arguments in different locations, and send judges and court staff out to mentor schools, help with mock trial programs, and explain the court system.
- Outreach should include civics education in the schools—a practice many judges feel is underemphasized presently.
- Many court systems have public information officers or other specifically in charge of outreach, sometimes covering more than one level of courts.
- Some courts have public assistance (“self-help”) programs for pro se litigants.
- Outreach can be limited by lack of resources.
- Some courts have found that public outreach has improved relations with their legislatures.

How the courts can be more transparent to the public.

- Judges were well-disposed toward transparency, but noted that enhancing transparency costs money, and that adequate funding for the courts is always a problem.
- Some transparency-related suggestions:
 - providing virtual tours of courthouses online;
 - holding more oral arguments (one judge observed that “lawyers who are poor brief-writers are often good at oral argument”);
 - publishing otherwise “unpublished” decisions on court websites;
 - extending state public records acts to the courts, so that internal statistics will become available to the public and emails to non-judges will be public;
 - publicizing assignments for decision writing.

Court use of the Internet and social media.

- Issues affecting Internet/social media use by the courts:
 - ever-present budgetary problems;
 - resistance to online posting of unpublished decisions (most of which are published online by West and Lexis-Nexis in any event);
 - concerns for litigants' privacy related to posting briefs online;
 - concerns about judges using email (which could become a public record in some states); and

- the advisability of using Facebook for public outreach.
- There is a difference between online access to the court's business and courts or judges actively using social media such as Facebook.
- There is varying use of social media among judges based on generational/personal factors (e.g. judges who don't email, won't migrate to new platforms, etc.).
- Some social media activity would be prohibited by ethics rules.
- Judges should never comment on cases in the social media, should not have personal websites where they comment on cases, and should not have social media exchanges with court personnel, and certainly not with litigants—in the latter case because such exchanges could be used too easily by litigants to create appearances of bias or conflict of interest.
- Judges expressed resistance to publishing their biographies, their recommendations regarding oral arguments, or statistics on cases they have decided.

Recording and broadcasting of court proceedings.

- Many courts have live Internet streaming of arguments, but some select the cases that are appropriate for cameras in the courtroom.
- Most cameras are small, and some are permanently installed. Some courts record only for their own records. Many judges forget that the cameras are there when conducting courtroom business.
- Recording has no effect on most judges, but there are a few exceptions.

The courts and the news media.

- The news media sometimes make significant mistakes, such as confusing summary judgment, dismissal, and/or jury verdicts. Reporters need to be corrected/educated by judges and/or lawyers when they misstate issues, reports, and court decisions. This may be a result of low pay and high turnover among media people.
- The two institutions must understand each other better. But the demise of many local newspapers hurts, and the absence of "courthouse beat" reporters diminishes public familiarity with the justice system. The result is that the press no longer covers most court proceedings, and the state courts in particular are largely ignored by the news media.
- There is too much reporting on whether judges were appointed by Democrat or Republican administrations.
- Courts can use media contact to help educate the public, but "the news media need to 'show up.'"

APPENDICES

FACULTY BIOGRAPHIES

Honourable Nicole Duval Hesler (WELCOME ADDRESS) was admitted to the Québec Bar in 1968 and, until 1992, was in private practice, specializing in litigation. She also served as a member of the Federal Human Rights Tribunal and helped to train lawyers in human rights matters. She was appointed to the Superior Court in 1992, the Court of Appeal in 2006, and became Chief Justice of the Province of Québec in 2011. Both before and after her judicial appointments, Madam Duval Hesler has been a frequent lecturer on human rights, environmental law, the administration of justice, and other legal topics, for the Canadian Bar Association, the Institute for Advanced Legal Studies (Cambridge Lectures) The National Judicial Institute, and the Montréal Bar Association. She has served the Canadian Institute for the Administration of Justice in numerous capacities, and was President of the Institute from 2003 to 2005. She is a member of the Executive Committee of the Canadian Judicial Council, and presides over its Appellate Courts Committee.

Professor Judith Resnik (MORNING PAPER PRESENTER) is the Arthur Liman Professor of Law at Yale Law School, where she teaches courses on federalism, procedure, courts, prisons, equality, and citizenship. Her books include *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (with Professor Dennis Curtis, 2011), and *MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER* (co-edited with Seyla Benhabib, 2009). With Linda Greenhouse, she co-edited the *Daedalus* volume *THE INVENTION OF COURTS*, published in 2014. Her recent articles include *The Privatization of Process* (U. Pa. L. Rev., 2014); *Federalism(s)'s Forms and Norms* (Nomos LV, 2014); and *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights* (Yale L. J., 2015). Professor Resnik is a Managerial Trustee of the International Association of Women Judges. She chairs Yale Law School's Global Constitutional Seminar, and she is the founding director of the Arthur Liman Program, supporting fellowships for law graduates and undergraduates at six colleges and sponsoring colloquia on the civil and criminal justice systems. Professor Resnik is a member of the American Philosophical Society, a Fellow of the American Academy of Arts and Sciences, and an occasional litigator. In 2009, she argued *Mohawk Industries, Inc., v. Carpenter* in the United States Supreme Court.

Professor Nancy S. Marder (AFTERNOON PAPER PRESENTER) is Professor of Law and Director of the Justice John Paul Stevens Jury Center at IIT-Chicago-Kent College of Law. Professor Marder, who graduated from Yale Law School and served as a law clerk to Justice John Paul Stevens, writes about juries, judges, and courts. She has written on a range of jury issues—from peremptory challenges to jury nullification—that have appeared in law reviews such as *Northwestern University Law Review* and *Texas Law Review* and she is the author of the book *THE JURY PROCESS* (2005). Recently, she organized two academic conferences on the jury, including one in Spain. Professor Marder reaches a wide audience with her work, particularly her work on juries and courts.

She has made numerous radio and television appearances, notably on National Public Radio and WTTW's "Chicago Tonight" television program, discussing current jury trials and court-related issues like cameras in the courtroom. As Professor/Reporter for the Illinois Supreme Court Committee on Jury Instructions in Civil Cases since 2003, Professor Marder has helped to draft jury instructions for Illinois. At Chicago-Kent, Professor Marder teaches courses on juries, judges, statutory interpretation, and women and law.

Adam Liptak (LUNCHEON SPEAKER) covers the United States Supreme Court for *The New York Times*, where his column on legal affairs, "Sidebar," appears every other Tuesday. Liptak was a finalist for the Pulitzer Prize in explanatory reporting in 2009 for his "American Exception" series, examining numerous ways in which the American legal system differs from those of other developed nations. He received the 2010 Scripps Howard Award for Washington reporting for a five-part series on the Roberts Court. A graduate of Yale College and Yale Law School, Liptak practiced law at a New York City law firm and in the New York Times Company's legal department before joining the paper's news staff in 2002. His journalism has appeared in *The New Yorker*, *Vanity Fair*, and *Rolling Stone*, and he has published articles in several law reviews. He is the author of *TO HAVE AND UPHOLD: THE SUPREME COURT AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (e-book, 2013). He is a visiting lecturer at the University of Chicago Law School, and has taught courses on media law and the Supreme Court at Columbia, U.C.L.A., U.S.C. and Yale.

Kathleen Flynn Peterson (FORUM MODERATOR) is a certified civil trial specialist and a partner in the firm of Robins Kaplan, LLP, in Minneapolis. She holds a B.A. degree in nursing from the College of St. Catherine, and a J.D. degree from the William Mitchell College of Law, *cum laude*. Her practice is focused on medical negligence litigation. She is a Fellow of the American College of Trial Lawyers, and is a member of the American Board of Trial Attorneys, the International Society of Barristers, the International Academy of Trial Lawyers, and the American Bar Foundation. In 2007-08 she served as president of the American Association for Justice. She has also served as president of the Minnesota Chapter of the American Board of Trial Attorneys and chair of the Minnesota State Committee of the American College of Trial Lawyers. She was Vice President of the Pound Civil Justice Institute at the time of the Forum, and became its President on August 1, 2015.

PANELISTS

Matthew W. Bailey, managing partner of the Baton Rouge law firm of Walsh & Bailey, LLC, has been defending corporations, insurers and individuals in civil litigation in courts throughout the State of Louisiana for over 20 years. His practice focuses on all areas of personal injury defense, including automobile and trucking liability, premises liability, products liability, insurance bad faith defense, coverage issues, and others. Mr. Bailey is the current Vice President of the Association of Defense Trial Attorneys, and is a member of the Federation of Defense and Corporate Counsel, the Defense Research Institute, the Louisiana Association of Defense Counsel, the Louisiana State Bar Association, and the Baton Rouge Bar Association.

Honorable Anne Elizabeth Barnes is Presiding Judge, and a former Chief Judge, of the Georgia Court of Appeals. In 1998 she was the first woman to be elected in a state-wide judicial race without having been first appointed to the bench, and was re-elected in 2004 and 2010. Judge Barnes attended DeKalb County public schools and graduated *magna cum laude* from Georgia State University in 1979. She earned her Juris Doctor

from the University of Georgia in 1983, and her Master of Laws in the Judicial Process from the University of Virginia in 2004. Before her election to the Court of Appeals of Georgia, she was a consumer lawyer in Atlanta, Georgia and served as a Vice President of the Georgia Trial Lawyers Association. Judge Barnes has held numerous leadership posts in the Georgia Judiciary and has been a member of the Council of Chief Judges of the State Courts of Appeal. In 2013 she completed a fellowship program with the Advanced Science and Technology Adjudication Resource Center and joined the Board of Directors of the National Courts and Science Institute in 2014. She has chaired the Atlanta Bar Association's Judicial Section, and serves on the Supreme Court's Commission on Interpreters. She has served on the American Constitution Society Georgia Lawyer Chapter Board of Advisors since 2010, and is a Master of the Bleckley Inn of Court and a member of the National Association of Women Judges. Judge Barnes is also a member of the Advisory Board of Georgia State University's Department of Sociology, the National Board of Forever Family (formerly Aid to Children of Imprisoned Mothers, Inc.), and, since 2011, the Board of Directors of Georgia Court-Appointed Special Advocates for Children. Judge Barnes also volunteers with the Truancy Intervention Project's Early Intervention program, working with elementary school children. She is a member of numerous other legal organizations, and is a recipient of the Romae Turner Powell Judicial Service Award. In her non-judicial life, Judge Barnes is a member of the Atlanta Track Club, and has participated in the Peachtree Road Race as a runner, walker or volunteer more than twenty times.

Leslie A. Brueckner is a Senior Attorney with Public Justice—a national public interest law firm that specializes in socially significant and precedent-setting civil litigation. Ms. Brueckner graduated from U.C. Berkeley *summa cum laude* in 1983 and from Harvard Law School *magna cum laude* in 1987. She joined Public Justice in 1993, and her areas of practice include federal preemption, food safety, and combatting unnecessary court secrecy. Among other victories, Ms. Brueckner served as lead counsel in *Sprietsma v. Mercury Marine Corp.*, a 2002 federal preemption case unanimously upholding an injury victim's right to sue a manufacturer for failing to install propeller guards on its recreational motor boat engines. In 2011, Ms. Brueckner became the director of Public Justice's Food Safety & Health Project, which seeks to hold corporations accountable for the manufacture, distribution and marketing of food and other products that endanger consumers' safety, health and nutrition. The Food Safety & Health Project spans the gamut of Public Justice's key practice areas, from workers' rights, consumer rights, and environmental protection to access to justice. In 2012, Ms. Brueckner was honored by the Animal Legal Defense Fund with its Pro Bono Achievement Award for her work combatting the unsafe and inhumane treatment of animals on factory farms. In addition to her litigation work, Ms. Brueckner has taught appellate advocacy at American University Law School and Georgetown University School of Law.

Lance Cooper is the founding partner of The Cooper Firm. He practices in a number of areas of litigation, with an emphasis on product liability cases involving automobile design and manufacturing defects, notably the recent litigation involving ignition switches in General Motors vehicles. He is a member of the American Board of Trial Advocates (ABOTA), and has held leadership positions in the Georgia Trial Lawyers Association and the Cobb County Bar Association. Mr. Cooper received his bachelor's degree in political economics from the University of California at Berkeley in 1985 and his law degree from Emory University in 1989. While in law school, he was a G. Joseph Tauro Scholar and an editor of the Harvard Journal of Law and Public Policy. Mr. Cooper is a member of the State Bars of Georgia and California.

Ronald J. Hedges practices law in Hackensack, NJ. He has extensive experience in e-discovery and in the management of complex litigation, and has served as a special master, arbitrator and mediator. He also consults on management and discovery of electronically stored information (“ESI”). Mr. Hedges was a United States Magistrate Judge in the United States District Court for the District of New Jersey from 1986 to 2007. While a magistrate judge, he was the Compliance Judge for the Court Mediation Program, a member of the Lawyers Advisory Committee, and both a member of, and reporter for, the Civil Justice Reform Act Advisory Committee. He has taught courses in evidence and electronic discovery at Seton Hall University School of Law, Georgetown University Law Center, and Rutgers School of Law—Newark. His many publications include *INTERNATIONAL EXTRADITION: A GUIDE FOR JUDGES* (Federal Judicial Center 2014), *THE SEDONA CONFERENCE® COOPERATION PROCLAMATION: RESOURCES FOR THE JUDICIARY* (The Sedona Conference® 2014, 2012 & 2011) (co-editor), *MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES* (Federal Judicial Center 2012 & 2007) (co-author), and *THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY & PUBLIC ACCESS IN CIVIL CASES* (The Sedona Conference® 2007). Mr. Hedges is a member of the American Law Institute, the American Bar Association, the Federal Bar Association, The Sedona Conference Judicial Advisory Board and its Working Group on Protective Orders, Confidentiality, and Public Access.

Patrick A. Malone practices law in Washington, DC, representing seriously injured people in professional liability and pharmaceutical products liability litigation. He is co-author of *RULES OF THE ROAD: A PLAINTIFF LAWYER’S GUIDE TO PROVING LIABILITY* and the author of *WINNING MEDICAL MALPRACTICE CASES WITH THE RULES OF THE ROAD TECHNIQUE*. He has also published a book for consumers: *THE LIFE YOU SAVE: NINE STEPS TO FINDING THE BEST MEDICAL CARE—AND AVOIDING THE WORST*. His recent articles include *Paying It Forward by Pressing for Safety Changes* (TRIAL, June 2014), and *Unethical Secret Settlements: Just Say No*, (TRIAL, Sept. 2010, co-author with Jon Bauer). Mr. Malone is a graduate of Yale Law School, a member of the American Law Institute, a fellow of the International Academy of Trial Lawyers, and a Trustee of the Pound Civil Justice Institute.

John Parker Sweeney practices law in Washington, DC with the firm of Bradley Arant Boult Cummings LLP. For more than 30 years, he has specialized in the defense of major litigation involving product liability, warranty, consumer protection, environmental, and toxic tort issues. He regularly serves as lead counsel in nationwide class action and mass tort cases. Mr. Sweeney holds a B.A. degree from Ohio Wesleyan University and a J.D. degree from Washington College of Law, American University. He is the 2014-15 president of DRI—The Voice of the Defense Bar, a 22,000-member association of defense lawyers.

Honorable Jean Hoefer Toal, the first woman to serve as a Justice of the South Carolina Supreme Court, began her judicial service in 1988, and has been re-elected as a Justice or as Chief Justice ever since. Chief Justice Toal received her B.A. degree in philosophy in 1965 from Agnes Scott College, where she served on the Judicial Council and on the National Supervisory Board of the U. S. National Student Association. She received her J.D. degree in 1968 from the University of South Carolina School of Law, where she served as Managing Editor, Leading Articles Editor and Book Review Editor of the South Carolina Law Review. Prior to her election to the South Carolina Supreme Court she practiced law for 20 years, appearing on a frequent basis in all levels of state and federal trial and appellate courts. Her practice included a balance of plaintiff and defense work, criminal trial work, and complex constitutional litigation. She also had considerable administrative law experience

in litigation involving environmental matters, federal and state procurement, hospital certificates of need, employment matters, and election matters. In addition to her private law practice, Chief Justice Toal served as a member of South Carolina's House of Representatives for 13 years. During her 27 years on the Supreme Court, Justice Toal has written opinions addressing the full range of issues, both criminal and civil, which come before her Court. She is co-author (with two of her law clerks) of *APPELLATE PRACTICE IN SOUTH CAROLINA*. She has also been integrally involved in the South Carolina judiciary's efforts to improve public outreach, increase the use of technology in the courts, and enhance judicial transparency. Notable in the latter regard is South Carolina's Rule 41.1, which requires trial judges to balance litigants' privacy interests against the public interest in the disposition of lawsuits.

DISCUSSION GROUP MODERATORS

Linda Miller Atkinson is a partner in the firm of Atkinson, Petruska, Kozma & Hart, with offices in Gaylord and Channing, Michigan. She is licensed in Georgia, Indiana, Michigan and Wisconsin. A 1963 graduate of Oberlin College, Oberlin, Ohio, and a 1973 graduate of Wayne State University Law School in Detroit, Michigan, she is an author and editor of *TORTS: MICHIGAN LAW AND PRACTICE*, published by the Institute of Continuing Education since 1994, and of *LAWYERS DESK REFERENCE* (8th edition, Thomson-West), and is author of the "Depositions" chapter of *LITIGATING TORT CASES* (AAJ Press, published by Thomson-West). She was the recipient of the American Association for Justice's Champion of Justice Award in 2007, the Trial Lawyer of the Year Award in 1995, and the Women Trial Lawyer's Caucus Marie Lambert Award in 2000. She is a past president of the Michigan Association for Justice, a member of the American Association for Justice, and a Fellow, Trustee, and Secretary of the Pound Civil Justice Institute. In her life outside the courtroom she is in her 20th year of providing outdoor emergency care with the National Ski Patrol.

Chris Aumais practices in Los Angeles with the firm of Girardi & Keese, specializing in products liability, toxic torts, premises liability, and general personal injury matters. He holds a B.A. from Mount Allison University, New Brunswick, Canada, a J.D. from Queen's University School of Law, Belfast, Northern Ireland, and an LL.M. from Southwestern Law School in Los Angeles. He is bilingual in English and French, studied in a joint Cornell/Sorbonne summer program in Paris, and is a past president of the Irish-American Bar Association.

James Bilsborrow practices in New York City with Weitz & Luxenberg, in the firm's Environmental, Toxic Tort & Consumer Protection group. He has been involved in numerous complex matters, including the BP Gulf Coast oil spill multi-district litigation and the General Motors ignition switch litigation. He received his B.A. degree from the University of Chicago and his J.D. degree from William and Mary, and clerked for Hon. D. Brooks Smith of the U.S. Court of Appeals for the Third Circuit and Hon. Christopher C. Conner of the U.S. District Court for the Middle District of Pennsylvania. He is a member of the American Association for Justice (AAJ) and a current member of its Leadership Academy, and is active with the Brooklyn Volunteer Lawyers Program, providing pro bono legal services to low-income residents of Brooklyn.

Kathryn H. Clarke is the Immediate Past President of the Pound Civil Justice Institute. She is an appellate lawyer and complex litigation consultant in Portland, Oregon. She specializes in medical negligence, products

liability, punitive damages, and constitutional litigation in both state and federal courts. She received her undergraduate degree from Whitman College, and her law degree from the Northwestern School of Law of Lewis and Clark College. She has served as president of the Oregon Trial Lawyers Association, and is a governor of the American Association for Justice.

Thomas Fortune Fay practices in Washington, D.C. with the firm of Fay Kaplan Law, P.A. In addition to a general civil trial litigation practice, the firm prosecutes cases arising from foreign state-sponsored terrorist attacks carried out against American citizens and employees. Mr. Fay is a graduate of Notre Dame University and Rutgers School of Law. He is a Supporting Fellow of the Pound Civil Justice Institute, a member of the American Board of Trial Advocates, a trustee of Public Citizen, and a director of No Greater Love, an organization whose mission is the recognition and remembrance of persons who lost their lives in service to others.

Bill Gaylord has practiced law in Portland since being admitted to the Oregon State Bar in 1973. He attended the engineering school at Cornell University, and Portland State University, and graduated with a BS degree from Oregon State University in 1969. He received his Juris Doctorate from Northwestern School of Law at Lewis & Clark College. He is nationally recognized for his work in product litigation, notably tobacco products, all-terrain vehicles, and nail guns and staple guns. He is a past-president of the Oregon Trial Lawyers Association, and remains active in leadership with both OTLA and the American Association for Justice. He is also a former president and trustee of the Pound Civil Justice Institute. He is former chairperson of the Oregon Uniform Trial Court Rules Committee and the Oregon Council on Court Procedures. He has also served on the Multnomah Bar Association Committee on Professionalism and the Multnomah County Arbitration Commission.

Steve Herman is a partner in the New Orleans law firm Herman Herman & Katz, and the current President of the Louisiana Association for Justice. After graduating from Dartmouth College and Tulane Law School, he clerked for now-retired Louisiana Supreme Court Justice Harry T. Lemmon. A 2005 Trial Lawyers for Public Justice Trial Lawyer of the Year Finalist, and 2010 *N.O. City Business* Leadership in the Law recipient, Herman teaches complex litigation at both Tulane and Loyola Law Schools. He also served, for six years, as a Lawyer Chair for one of the Louisiana Attorney Disciplinary Board Hearing Committees. A past member of the Southeast Louisiana Legal Services Board, and a past president of the Civil Justice Foundation, Herman currently serves as Co-Liaison Counsel for the Plaintiffs in MDL No. 2179, the *Deepwater Horizon* Litigation.

Adam Langino Prior to joining Cohen, Milstein, Sellers, & Toll, PLLC, Adam was an Assistant Public Defender in West Palm Beach, Florida, handling complex criminal cases, including crimes punishable by life in prison, gaining valuable trial experience securing freedom for the wrongly accused. Adam is a member of the Florida and Minnesota bars. Adam is a Board member for the Florida Justice Association's Young Lawyer's Section and a member of APITLA (Association of Plaintiff Interstate Trucking Lawyers of America), the American Association for Justice, and the Palm Beach County Association of Criminal Defense Lawyers. Adam is a 2006 *cum laude* graduate of the University of Minnesota School of Law. He received his Bachelor's degree with Honors in Government and Politics, graduating *magna cum laude* from the University of Maryland—College Park, and was selected to study at Exeter College at Oxford University, where he participated in an Honors Seminar in British Law and Society.

Wayne Parsons practices in Honolulu, Hawai'i. He received B.S. and M.S. degrees in engineering, physics and mathematics from the University of Michigan. He went to work with NASA on the Apollo space project, which took him to the astronomical observatory on the Island of Maui. After seeing Hawai'i, he went to the University of Michigan Law School and moved to Hawai'i permanently. He specializes in personal injury matters for plaintiffs and engages in consumer advocacy in the construction industry. Mr. Parsons has been president of the Hawai'i State Bar Association, was a founder of the Consumer Lawyers of Hawai'i, has served as a governor of the American Association for Justice and has been the Hawai'i chair of the Public Justice organization. He is a Fellow of the Pound Civil Justice Institute and a member of several construction, engineering and architecture organizations.

Alinor Sterling practices in Bridgeport, Connecticut with the law firm of Koskoff, Koskoff and Bieder, specializing in complex cases, in both trial and appeal courts. She received her undergraduate degree from Princeton University, where she had a major in the Woodrow Wilson School of Public and International Affairs and a minor in Russian Studies. After a year on a graduate fellowship in Moscow, Ms. Sterling attended the UCLA School of Law, where she was elected to the Order of the Coif and was an editor of the UCLA Law Review. She is a Fellow of the Pound Civil Justice Institute.

John Vail is the proprietor of John Vail Law PLLC, "An appellate voice for the trial bar." Since 1997 Mr. Vail has focused his work solely on access to justice issues, representing clients in numerous state supreme courts and in the Supreme Court of the United States. He has received the Public Justice Achievement Award from Trial Lawyers for Public Justice for his "outstanding work and success challenging the constitutionality of legislation limiting injury victims' access to justice." His legal theories, and the evidence he has developed to support them, have been used widely to keep open the doors to America's courtrooms. His articles, such as *Blame it on the Bee Gees: The Attack on Trial Lawyers and Civil Justice*, 51 N.Y.L. Sch. L. Rev. 323 (2006) and *Big Money v. The Framers*, Yale L.J. (The Pocket Part), Dec. 2005, <http://www.thepocketpart.org/2005/12/vail.html>, have enlivened scholarly debate and have guided practitioners. Mr. Vail spent seventeen years doing legal aid work, concentrating on major litigation to advance rights. He has been recognized by the legal services community for "inspired vision and outstanding leadership" and for "tireless devotion as a champion for the rights of low income people." He was an original member of the Center for Constitutional Litigation, where he was Vice President and Senior Litigation Counsel. Mr. Vail has served as Professorial Lecturer in Law at the George Washington University School of Law. He is a graduate of the College of the University of Chicago and of Vanderbilt Law School.

Molly Hoffman Wolfe practices with Fay Kaplan Law, P.A., in Washington, D.C., concentrating on medical negligence, birth injuries, terrorism-related litigation, bullying cases, and general civil litigation. She is a graduate of the Art Institute of Dallas, the University of Texas, and the David A. Clarke School of Law of the University of the District of Columbia, where she was Senior Editor of the law review. She is a member of the Trial Lawyers Association of Metropolitan Washington, D.C. and the American Association for Justice, and is a Trustee of the Pound Civil Justice Institute.

JUDICIAL ATTENDEES

ALABAMA

Hon. Craig Sorrell Pittman, Court of Civil Appeals
Hon. Terri Willingham Thomas, Court of Civil Appeals

ARIZONA

Hon. Robert M. Brutinel, Supreme Court
Hon. Margaret H. Downie, Court of Appeals
Hon. Philip G. Espinosa, Court of Appeals
Hon. John Pelander, Supreme Court
Hon. Peter B. Swann, Court of Appeals
Hon. Jon W. Thompson, Court of Appeals
Hon. Ann A. Scott Timmer, Supreme Court

ARKANSAS

Hon. Robert Gladwin, Court of Appeals
Hon. David M. Glover, Court of Appeals
Hon. Phillip T. Whiteaker, Court of Appeals

CALIFORNIA

Hon. William W. Bedsworth, Court of Appeal
Hon. Robert L. Dondero, Court of Appeal
Hon. Malcolm Mackey, Los Angeles Superior Court
Hon. Eileen C. Moore, Court of Appeal
Hon. Vance W. Raye, Court of Appeal
Hon. William F. Rylaarsdam, Court of Appeals

COLORADO

Hon. Karen Michele Ashby, Court of Appeals
Hon. Terry Fox, Court of Appeals

FLORIDA

Hon. Robert T. Benton II, Court of Appeals
Hon. Charles T. Canady, Supreme Court
Hon. Cory J. Ciklin, Court of Appeal
Hon. Alan O. Forst, Court of Appeal
Hon. Jonathan D. Gerber, Court of Appeal
Hon. Nelly N. Khouzam, Court of Appeal
Hon. Mark W. Klingensmith, Court of Appeal
Hon. Joseph Lewis Jr., Court of Appeal
Hon. Thomas W. Logue, Court of Appeal
Hon. Robert Morris, Court of Appeal
Hon. Richard B. Orfinger, Court of Appeal
Hon. Morris Silberman, Court of Appeal
Hon. Bradford L. Thomas, Court of Appeals

GEORGIA

Hon. Anne Elizabeth Barnes, Court of Appeals
Hon. Christopher J. McFadden, Court of Appeals

HAWAII

Hon. Sabrina S. McKenna, Supreme Court
Hon. Paula A. Nakayama, Supreme Court
Hon. Richard W. Pollack, Supreme Court
Hon. Lawrence M. Reifurth, Court of Appeals
Hon. Michael D. Wilson, Supreme Court

ILLINOIS

Hon. Robert L. Carter, Appellate Court
Hon. Mathias W. Delort, Appellate Court
Hon. Richard P. Goldenhersh, Appellate Court
Hon. Stuart E. Palmer, Appellate Court
Hon. Carol Pope, Appellate Court
Hon. Alexander P. White, Circuit Court

INDIANA

Hon. Lloyd Mark Bailey, Court of Appeals
Hon. Michael P. Barnes, Court of Appeals
Hon. James S. Kirsch, Court of Appeals
Hon. Patricia Riley, Court of Appeals

IOWA

Hon. Mark Bennett, U.S. District Court
Hon. Edward Mansfield, Supreme Court
Hon. Amanda Potterfield, Court of Appeals
Hon. Mary Tabor, Court of Appeals
Hon. David S. Wiggins, Supreme Court

KENTUCKY

Hon. Michael Caperton, Court of Appeals
Hon. Allison Emerson Jones, Court of Appeals
Hon. Joy A. Kramer, Court of Appeals
Hon. Debra Hembree Lambert, Court of Appeals
Hon. Irv Maze, Court of Appeals
Hon. Janet L. Stumbo, Court of Appeals
Hon. Kelly Thompson, Court of Appeals

LOUISIANA

Hon. Roland L. Belsome, Court of Appeal
Hon. Paul A. Bonin, Court of Appeal
Hon. Henry N. Brown Jr., Court of Appeal
Hon. J. Jay Caraway, Court of Appeal
Hon. Marc E. Johnson, Court of Appeal
Hon. Phyllis M. Keaty, Court of Appeal
Hon. Jimmy Kuhn, Court of Appeals
Hon. Edwin A. Lombard, Court of Appeal
Hon. Ulysses Gene Thibodeaux, Court of Appeal
Hon. Jewel E. Welch, Court of Appeal
Hon. Vanessa Whipple, Court of Appeal

MARYLAND

Hon. Clayton Greene Jr., Court of Special Appeals
Hon. Andrea M. Leahy, Court of Special Appeals
Hon. Michael Wilson Reed, Court of Special Appeals
Hon. Alexander Wright Jr., Court of Special Appeals

MASSACHUSETTS

Hon. Robert J. Cordy, Supreme Judicial Court
Hon. Ralph D. Gants, Supreme Judicial Court

MICHIGAN

Hon. Mark T. Boonstra, Court of Appeals
Hon. Elizabeth Gleicher, Court of Appeals
Hon. Michael J. Kelly, Court of Appeals
Hon. Stephen Markman, Supreme Court
Hon. William B. Murphy, Court of Appeals
Hon. Peter D. O'Connell, Court of Appeals
Hon. Michael J. Riordan, Court of Appeals
Hon. David H. Sawyer, Court of Appeals
Hon. Douglas B. Shapiro, Court of Appeals
Hon. Cynthia Diane Stephens, Court of Appeals

MINNESOTA

Hon. Margaret Chutich, Court of Appeals
Hon. Edward J. Cleary, Court of Appeals
Hon. Carol A. Hooten, Court of Appeals
Hon. Matthew E. Johnson, Court of Appeals
Hon. John P. Smith, Court of Appeals
Hon. Renee Worke, Court of Appeals

MISSISSIPPI

Hon. Josiah D. Coleman, Supreme Court
Hon. Tyree Irving, Court of Appeals
Hon. James W. Kitchens, Supreme Court

MISSOURI

Hon. Anthony Rex Gabbert, Court of Appeals
Hon. Victor Howard, Court of Appeals
Hon. Mary W. Sheffield, Court of Appeals
Hon. James E. Welsh, Court of Appeals

MONTANA

Hon. Beth Baker, Supreme Court

NEBRASKA

Hon. Everett O. Inbody, Court of Appeals
Hon. Frankie J. Moore, Court of Appeals

NEVADA

Hon. Michael L. Douglas, Supreme Court

NEW MEXICO

Hon. Charles W. Daniels, Supreme Court
Hon. James Wechsler, Court of Appeals

NEW YORK

Hon. Sheila Abdus-Salaam, Court of Appeals
Hon. Darcel D. Clark, Supreme Court,
Appellate Division
Hon. Sylvia Hinds-Radix, Supreme Court,
Appellate Division
Hon. John M. Leventhal, Supreme Court,
Appellate Division
Hon. Karla Moskowitz, Supreme Court,
Appellate Division
Hon. Erin Peradotto, Supreme Court,
Appellate Division
Hon. Rosalyn Richter, Supreme Court,
Appellate Division
Hon. Jenny Rivera, Court of Appeals

NORTH CAROLINA

Hon. Cheri Beasley, Supreme Court
Hon. Wanda G. Bryant, Court of Appeals
Hon. Robert C. Dillon, Court of Appeals
Hon. Robert Neal Hunter Jr., Court of Appeals
Hon. Barbara A. Jackson, Supreme Court
Hon. John Douglas McCullough, Court of Appeals
Hon. John M. Tyson, Court of Appeals

NORTH DAKOTA

Hon. Dale V. Sandstrom, Supreme Court

OHIO

Hon. Mary J. Boyle, Court of Appeals
Hon. Jennifer Brunner, Court of Appeals
Hon. Mary DeGenaro, Court of Appeals
Hon. W. Scott Gwin, Court of Appeals
Hon. Tim McCormack, Court of Appeals
Hon. Colleen Mary O'Toole, Court of Appeals
Hon. Cynthia Wescott Rice, Court of Appeals

OKLAHOMA

Hon. Brian Jack Goree, Court of Civil Appeals
Hon. Bill Hetherington, Court of Civil Appeals
Hon. P. Thomas Thornbrugh, Court of Civil Appeals
Hon. Jane P. Wiseman, Court of Civil Appeals

OREGON

Hon. Rex Armstrong, Court of Appeals
Hon. Richard C. Baldwin, Supreme Court
Hon. Chris Garrett, Court of Appeals
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ABOUT THE POUND CIVIL JUSTICE INSTITUTE

What is the Pound Civil Justice Institute?

The Pound Civil Justice Institute is a legal think tank dedicated to the cause of promoting access to the civil justice system through its programs and publications. The Institute was established in 1956 to build upon the work of Roscoe Pound, Dean of Harvard Law School from 1916 to 1936 and one of law's greatest scholars. The Pound Institute promotes ongoing dialogue among the academic, judicial, and legal communities on issues critical to protecting the right to trial by jury. At conferences, symposia, and judicial forums, in reports and publications, and through grants and awards, the Pound Institute promotes a balanced debate which brings positive changes to American jurisprudence and strives to guarantee access to justice.

What Programs Does the Institute Sponsor?

Annual Forum for State Appellate Court Judges—Since 1992, Pound's Judges Forum has brought together judges from state supreme courts and intermediate appellate courts, legal scholars, practicing attorneys, and policymakers for open dialogue about major issues affecting the civil justice system. The Forum recognizes the important role of state courts in our system of justice, and deals with issues of responsibility and independence that lie at the heart of a judge's work. Pound Forums have addressed such issues as rule making, electronic discovery, mandatory arbitration, transparency in the courts, judicial independence, and the civil jury. The Forum is one of the Institute's most respected programs, and has often been called by jurists "one of the best seminars available to jurists in the country."

Academic Symposia—One of Pound's primary goals is to provide a well-respected basis for challenging the claims made by entities attempting to limit individual access to the civil justice system. To this end, the Institute inaugurated its Academic Symposium, which seeks to develop a new school of thought emphasizing the right to trial by jury and to provide a fertile breeding ground for new research supportive of the civil justice system. The next Symposium will be held in September 2016 with Rutgers Center for Risk and Responsibility and Northeastern Law School on the topic of The Demise of the Grand Bargain. The Institute held Symposia with Emory Law on "The 'War' on the Civil Justice System" (2015); with Vanderbilt Law School on medical malpractice (2005); and with Duke University Law School on forced arbitration (2002). The academic papers prepared for the Symposia are published in the co-sponsoring law schools' law reviews.

Appellate Advocacy Award—The Institute established this award for legal practitioners in 2015 in an effort to recognize excellence in appellate advocacy in America and those who achieve it. The Award is given to attorney(s) who have been instrumental in securing a final appellate court decision with significant impact on the right to trial by jury, public health and safety, consumer rights, civil rights, access to civil justice.

Howard Twigg Memorial Lecture on Legal Professionalism—Founded in 2010 to honor former Pound President Howard Twigg – a legal giant, consummate professional and champion of justice for Americans – this lecture series educates attorneys on legal ethics and professionalism. Lectures have been delivered by Hon. Mark Bennett of U.S. District Court (IA), Hon. R. Fred Lewis of the Florida Supreme Court, Hon. James Kitchens of the Supreme Court of Mississippi, Oliver Diaz, formerly of the Supreme Court of Mississippi, and attorney Mark Mandell of Rhode Island.

Papers of the Pound Institute—Pound has an expansive collection of research resulting from its Judges Forums, Warren Conferences, academic research grants, Academic Symposia, Roundtable discussions, and other sponsored publications. Reports of these activities, called Papers of the Pound Civil Justice Institute, are available via Pound’s website (www.poundinstitute.org) or by contacting the Pound Institute.

Fellows Receptions—Members of the Pound Institute, called Fellows, gather twice annually to celebrate the work of the Institute. Invited guests include the Officers and Trustees of the Pound Institute, Pound Fellows, legal academics, and judges.

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PAPERS OF THE POUND CIVIL JUSTICE INSTITUTE

Reports of the Annual Forums for State Appellate Court Judges

(All Forum Reports or academic papers are available for full viewing at www.poundinstitute.org.)

2015 • Judicial Transparency and the Rule of Law

Judith Resnik, Yale Law School, *Contracting Transparency: Public Courts, Privatizing Processes, and Democratic Practices*

Nancy Marder, IIT Chicago-Kent College of Law, *Judicial Transparency in the Twenty-First Century*.

2014 • Forced Arbitration and the Fate of the 7th Amendment: The Core of America's Legal System at Stake?

Myriam Gilles, Cardozo Law School, Yeshiva University, *The Demise of Deterrence: Mandatory Arbitration and the "Litigation Reform" Movement*

Richard Frankel, Drexel University School of Law, *State Court Authority Regarding Forced Arbitration After Concepcion*

2013 • The War on the Judiciary: Can Independent Judging Survive?

Charles Geyh, Indiana University Maurer School of Law, *The Political Transformation of the American Judiciary*

Amanda Frost, American University, Washington College of Law, *Honoring Your Oath in Political Times*

2012 • Justice Isn't Free: The Court Funding Crisis and Its Remedies

John T. Broderick, University of New Hampshire School of Law, and Lawrence Friedman, *New England School of Law, State Courts and Public Justice: New Challenges, New Choices*

J. Clark Kelso, McGeorge School of Law, *Strategies for Responding to the Budget Crisis: From Leverage to Leadership*

2011 • The Jury Trial Implosion: The Decline of Trial by Jury and its Significance for Appellate Courts

Marc Galanter, University of Wisconsin Law School, and Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*

Stephan Landsman, DePaul University College of Law, *The Impact of the Vanishing Jury Trial on Participatory Democracy*

Hon. William G. Young, Massachusetts District Court, *Federal Courts Nurturing Democracy*

2010 • Back to the Future: Pleading Again in the Age of Dickens?

A. Benjamin Spencer, Washington and Lee University School of Law, *Pleading in State Courts after Twombly and Iqbal*

Stephen B. Burbank, University of Pennsylvania Law School, *Pleading, Access to Justice, and the Distribution of Power*

2009 • Preemption: Will Traditional State Authority Survive?

Mary J. Davis, University of Kentucky College of Law, *Is the "Presumption against Preemption" Still Valid?*

Thomas O. McGarity, University of Texas School of Law, *When Does State Law Trigger Preemption Issues?*

2008 • Summary Judgment on the Rise: Is Justice Falling?

Arthur R. Miller, New York University School of Law, *The Ascent of Summary Judgment and Its Consequences for State Courts and State Law*

Georgene M. Vairo, Loyola Law School, Los Angeles, *Defending against Summary Justice: The Role of the Appellate Courts*

2007 • The Least Dangerous but Most Vulnerable Branch: Judicial Independence and the Rights of Citizens

Penny J. White, University of Tennessee College of Law, *Judicial Independence in the Aftermath of*

Republican Party of Minnesota v. White

Sherrilyn Ifill, University of Maryland School of Law, *Rebuilding and Strengthening Support for an Independent Judiciary*

2006 • The Whole Truth? Experts, Evidence, and the Blindfolding of the Jury

Joseph Sanders, University of Houston Law Center, *Daubert, Frye, and the States: Thoughts on the Choice of a Standard*

Nicole Waters, National Center for State Courts, *Standing Guard at the Jury's Gate: Daubert's Impact on the State Courts*

2005 • The Rule(s) of Law: Electronic Discovery and the Challenge of Rulemaking in the State Courts

Report of the thirteenth Forum for State Appellate Court Judges. Discussions include state court approaches to rule making, legislative encroachments into that judicial power, the impact of federal rules on state court rules, how state courts can and have adapted to the use of electronic information, whether there should be differences in handling the discovery of electronic information versus traditional files, and whether state courts should adopt new proposed federal rules on e-discovery.

2004 • Still Coequal? State Courts, Legislatures, and the Separation of Powers

Report of the twelfth Forum for State Appellate Court Judges. Discussions include state court responses to legislative encroachment, deference state courts should give legislative findings, the relationship between state courts and legislatures, judicial approaches to separation of powers issues, the funding of the courts, the decline of lawyers in legislatures, the role of courts and judges in democracy, and how protecting judicial power can protect citizen rights.

2003 • The Privatization of Justice? Mandatory Arbitration and the State Courts

Discussions include the growing rise of binding arbitration clauses in contracts, preemption of state law via the Federal Arbitration Act (FAA), standards for judging the waiver of the right to trial by jury, the supposed national policy favoring arbitration, and resisting the FAA's encroachment on state law.

2002 • State Courts and Federal Authority: A Threat to Judicial Independence?

Discussions include efforts by federal and state courts to usurp the power of state court through removal, preemption, etc., the ability of state courts to handle class actions and other complex litigation, the constitutional authority of state courts, and the relationship between state courts and legislatures and federal courts.

2001 • The Jury as Fact Finder and Community Presence in Civil Justice

Discussions include the behavior and reliability of juries, empirical studies of juries, efforts to blindfold the jury, the history of the civil jury in Britain and America, the treatment of juries by appellate courts, how juries judge cases in comparison to other fact-finders, and possible future approaches to trial by jury in the United States.

2000 • Open Courts with Sealed Files: Secrecy's Impact on American Justice

Discussions include the effects of secrecy on the rights of individuals, the forms that secrecy takes in the courts, ethical issues affecting lawyers agreeing to secret settlements, the role of the news media in the debate over secrecy, the tension between confidentiality proponents and public access advocates, and the approaches taken by various judges when confronted with secrecy requests.

1999 • Controversies Surrounding Discovery and Its Effect on the Courts

Discussions include the existing empirical research on the operation of civil discovery; the contrast between the research findings and the myths about discovery that have circulated; and whether or not the recent changes to the federal courts' discovery rules advance the purpose of discovery.

1998 • Assaults on the Judiciary: Attacking the "Great Bulwark of Public Liberty"

Discussions include threats to judicial independence through politically motivated attacks on the courts and on individual judges as well as through legislative action to restrict the courts that may violate constitutional guarantees, and possible responses by judges, judicial institutions, the organized bar, and citizens.

1997 • Scientific Evidence in the Courts: Concepts and Controversies

Discussions include the background of the controversy over scientific evidence; issues, assumptions, and models in judging scientific disputes; and the applicability of the *Daubert* decision's "reliability threshold" under state law analogous to Rule 702 of the Federal Rules of Evidence.

1996 • Possible State Court Responses to American Law Institute's Proposed Restatement of Products Liability

Discussions include the workings of the American Law Institute's (ALI) restatement process; a look at provisions of the proposed restatement on products liability and academic responses to them; the relationship of its proposals to the law of negligence and warranty; and possible judicial responses to suggestions that the ALI's recommendations be adopted by the state courts.

1995 • Preserving Access to Justice: Effects on State Courts of the Proposed Long Range Plan for Federal Courts

Discussions include the constitutionality of the federal courts' plan to shift caseloads to state courts without adequate funding support, as well as the impact on access to justice of the proposed plan.

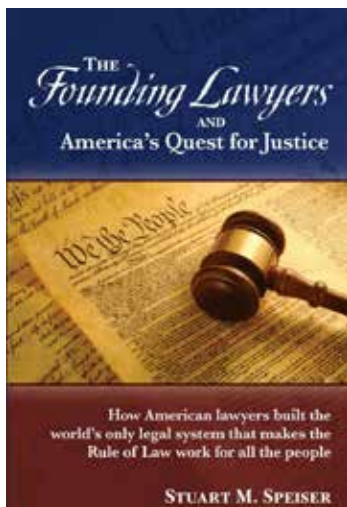
1993 • Preserving the Independence of the Judiciary

Discussions include the impact on judicial independence of judicial selection processes and resources available to the judiciary.

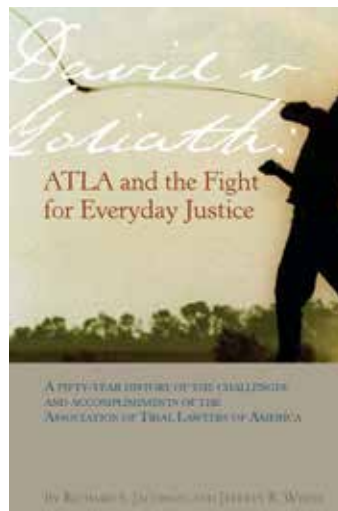
1992 • Protecting Individual Rights: The Role of State Constitutionalism.

Report of the first Forum for State Court Judges. Discussions include the renewal of state constitutionalism on the issues of privacy, search and seizure, and speech, among others. Also discussed was the role of the trial bar and academics in this renewal.

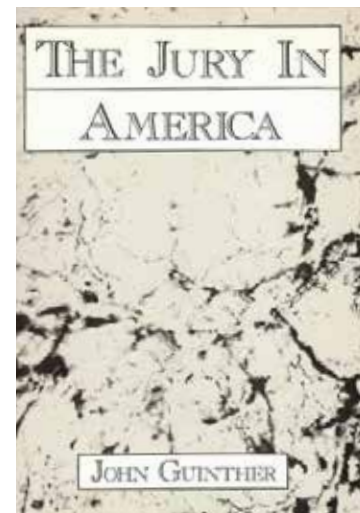
Books distributed by the Pound Civil Justice Institute



The Founding Lawyers and America's Quest for Justice
by Stuart M. Speiser (2010)



David v. Goliath: ATLA and the Fight for Everyday Justice
by Richard S. Jacobson & Jeffrey R. White (2004)
(Free viewing and downloading at www.poundinstitute.org.)



The Jury In America
by John Guinther (1988)

Reports of the Chief Justice Earl Warren Conferences on Advocacy

1989 • Medical Quality and the Law

1986 • The American Civil Jury

1985 • Dispute Resolution Devices in a Democratic Society

1984 • Product Safety in America

1983 • The Courts: Separation of Powers

1982 • Ethics and Government

1981 • Church, State, and Politics

1980 • The Penalty of Death

1979 • The Courts: The Pendulum of Federalism

1978 • Ethics and Advocacy

1977 • The American Jury System

1976 • Trial Advocacy as a Specialty

1975 • The Powers of the Presidency

1974 • Privacy in a Free Society

1973 • The First Amendment and the News Media

1972 • A Program for Prison Reform

Reports of Roundtable Discussions

1993 • Justice Denied: Underfunding of the Courts.

Report on the 1993 Roundtable, examining the issues surrounding the current funding crisis in American courts, including the role of the government and public perception of the justice system, and the effects of increased crime and drug reform efforts. Moderated by Chief Justice Rosemary Barkett of the Florida Supreme Court.

1991 • Safety of the Blood Supply.

Report on the Spring 1991 Roundtable, written by Robert E. Stein, a Washington, D.C., attorney and an adjunct professor at Georgetown University Law Center. The report covers topics such as testing for the presence of HIV and litigation involving blood products and blood banks.

1990 • Injury Prevention in America.

Report on the 1990 Roundtables, written by Anne Grant, lawyer and former editor of Everyday Law and TRIAL magazines. Topics include “Farm Safety in America,” “Industrial Safety: Preventing Injuries in the Workplace,” and “Industrial Diseases in America.”

1988-89 • Health Care and the Law III.

Report on the 1988–1989 Roundtables, written by health policy specialist Michael E. Carbine. Topics include “Drugs, Medical Devices and Risk: Recommendations for an Ongoing Dialogue,” “Health Care Providers and the New Questions of Life and Death,” and “Medical Providers and the New Era of Assessment and Accountability.”

1988 • Health Care and the Law.

Report on the 1988 Roundtables, written by health policy specialist Michael E. Carbine. Topics include “Hospitals and AIDS: The Legal Issues,” “Medicine, Liability and the Law: Expanding the Dialogue,” and “Developing Flexible Dispute Resolution Mechanisms for the Health Care Field.”

1988 • Health Care and the Law II—Pound Fellows Forum.

Report on the 1988 Pound Fellows Forum, “Patients, Doctors, Lawyers and Juries,” written by John Guinther, award-winning author of *The Jury in America*. The Forum was held at the Association of Trial Lawyers Annual Convention in Kansas City and was moderated by Professor Arthur Miller of Harvard Law School.

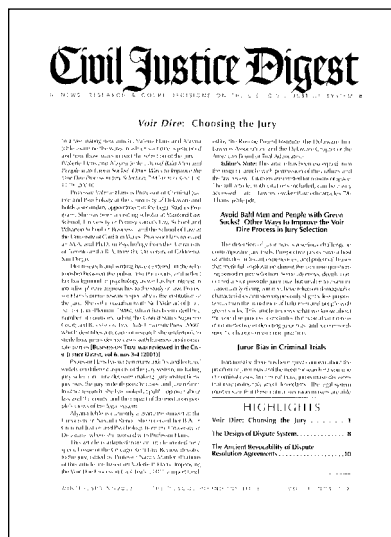
Research Monographs

Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts. This landmark study, written by Professor Michael Rustad of Suffolk University Law School with a grant from the Pound Foundation, traces the pattern of punitive damages awards in U.S. products cases. It tracks all traceable punitive damages verdicts in products liability litigation for a quarter century and provides empirical data on the relationship between amounts awarded and those actually received.

The Pound Connective Tissue Injury Research Project: Final Report, by Valerie P. Hans, Ph.D. Each year, automobile accidents account for a substantial number of deaths and other personal injuries nationwide. Lawsuits over injuries suffered in auto accidents constitute the most frequent type of tort case in the state courts. The Pound Institute supported a series of research studies on the public's views of whiplash and other types of soft tissue and connective tissue injuries within the context of civil lawsuits. The 2007 final report presents and integrates key research findings and identifies some of their implications for trial practice.

The American Lawyer's Code of Conduct, Revised Draft. Available at www.poundinstitute.org.

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