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

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Jeremy Bentham theorized the disciplinary, educative, and evaluative utilities of public adjudication, in which third parties can observe and critique the proceedings. Constitutions around the world have applied those ideas through mandates for 'open courts' and 'fair hearings,' albeit translated in practice in diverse ways. The contemporary #MeToo movement has deployed Bentham's 'public-

* This chapter builds on related articles and books, cited below, and especially *Representing Justice: Invention, Controversy and Rights in City-States and Democratic Courthouses*, co-authored with Dennis Curtis. This essay also is the predicate to another book on which I am working. Thanks are owed to Burkhard Hess, Ana Koprivica Harvey, and Marta Requejo Isidro at the Max Planck Institute, as well as to participants at the conference 'Open Justice,' organized in February of 2018 by the Max Planck Institute, Luxembourg, in cooperation with Saarland University. Their generosity enabled me to understand a good deal more about the nuances of European law. Thanks are also due to Andrew Brandt, Anne Joseph O'Connell, Amanda Tyler, and participants at the Berkeley Public Interest Workshop; to Stephen Vladeck, Robert Bone, Willie Forbath, and participants at the University of Texas Faculty Workshop; to Allison Tait and participants at the University of Richmond Faulty workshop; to Robert Post, Suzanne Augenhofer, and participants in the Humboldt University Consumer Law Workshop; to Denny Curtis, John Langbein, Hazel Genn, Daniel Markovits, Sadie Blanchard, Nancy Welsh, Tanina Rostain, Shannon Salter, Stacie Strong, and Darin Thompson for many exchanges; to current and former law students Jason Bertoldi, Matt Butler, David Chen, Kathleen Claussen, Greg Conyers, Adam Grogg, Kate Huddleston, Clare Kane, Adam Margulies, Catherine McCarthy, Michael Morse, Devon Porter, Heather Richard, Regina Wang, Emily Wanger, and Iva Velickovic; and to Bonnie Posick for her expert advice and editorial assistance. Thanks are also owed to Ryan Boyle, Vice President, Statistics and In-House Research, and to staff at the American Arbitration Association for clarifying data questions, and to Philip Schofield, for guiding me through materials from the Bentham Project at UCL. I am an Andrew Carnegie 2018-2020 Fellow, and this essay was made possible in part by a grant from Carnegie Corporation of New York. The statements made and views expressed are solely my responsibility.

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ity principle' by using twenty-first century technologies to challenge institutions for failing to sanction sexual predators. The web has thus provided a function akin to what courts do – disseminating information and imposing discipline. These new technologies, enabling 'online dispute resolution' (ODR), augment efforts styled alternative dispute resolution (ADR) to transform courts or to route legal disputes to conclusions without courts. Neither ODR nor ADR, based in or out of courts, routinely builds in mechanisms for third-party access to processes or outcomes. Ready access to information is not, however, an unmitigated good, as reflected in a new right 'to be forgotten' that eliminates materials from the web through decisions by a private adjudicator – Google. This chapter explores the impetus for reforming courts, the repeat players promoting new procedures, the challenges of regulating both process and information, and the fragility of commitments to state-provided public adjudication in which third parties are recognized as authorized to observe and critique.

1. *Unpacking the Terms, Concepts, and Technologies*

When asked to think about the concept of 'open justice' for a discussion on 'Privatization of Justice and Transparency: Arbitration and ADR,'[1] I found myself stumbling over the terms. One could posit that the 'alternatives' to court include administrative agency or tribunal adjudication, arbitration, other forms of alternative dispute resolution (ADR), and online dispute resolution (ODR). This list does not, however, capture the differences within and overlaps among these processes in a spectrum that runs from formal live-person in-court proceedings[2] and large-scale international

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

2 See Ana Koprivica, 'Revisiting the Principle of Public Hearings in the Light of the Ongoing Reform in Germany: Much Ado about Nothing?' in Selena Clavora & Thomas Garber (eds), *Grundsätze des Zivilverfahrensrechts auf dem Prüfstand: 5. Österreichische Assistententagung zum Zivil- und Zivilverfahrensrecht der Karl-Franzens-Universität Graz* (NWV Verlag 2017).

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investment arbitrations[3] to the 'paths to justice'[4] for small-scale claimants. A thicker description would also entail specifying the range of technologies relied upon, from the buildings (and sometimes the grand architecture) of courthouses to virtual exchanges through the internet, and the mix of public and private regulation and actors involved.

Many concerns animate the expanding array of dispute resolution procedures. For some, the provision of dispute resolution has not kept pace with the large number of claimants that egalitarian commitments to open access have authorized to assert their rights. Moreover, the price and complexity of process makes it hard for individuals of limited resources to participate. For others, too much ready access has produced too many claims not appropriate for state-based resolution.

The many proponents of altering procedures have succeeded in installing alternative dispute resolution and internet-based interactions in courts and tribunals, such as those used in the UK[5] and in British

3 See Dimitrij Euler, Markus Gehring & Maxi Scherer (eds), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (CUP 2015); Janice Lee, 'The Evolving Role of Institutional Arbitration in Preserving Parties' Due Process Rights' (2017) 10 Contemporary Asia Arbitration Journal 71; see also Gilles Cuniberti, *Rethinking International Commercial Arbitration: Towards Default Arbitration* (Edward Elgar Publishing 2017); Gilles Cuniberti, 'The Recognition of Foreign Judgments Lacking Reasons in Europe: Access to Justice, Foreign Court, Avoidance, and Efficiency' (2008) 57 International and Comparative Law Quarterly 25.

4 Dame Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (Hart 1999); Dame Hazel Genn, *Judging Civil Justice*, Hamlyn Lecture 2008 (CUP 2010).

5 Sir Ernest Ryder, 'Securing Open Justice', (Lecture at Max Planck Institute Luxembourg, 1 February 2018) <https://www.judiciary.gov.uk/wp-content/uploads/2018/02/ryder-spt-open-justice-luxembourg-feb-2018.pdf> accessed 26 August 2018, and in this Volume; John Sorabji, 'The Online Solution Court: A Multi-Door Courthouse for the 21st Century' (2017) 36 Civil Justice Quarterly 51; Ministry of Justice, Transforming our Justice System (2016) 5, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf> accessed 26 August 2018; Joe Tomlinson, A Primer on the Digitisation of Administrative Tribunals (University of Sheffield 2017) 14–17 <https://lawandgoodadministration.files.wordpress.com/2017/09/a-primer-on-the-digitisation-of-administrative-tribunals1.pdf> accessed 26 August 2018; Dame Hazel Genn, 'Online Courts and the Future of Justice', 2017 Birkenhead Lecture (16 October 2017), <https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf> accessed 29 November 2018.

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Columbia.[6] Many of the new processes relocate the places of decision away from courtrooms and authorize actors who are not state-appointed judges to render decisions that, in some jurisdictions, are binding and legally enforceable. Whether preclusive or not, the hope is that the outcomes will suffice for the disputants and that they will not press for more in courts. The ADR/ODR array works to diffuse disputes[7] by undoing the unity of time, place, and process that has been long associated with adjudication.[8]

Thus, an account that posits a dichotomy between courts and their alternatives misses that, as I detail below, what *is* a 'court' is now in question. In some jurisdictions, these 'other' processes are part – or all – of what judges/courts actually do. The distinctions that once seemed plausible between 'judicial' and 'extra-judicial activities' (to borrow terminology from a 1983 version of a federal procedural rule[9]) are diminishing. Rather than *alternatives*, they are *replacements* for adjudication.

Given this array, an integrated analysis is needed of the meaning and value placed on 'transparency,' 'openness,' and 'privatization' across this variety of dispute resolution processes. And, once again, the terms need more elaboration before they can be discussed.

Transparency often describes the idea of seeing *into* activities. When assessing transparency in dispute resolution, questions focus on how easy it is to know and follow a process's rules; to understand how decision-makers are selected and their methods for resolving conflicts; and to learn about outcomes, individually and in the aggregate.[10] Transparency is sometimes argued to be an end unto itself or to be a means of regulation, molding

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6 The British Columbia provisions are at Civil Resolution Tribunal, *Rules* (effective 12 July 2017) 3, 5 <https://civilresolutionbc.ca/wp-content/uploads/2017/07/CRT-rules-effective-July-12-2017.pdf> accessed 26 August 2018 [hereinafter British Columbia CRT 2017 Rules].

7 See Judith Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' (2015) 124 Yale Law Journal 2804 [hereinafter Judith Resnik, 'Diffusing Disputes'].

8 Cécile Chainais, 'Open Justice and the Principle of Public Access to Hearings in the Age of Information Technology: Theoretical Perspectives and Comparative Law,' in this Volume.

9 Federal Rules of Civil Procedure (1983), s 16(c)(7). The changing terminology is analyzed in Judith Resnik, 'The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75' (2014) 162 University of Pennsylvania Law Review 1793.

10 See eg Euler, Gehring & Scherer (eds) (n 3) 5; Nancy S. Marder, 'Judicial Transparency and the Rule of Law' (Pound Civil Justice Institute 2015 Forum for State Appellate Court Judges, 2015) <http://www.poundinstitute.org/sites/default/files/2015PoundForumPaper-NancyMarder.pdf> accessed 26 August 2018.

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behavioral expectations of the actors involved and permitting assessments of their work.[11]

Openness often references the capacity of individuals either to enter or to observe dispute resolution systems. One aspect is the *accessibility* of procedures for seeking relief. Concerns that classes of people are priced out have become one of the bases for advocating making entry easier through new technologies.[12] Openness-as-accessibility could also reference third parties, entitled (or not) to observe the interactions.

Even when obligations for open court proceedings exist, what it means in practice varies. An essentialist posture, assuming that institutions called 'courts' provide access to the same aspects of their proceedings, is undercut by the diverse responses from 'courts' around the world about whether third parties can attend hearings, read written submissions, watch deliberations, and read judgments. Different rules are justified on the basis of the same basic principles of fairness, deliberative integrity, and democracy. The rationales for limiting as well as permitting third-party access help to illuminate the stakes of 'openness' for decision-makers, direct participants, and the general public.

In the European context, openness is generally focused on rights to a 'hearing,' typically referring to live, interpersonal exchanges among disputants and decision-makers.[13] In contrast, permitting the public to watch deliberations among the judges is counter-intuitive in many legal cultures.

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11 See David E. Pozen, 'Transparency's Ideological Drift' (2018) 128 Yale Law Journal 100. Pozen tracked the progressive aspirations for transparent government administration, presumed to generate better processes that in turn would produce faith in and a more rational acting government. He argued that transparency has come to be seen as an independent metric of 'good governance' that can be marshalled to undermine government authority and that a nuanced understanding of its regulatory utility and limits is needed.

12 As Lord Ryder explained, 'open justice' encompasses 'the principle of equal access to court,' which is a 'common law constitutional right in the United Kingdom.' See Ernest Ryder (n 5) para 3.

13 For example, art 31 of the Statute of the Court of Justice of the European Union states: 'The hearing in court shall be public, unless the Court of Justice, of its own motion or on application by the parties, decides otherwise for serious reasons.' Statute of the Court of Justice of the European Union (Consolidated Version, Curia) art 31. See also 'Public Hearings' (Curia) <https://curia.europa.eu/jcms/jcms/Jo2_22322/en/> accessed 26 August 2018. The commitment to orality raises questions about the lawfulness of plea bargaining in criminal proceedings. See Katrin Gierhake, 'How to Justify the Open Court Principle in Criminal Proceedings' in this Volume; Ana Koprivica (n 2) 73–90.

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Yet, in Brazil, plenary sessions of the Supreme Court's deliberations are televised.[14]

Access to the outcomes of such deliberations – the judgments rendered by courts – is assumed to be universal, even though not all jurisdictions make a comprehensive set accessible through print or online reports.[15] And of course, publishing decisions may not entail providing reasons; in

14 The Brazilian Constitution has two provisions mandating openness. A first is art 5 – LX, providing that 'the law may restrict publicity of procedural acts only if required to defend privacy or the social interest.' The other is art 93 – IX, which states that 'all judgments of judicial bodies shall be public, and all decisions shall be substantiated, under penalty of nullity; in cases in which preservation of the right of intimacy of the interested parties in secrecy does not prejudice the public interest in information, the law may limit attendance at determined occasions to only the parties themselves and their attorneys, or only to the latter.' See 'Brazil 1988 (rev 2017)' (Keith S. Rosenn tr, *Constitute*) at <https://www.constituteproject.org/> accessed 26 August 2018; original available at <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm> accessed 26 August 2018.

The Code of Proceedings provides for exceptions, and regulations also come from the National Council of Justice. The Portuguese provisions, which are not to my knowledge available in English, are at <http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm> accessed 26 August 2018; Resolução no 215 de 16/12/2015. Art 22 provides that '[t]he sessions of collegiate organs of the Judiciary Power are public and shall be, whenever possible, live broadcasted online, being considered each organ or tribunal's internal rules, as well as its budgetary availability.' Available at 'Administrative Acts' (National Justice Council) <http://www.cnj.jus.br/busca-atos-adm?documento=3062> accessed 26 August 2018. Thanks to Juliana Cesario Alvim Gomes for this information and the translations.

One researcher concluded that the live televised broadcasting of deliberations, begun in 2002, resulted in the justices behaving 'as politicians,' seeking 'to maximize their individual exposure' to the public. Thus, judges talk more in discussion with their peers and write longer decisions. See Felipe de Mendonça Lopes, 'Television and Judicial Behavior: Lessons from the Brazilian Supreme Court' (2018) 9 Economic Analysis of Law Review 41, 43, available at <https://portalrevistas.ucb.br/index.php/EALR/article/view/8393/5660> accessed 26 August 2018. The court also has a radio station partially dedicated to broadcasting, a TV channel, and sometimes uses YouTube. See Virgílio Afonso da Silva, 'Deciding without deliberating' (2013) 11 I•CON 557, 580. Da Silva argued such publicity could work to limit frank exchanges and in some respects render a justice less 'open' to differing viewpoints and less willing to try alternative approaches. Ibid 580–582. The concern was that the public interactions, along with other practices, undercut fulsome deliberation. Ibid 584.

15 The Supreme Court of India does not have a complete set of published decisions. See Aparna Chandra, *Fostering Respect?: The Supreme Court of India's Approach to International Law: A Call for Caution* (2013) (JSD Thesis, Yale Law School).

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the United States, appellate courts may have tables listing their affirmations, 'on the decision below'. Moreover, in some jurisdictions, 'depublication' entails taking a published decision offline to end its authority.[16]

Access to documents that parties give *to* courts is a distinct question that has produced a variety of responses. Public access to docket sheets, pleadings, and briefs filed with courts is familiar in U.S. law, predicated on a mix of common law and constitutional traditions.[17] In the European Court for Human Rights (ECtHR) in Strasbourg and in some of the ad hoc international criminal tribunals, that pattern has been followed, including mak-

16 In the United States, California is an example of de-publication practices. See Penelope Pether, 'Inequitable Injunctions: The Scandal of Private Judging in the US Courts' (2004) 56 Stanford Law Review 1435. A debate in the federal system about whether courts can publish decisions described as 'without precedential value' or 'not for citation' entailed arguments that a court constituted under art III had no power to issue a judgment which stated others could not rely upon it in subsequent cases. See *Anastasoff v United States* 223 F3d 898 (8th Cir), *vacated en banc as moot*, 235 F3d 1054 (8th Cir 2000). See also Judith Resnik, 'Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century' (1994) 41 UCLA Law Review 1471, 1530.

17 See eg *Hartford Courant Co v Pellegrino* 380 F3d 83, 93–96 (2d Cir 2004); *United States v Amodeo* 44 F3d 141, 145–46 (2d Cir 1995); *Brown & Williamson Tobacco Corp v FTC* 710 F2d 1165, 1179 (6th Cir 1983). For discussion of the doctrine on what constitutes a 'judicial document' and its potential application to ADR, see Judith Resnik, 'A2J/A2K: Access to Justice, Access to Knowledge, Economic Inequalities, and Open Courts and Arbitrations' (2018) 96 North Carolina Law Review 605 [hereinafter Judith Resnik, 'Open Courts and Arbitrations'].

The UK changed its practice in the 2006 procedural reforms and permitted some non-party access to certain filings. See 2006 CPR r 5.4C (Civil Procedure (Amendment), Rules 2006, SI 2006/1689); 'Part 5-Court Documents' (Ministry of Justice, 28 November 2017) r 5.4C <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part05> accessed 28 August 2018; see also Civil Procedure (Amendment) Rules 2006 <http://www.legislation.gov.uk/uksi/2006/1689/pdfs/uksi_20061689_en.pdf> accessed 26 August 2018 (original print PDF version of the 2006 Amendment adding rule 5.4C); 'Practice Direction 5A-Court Documents' (Ministry of Justice, 30 January 2017) <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part05/pd_part05a> accessed 26 August 2018; 'Practice Direction 5B-Communication and Filing of Documents By Email, Ministry of Justice' (Ministry of Justice, 30 January 2017) <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part05/pd_part05b> accessed 26 August 2018. In November 2006, the Civil Procedure Rule Committee added sub-paragraph (1A) to rule 5.4C, providing that non-parties will not be able to obtain statements of cases filed before 2 October 2006, the date on which the original access rule came into force, without court permission. See Civil Procedure (Amendment No. 2) Rules 2006, SI 2006/3132.

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ing documents accessible when cases are pending as well as after they are closed.[18]

But several Member States of the European Union (EU) have traditions that parties' filings are not accessible. Likewise, the Court of Justice for the European Union (CJEU) does not routinely make available written submissions of parties, including filings from Member States and the Commission.[19] In pending cases, the questions sent to the court in the reference are public but not the parties' views. When cases are argued, the hearings are open to the public, able to listen to each participant briefly summarize the arguments made.

In January 2011, the Civil Procedure Rule Committee added sub-paragraph (1B) to rule 5.4C, providing that certain documents related to mediation may not be inspected by non-parties without court permission. See Civil Procedure (Amendment) Rules 2011, SI 2011/88. In October 2015, the Civil Procedure Rule Committee added a signpost after rule 5.4D to assist users. See Civil Procedure (Amendment No. 4) Rules 2015, SI 2015/1569; see also Civil Procedure Rules (Ministry of Justice, 24 November 2017) <https://www.justice.gov.uk/courts/procedure-rules/civil> accessed 26 August 2018. For more on the diversity of common law traditions and limits on non-party access to documents, see Vanessa Yeo, 'Access to Court Records: The Secret to Open Justice' [2011] Singapore Journal of Legal Studies 510.

18 A summary of those access-to-document provisions can be found in *Sweden v API and Commission*, Opinion of Advocate General Poiares Maduro (1 October 2009) paras 26–28 [hereinafter *Sweden v API*, Opinion of AG Maduro]. Of the EU Member States in 2008, Finland and Sweden were the two to permit access to documents filed in pending cases. Ibid para 29. The more common practice was that courts made individualized decisions in specific cases. Ibid. In a few Member States (including Luxembourg in which the CJEU sits), access to documents in case files was prohibited. Ibid. Maduro proposed that it should be up to the CJEU to decide in pending cases about access to submissions. Ibid para 30. Once cases were closed, he opined that access should be permitted and that doing so would be especially useful in light of the CJEU practice that no dissenting opinions are issued. Ibid paras 31–33.

19 See art 20(2) of the Statute of the Court of Justice. That provision restricts access to the parties as well as the institutions (such as the Commission) whose decisions are the subject matter of the dispute. The rules do not provide third-party access. See also joined cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission* [2010] ECR 2010 I-08533, para 98 [hereinafter *Sweden v API*]. The Court thus shaped a presumption of closure in pending cases, subject to an individual assessment about whether that presumption should not preclude access to particular documents. Ibid paras 94, 103. In closed cases, the CJEU concluded that a case-by-case determination was again required, to consider whether disclosure would affect other pending cases. Ibid paras 133–34.

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While jurisdictions permitting access often do so without elaborating theories of their practices, challenges to the CJEU have prompted it to justify limiting access. A brief account of those explanations illustrates the tensions, discussed in subsequent sections of this chapter, between openness as a means to make courts legitimate in democracies and openness as enabling manipulative exploitation.

A 2001 EU regulation mandated 'public access to all the documents drawn or received and held' by the European Parliament, Commission, and Council 'in all areas of activity of the European Union.'[20] That regulation also provided that institutions 'shall refuse access to a document' that would undermine 'the protection of . . . court proceedings and legal advice . . . unless there is an overriding public interest in disclosure.'[21] Thus, while acknowledging that 'the right of public access to documents of the institutions is related to the democratic nature of those institutions,'[22] the CJEU has refused public access to parties' filings on the grounds that those materials were part of its own deliberative processes, appropriately sheltered from view. In its words, the 'pleadings constitute the basis on which the Court carries out its judicial activities.'[23] The Court therefore shaped a presumption of closure in pending cases, subject to an individual assessment about whether that presumption should not pre-

20 See Council Regulation (EC) 1049/2001 on Access to Documents [2001] OJ L 145/43, Recital 2. The regulation aims to enable citizens 'to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizens in a democratic system.' See Case C-213/15 P *Commission v Patrick Breyer* [2017] OJ C 300/02 [hereinafter *Breyer*], Opinion of AG Bobek, para 9 [hereinafter *Breyer*, Opinion of AG Bobek]. But, another provision (Declaration no 35 attached to the Final Act of the Treaty of Amsterdam) imposed the limitation that a 'Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement.' Regulation (EC) 1049/2001, Recital 10.

21 Regulation (EC) 1049/2001 (n 20) art 4(2).

22 *Sweden v API* (n 19) para 68. Pozen's account of the progressive goals in the twentieth century in the United States for transparency in government to make it 'stronger and more egalitarian' resembles the EU's linkage of democracy, transparency, and legitimacy. As he chronicles, some of the mandates installed – such as open meeting laws – have created incentives to avoid creating advisory boards subject to such obligations. David Pozen (n 11) 127. Moreover, those with resources can attend such activities and lobbyists can gather information to target individuals with whom they disagree. Some political scientists see the declining legitimacy of the US Congress as linked to some of its 'openness.' Ibid 131-132.

23 See *Sweden v API* (n 19) para 130.

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clude access to particular documents.[24] As for closed cases, the CJEU concluded that a case-by-case determination was again required, to consider whether disclosure would affect other pending cases.[25]

In that 2010 ruling, the CJEU explained that disclosure would subject both the participants and the court to 'external pressures' and therefore 'disturb the serenity of the proceedings'.[26] The concern appears to be that, if the positions of member states are readily known through filings (rather than only at the time when argument is made before the public), lobbyists would try to persuade those states or others to shift positions or rally public disapproval of the legal posture adopted.

In 2016, the issue of third-party access to documents returned to the CJEU through an individual's request for submissions that the EU Commission had from another party and that had been presented to the CJEU.[27] The EU Commission's view was that it need not respond, as it had no obligation to do so. The Commission lost in the General Court, before the Advocate General, and in the Grand Chamber.[28] Thus the current CJEU doctrine requires the Commission to respond to requests and poten-

24 Ibid paras 103, 104, 130.

25 Ibid paras 131–136.

26 Ibid para 93.

27 See *Breyer* (n 20) and *Breyer*, Opinion of AG Bobek (n 20). Patrick Breyer sought pleadings submitted in a case brought by the Commission against Austria; the Commission had alleged that Austria had failed to implement the Transposition of Data Retention Directive 2006/24. The request related to closed proceedings. Breyer relied on EU Regulations, the TFEU, and art 42 of the European Charter, entitled 'Right of access to documents' and providing that citizens of the Union have 'a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.' See *Breyer*, Opinion of AG Bobek (n 20) paras 4–18.

28 The Advocate General's decision focused on the Treaty on the Functioning of the European Union (TFEU), art 15(1), which states that 'in order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.' Also relevant was art 15(3), providing that 'Any citizen of the Union … shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, … [subject to limits based on] public or private interest governing this right of access as decided by the European Parliament and the Council. … Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents … .' Regulations provided that these precepts applied to the 'Court of Justice of the European Union, the European Central Bank and the European Investment Bank' only when those institutions

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tially provide documents. However, given mandates to weigh public and private interests, disclosure would not necessarily result.

The word *privatization* has yet more to untangle. One aspect is closing processes to protect disputants' privacy. Doing so could be ad hoc or regularized, voluntary or required. The use of nondisclosure agreements

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exercised 'administrative tasks,' in this context as distinct from 'judicial tasks.' *Breyer*, Opinion of AG Bobek (n 20) paras 57–58.

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

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

The Grand Chamber decision agreed that Breyer should be given the opportunity to request the documents; it did not address the proposal made by Advocate General Bobek for a general framework. Rather, the Grand Chamber relied on its earlier decision discussing 'the principle of transparency in EU law.' Documents 'originating from a Member State, such as the written submissions at issue,' held by the Commission 'in connection with proceedings before the Court of Justice of the European Union' could be provided. Moreover, the fact that the Commission had received submissions from the CJEU was not a barrier to the application of Regulation 1049/2001, which applied to documents in the Commission's 'possession.' Origin and authorship did not undercut that obligation. *Breyer* (n 20) para 55.

Under the ruling, Breyer could request documents, but whether disclosure was to follow was a separate question, as other exceptions could shield them. Because by then Breyer had already posted on the internet pleadings which he had obtained without authorization, he was awarded only a portion of the costs for the appeal that he won. Ibid paras 61–62. Concerns about the need for more openness have emerged in part based on the role of the CJEU in a widening array of issues. See eg Grainne de Burca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 168.

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(NDAs) is an example of individualized provisions, mandating confidentiality in specific instances. Rules of mediations or arbitrations may also mandate that what transpires is kept private.[29] Privacy can also entail insistence on secrecy through the sealing of information or the shredding of records. The question of whether law should promote, prohibit, or regulate the various forms of closure has gained new salience as individuals have alleged that they unwittingly agreed or felt themselves forced to accede to confidentiality when high-profile individuals (including senior executives of governments and corporations) paid them to forego litigation and hide accusations of sexually predatory misbehavior.[30]

The term privatization also refers to a global phenomenon about shifting allocations of power between governments and the private sector, which can take place under conditions of regulation or can be a part of deregulatory efforts to limit the authority of governments in general.[31] In terms of courts, privatization denotes a movement away from the sovereign monopoly over dispute resolution to permit non-public actors to have authority of aspects of that power.

Disaggregating various forms of privatization is needed. The term privatization could also refer to private decision-makers employed by the parties or to obligations that individuals pay for court-based services such as probation, drug-testing, or for the use of court-annexed ADR/ODR. Those services in turn could be provided by staff employed by the courts or outsourced to private contractors.

Less often discussed is what is taken for granted as the baseline, which is the accrual of sovereign power. I have used the word 'statization' to denote the numbers of activities that governments took on during the twentieth

29 See Judith Resnik, 'Open Courts and Arbitrations' (n 17) 637–38.

30 See Richard Moorhead, 'Ethics and NDAs: A Report of the Centre for Ethics and Law' (UCL Faculty of Laws, April 2018); House of Commons, The Women and Equalities Committee, *Sexual Harassment in the Workplace* (2018) <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf> accessed 26 August 2018.

31 Manuel José Cepeda-Espinosa and Judith Resnik, 'Puzzles of State Identity, Privatization, and Constitutional Authority'; Jon Michaels and Susan Rose-Ackerman, 'Privatization and Regulation' in Judith Resnik (ed), *Governments' Authority* (E-volume of the Yale Global Constitutionalism Seminar, 2013, A Part of the Gruber Program for Global Justice and Women's Rights, 2013) <https://documents.law.yale.edu/sites/default/files/global-constitutionalism-2013.pdf> accessed 26 August 2018.

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century.[32] Pressed by democratic egalitarian social movements, many countries committed themselves to be welfarist. Social, economic, and civil rights expanded and positive obligations followed.[33]

Courts are one example of the services which came, during the last century, to be understood as entitlements for all.[34] As Lord Ryder, the Senior President of Tribunals in England and Wales, has put it, 'open justice' encompasses 'the principle of equal access to court,' which is a 'common law constitutional right in the United Kingdom.'[35] A failure to provide genuine access to individuals and businesses results in a 'democratic deficit.'[36] Concerned about how courts could meet the demand to provide access, Lord Ryder discussed the utility of moving towards digitalization of court processes.[37]

Reflection is also needed about why questions of 'open justice' – the title of this symposium – are on the agenda. Had this symposium been convened forty years ago, a segment on the privatization of courts and their replacements would have been unlikely.[38] Indeed, even today, we remain awash with the *doctrinal openness* of courts, familiar because of layers of custom, practice, rules, and law.[39] But as I will detail, despite the many textual commitments to open courts and public hearings, there is a

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

33 Distinctive questions are court enforcement of such rights. See Judith Resnik, 'Courts *and* Economic and Social Rights/Courts *as* Economic and Social Rights' in Katharine G. Young (ed), *The Future of Economic and Social Rights* (OUP forthcoming 2019) [hereinafter Judith Resnik, 'Economic and Social Rights'], at <https://ssrn.com/abstract=2983853> accessed 26 August 2018; see also Alastair R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Bloomsbury 2004).

34 See generally Judith Resnik, 'Economic and Social Rights' (n 33).

35 See Ernest Ryder (n 5) paras 3, 4.

36 Ibid.

37 Ibid paras 5–13.

38 Frank Sander, one of the early proponents of ADR in the United States, used the metaphor of opening 'many doors' in a courthouse, rather than of closing off doors. Frank E. A. Sander, 'Varieties of Dispute Processing' (1976) 70 Federal Rules Decisions 111, 131.

39 In Europe, the shorthand had been art 6, Right to a Fair Trial of the European Court of Human Rights, European Convention on Human Rights (4 November 1950) 213 UNTS 221 [hereinafter art 6 ECHR], now augmented by art 47 of the Charter of Fundamental Rights of the European Union [2010] OJ C 83/02 [hereinafter art 47 Charter]. I discuss the bases of the constitutional and common law mix in the United States in Judith Resnik, 'Constitutional Entitlements to and in

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pervasive *functional privatization* of court-based activities and of some forms of ADR/ODR, which undercuts openness and transparency in their many senses.

Courts, arbitration, and other forms of ADR are creatures of our own making, refashioned regularly as politics produces legal change. These processes are always interactive; practices, regulations, and constitutional doctrine shape – and reshape – the normative expectations of each. We are today in a struggle over norms about the power to bring claims, the rules to determine their merits, the right of the public to observe, and the function of courts. Those conflicts are embedded in debates about whether goals of 'open justice' and 'open government' remain central to political ordering.

2. *Repeat Players, Asymmetries, Aspirations for Publicity, and the Risks of a Predatory Public*

Analyzing the dynamics, pressures, and the stakes of new processes brings me to the idea of 'repeat players.' Marc Galanter deployed this phrase decades ago to focus attention on the ability of individuals and entities (lawyers and judges, governments, corporations, and the media) to use their resources and knowledge to structure procedures benefitting their interests rather than those of 'one-shot' players.[40]

The impact that law has on our lives makes me pause when using game metaphors. Yet Galanter's terms identify how reiterative involvement provides insights *into*, and the potential for authority *over*, the procedures that

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Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture' (2012) 56 St Louis University Law Journal 917.

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

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have substantive impacts on rights and remedies.[41] As his terms also reflect, resource asymmetries abound. Rather than an 'equality of arms' (as the English put it), profound disparities haunt today's dispute resolution systems.[42]

We are, of course, not the first generation to face these problems. An early proponent of what today we call ADR was Jeremy Bentham, who shared Galanter's insight about the power of repeat players. Bentham famously railed against 'Judge & Co.' (lawyers), whom he believed developed common law practices that promoted their own self-interest.[43] Bentham argued that they had crafted a legal system which created 'so thick a mist' that one could not, if 'not in the trade,' get anywhere.[44] The 'artificial rules' of the common law produced a 'factitious' practice full of procedural obfuscation that cost clients and the public.[45] Civil courts were thus 'shops' at which 'delay [was] sold by the yard as broadcloth [was] sold by the piece.'[46]

Bentham argued that once dispute resolution moved from the open fields of the Medieval era to the indoors, there was nothing *natural* about it. Bentham understood, then, what is clear today: social and political movements, interacting with technologies (his focus was on the architec-

41 In the United States, Galanter's analysis explains how *functional privatization* has become so salient a feature of dispute resolution. See Judith Resnik, 'Open Courts and Arbitrations' (n 17).

42 An overview from the United States comes from Judith Resnik et al, *Who Pays? Fines, Fees, Bail, and the Cost of Courts,* Liman Colloquium 2018 (The Arthur Liman Center for Public Interest Law, Yale Law School, April 2018) <https://law.yale.edu/system/files/documents/pdf/Liman/liman2018.pdf> accessed 26 August 2018.

43 Jeremy Bentham, *Rationale of Judicial Evidence* in John Bowring (ed) *The Works of Jeremy Bentham* (William Tait 1843) vol 7, 232–33 [hereinafter Jeremy Bentham, Bowring edition]. The Bentham Project at UCL is providing new editions based on Bentham's thousands of pages of writings.

44 Jeremy Bentham, *Law as It Is*, in Jeremy Bentham, Bowring Edition (n 43) vol 5, 233–34.

45 Anthony J. Draper, '"Corruptions in the Administration of Justice": Bentham's Critique of Civil Procedure, 1806-1811' (2004) 7 Journal of Bentham Studies 1; William Twining, *Theories of Evidence: Bentham and Wigmore* (Weidenfeld and Nicolson 1985) 29, 52.

46 Quoted in Anthony J. Draper (n 45) 5. Bentham criticized the court system as a technically abstruse system replete with 'jargonization.' Jeremy Bentham, *Scotch Reform: Considered with Reference to the Plan, Proposed in the Late Parliament, for the Regulation of the Courts, and the Administration of Justice in Scotland* (1808) Letter I, in Jeremy Bentham, Bowring Edition (n 43) vol 5, 23 [hereinafter Jeremy Bentham, *Scotch Reform*].

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ture of buildings), shape what we expect courts to do. Choices are always being made, and Bentham's utilitarianism prompted him to call for radical reforms of the justice system in England.

Bentham famously opined: 'Publicity is the very soul of justice. … It keeps the judge himself, while trying, under trial.'[47] Bentham spent the first decades of the nineteenth century advocating for 'codification' (another word he coined) of law as one method of achieving publicity. Bentham thought written laws in an organized code, rather than promulgated in fragments through common law opinions, would make accessible what law demanded. Bentham also wanted to require judges to preside over a whole case so as to dispense justice swiftly,[48] as he hoped that 'oral interrogation before the judge in public'[49] would avoid lengthy, slow, and costly written exchanges.

What are the utilities and the politics of this form of knowledge production and its relationship to justice? Bentham argued that publicity made several contributions. A first was truth; he thought that public access to witness testimony would serve as 'a check upon mendacity and incorrectness' – that public disclosures would make it easier to identify false statements.[50]

Another was education, in that Bentham assumed that judges would want to explain their actions to the people in attendance. Courts were therefore both 'schools' and 'theatres of justice.'[51] And famously, Bentham lauded publicity's disciplinary powers: 'the more strictly we are watched, the better we behave.'[52] Bentham wanted the public to function as a 'half real and half imaginary' Tribunal of Public Opinion, able to know the pro-

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47 Jeremy Bentham, *Draught for the Organization of Judicial Establishments, Compared with that of the National Assembly, with a Commentary on the Same*, in Jeremy Bentham, Bowring Edition (n 43) vol 4, 316.

48 In the United States, we call that practice an 'individual' calendar system, as contrasted with the 'master' calendar system. Maureen Solomon, *Caseflow Management in the Trial Court* (American Bar Association 1973) 9.

49 William Twining (n 45) 31.

50 Ibid 90.

51 Jeremy Bentham, *Rationale of Judicial Evidence* (1827) [hereinafter Jeremy Bentham, *Rationale of Judicial Evidence*], in Jeremy Bentham, Bowring Edition (n 43) vol 6, 354.

52 See 'The More Strictly We Are Watched The Better We Behave' (*UCL Faculty of Laws, Bentham Project*, 2007), <https://www.ucl.ac.uk/drupal/site_bentham-project/sites/bentham-project/files/benthampanopticon.pdf> accessed 26 August 2018. The quote comes from Michael Quinn (ed), *The Collected Works of Jeremy Bentham: Writings on the Poor Laws* (OUP 2001) vol 1, 277.

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cess of decision-making and the bases for the outcomes and therefore to assess whether the rules comported with its interests. That competency would enable the public to assess the decision-makers and hence to sit in judgment of judges and of the state that empowered them.[53]

In addition, Bentham worried about state control of information. Bentham proposed that ordinary spectators ('auditors') be permitted to make notes that could be distributed widely. (Today we might call such persons 'bloggers.') Those 'minutes' would, Bentham argued, serve as insurance for the good judge and as a corrective against 'misrepresentations' made by 'an unrighteous judge.'[54] Bentham was not confident that courts would attract enough interest to have sufficient auditors; he proposed the incentive of paying them to observe and distribute information.[55]

Bentham's advocacy for simplified and public proceedings (brought about in part through legislative control) aimed to enable public opinion to function as a 'direct check' on judicial authority – to underscore or to criticize courts.[56] Publicity, 'underwritten by simplicity,' would be the 'main security against mis-decision and non-decision.'[57] 'Without publicity all other checks are insufficient: in comparison with publicity, all other checks are of small account.'[58]

Bentham was nuanced in drawing distinctions between institutional publicity and personal privacy. Bentham, focused on disciplining the power of judges and lawyers, understood well that public processes could burden individuals. Bentham therefore argued for limiting openness if observers were unruly, so as to preserve 'peace and good order.'[59] Also concerned about the need to 'protect the judge, the parties, and all other persons present, against annoyance.'[60] Bentham supported closure of court proceedings to 'preserve the tranquility and reputation of individuals and families from unnecessary vexation by disclosure of facts prejudicial to their honour, or liable to be productive of uneasiness or disagreements among themselves,' or that would reveal their 'pecuniary circumstances.'[61]

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53 Robert Post, 'Data Privacy and Dignitary Privacy: Google Spain, The Right to be Forgotten, and the Construction of the Public Sphere' (2018) 67 Duke Law Journal 981.
54 Jeremy Bentham, *Rationale of Judicial Evidence* (n 51) 355.
55 Ibid 543.
56 Anthony Draper (n 45) 8–9; Jeremy Bentham, *Scotch Reform* (n 46) 23.
57 William Twining (n 45) 48.
58 Jeremy Bentham, *Rationale of Judicial Evidence* (n 51) 355.
59 Ibid 360.
60 Ibid.
61 Ibid.

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In short, Bentham limited his publicity principle for reasons ranging from 'public decency' to state secrets.[62] Those circumstances for closure, like Bentham's arguments for openness, are reflected in the rules made in contemporary courts.[63]

Bentham's concerns made him a proponent of reforms for another reason; he was an early advocate of what we now call 'access to justice' (A2J). Although Bentham disdained natural rights, which he called 'nonsense on stilts,'[64] Bentham's utilitarianism made him somewhat of an egalitarian.[65] Bentham described filing fees as 'a tax on distress,'[66] and he argued for subsidies for those too poor to participate. He proposed that an 'Equal Justice Fund' be established, supported by 'fines imposed on wrongdoers,' by the government, and by charitable donations.[67] Bentham wanted not only to subsidize the 'costs of legal assistance but also the costs of transporting witnesses' and the production of other evidence.[68] Bentham called on judges to be available 'every hour on every day of the year,' and he suggested that courts be on a 'budget' for evidence to produce one-day trials and immediate decisions.[69]

While Bentham was innovative, his insistence on publicity was built on practices familiar in the system that he criticized – the common law presumption (in part built on jury trials) that courthouses were open venues.

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62 Ibid.

63 For example, art 6(1) of the European Convention on Human Rights provides that: 'Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

64 That proposition comes from an essay, written in 1795, and also known as 'Anarchical Fallacies.' See Philip Schofield, 'Jeremy Bentham's "Nonsense Upon Stilts"' (2003) 15 Utilitas 1, 10.

65 See Nicola Lacey, 'Bentham as Proto-Feminist? Or an Ahistorical Fantasy on "Anarchical Fallacies"' (1998) 51 Current Legal Problems 1.

66 Jeremy Bentham, *A Protest Against Law-Taxes: Showing the Peculiar Mischievousness of All Such Impositions as Add to the Expense of Appeal to Justice*, in Jeremy Bentham, Bowring Edition (n 43) vol 2, 582.

67 Philip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (OUP 2006) 310.

68 Frederick Rosen, *Jeremy Bentham and Representative Democracy: A Study of the Constitutional Code* (OUP 1983) 153–54.

69 See Thomas P. Peardon, 'Bentham's Ideal Republic' (1951) 17 Canadian Journal Economic & Political Science 184, 196.

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Long before Bentham, one can find commitments to that precept. One example comes from the seventeenth-century founding documents for the English Colony of West New Jersey: 'In all publick courts of justice for tryals of causes, civil or criminal, any person or persons . . . may freely come into, and attend . . . .'[70]

After the US revolution, that proposition was embedded in state constitutions. The rituals from Renaissance times of the public spectacles of adjudication became obligations of republican and democratic governments to welcome observers. 'R-i-t-e-s' turned into 'r-i-g-h-t-s,' as can be seen from excerpts of the Connecticut Constitution of 1818 and from Alabama's 1819 Constitution.

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.[71]

> 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.[72]

Those propositions took material shape through the development of a special type of building that departed from the multi-function town halls of earlier eras. These segregated spaces – 'courthouses' – came to dot the landscape, as exemplified by Figure 1, a photograph of a 1784 building in Connecticut.[73]

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70 Charter or Fundamental Laws, of West New Jersey, Agreed Upon, ch XXIII (1676), reprinted in Richard L. Perry (ed) *Sources of Our Liberties* (American Bar Foundation 1959) 188, also available at The Avalon Project <http://avalon.law.yale.edu/17th_century/nj05.asp> accessed 26 August 2018.

71 Connecticut Constitution (1818) art I, s 12.

72 Alabama Constitution (1819) art I, s 14.

73 For the history of courthouse construction, see Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge 2011); Clare Graham, *Ordering Law: The Architectural and Social History of the English Law Court to 1914* (Routledge 2003); Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy and Rights in City-States and Democratic Courtrooms* (Yale University Press 2011) [hereinafter Judith Resnik and Dennis Curtis, *Representing Justice*].

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Figure 1

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

On both sides of the Atlantic Ocean, 'open justice' was an artifact of the Enlightenment. Governments committed to building nation-state power had the economic resources to spend on public buildings and apportioned funds to construct courthouses, designed to serve as icons of law, justice, and their own authority. Persons walking into courtrooms had rights to observe what transpired therein, and the governments hoped that what they saw would prompt or renew commitments to the rule of their law. The commitments to *doctrinal openness* and to *functional openness* were in service of the need to build state power.

I have provided this image of an eighteenth century Connecticut courthouse because, even as the quaint building is still in use, it underscores the disjuncture between Bentham's era and ours. The numbers of people using courts, the buildings that house judges, and the practices of courts are very

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different. So too are the modes of communication. While Bentham could be styled a proponent of ADR, he did not live in a world in which his 'auditors' had become not only our 'bloggers' but also hackers. We have come to understand that they too may be a source of 'mendacity' as well as a buffer against it.

The world that we inhabit, therefore, raises a question about whether claims for open courts are passé, in that many other institutions and technologies disseminate information about conflicts. A vivid example comes from what in the United States is called '#MeToo' (and in Europe, *Balance-TonPorc*, and other phrases).[74] The web gives individuals the ability to tell their own stories of sexually predatory misbehavior and to hear others. Videos have been key to an array of popular outcries, from consumer protests when airline employees drag a seated, ticketed passenger from a plane to street rallies following recordings of the deadly encounters of police with black men in the United States. In some instances, these exchanges have produced structural changes about how institutions respond to complaints, how people treat each other, and what law requires. A version of Bentham's 'Tribunal of Public Opinion' has been put to work.

One of the terms in English for spreading this information is that web posts go 'viral'.[75] The word aptly captures the speed of transmission, and 'viral' also points to the specter of contamination, which brings me to another aspect of the disjuncture between Bentham's era and ours. Bentham assumed that publicity would produce a constructive link between the public and the institutions subjected to scrutiny. Twenty-first century theorists, however, analyze how forms of publicity can generate distrust and suspicion about the very institutions that are obliged to open their processes to public scrutiny.[76]

Moreover, Bentham's imagined public, reflected in his metaphor of a 'Tribunal of Public Opinion,' was predicated on the plausibility of consti-

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74 See eg Samantha Schmidt, '#MeToo: Harvey Weinstein case moves thousands to tell their own stories of abuse, break silence' *Washington Post* (Washington, 16 October 2017) <https://www.washingtonpost.com/news/morning-mix/wp/2017/10/16/me-too-alyssa-milano-urged-assault-victims-to-tweet-in-solidarity-the-response-was-massive/> accessed 26 August 2018.

75 Avi Selk and Lori Aratani, 'United Airlines CEO apologizes for "horrific event", promises review of policies after passenger violently deplaned' *Washington Post* (Washington, 11 April 2017) <https://www.washingtonpost.com/news/dr-gridlock/wp/2017/04/11/amid-pr-fiasco-over-dragged-passenger-united-ceo-defends-his-crew/> accessed 26 August 2018.

76 David Pozen (n 11) 151-2 summarizes some of that literature.

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tuting a singular public, understanding its own self-interests, aggregating preferences, and therefore enhancing the general welfare. But that postulate is belied by experiences of the many competing and deeply divided public(s), with understandings of their own self-interests different than what others ascribe to them.[77] Political and critical theorists insist on the construction of preferences and multiplicity of points of views,[78] just as art historians remind us that cubism broke the linear plane and refuted the singular perspective valorized in Renaissance art.[79]

Further, we know well about another kind of public – what I term a 'predatory public' – 'trolling' on the internet and at times launching aggressive attacks on individuals and institutions.[80] Too-easy dissemination of information (true and false) about individuals has caused many injuries. The techniques for manipulation have expanded, as is illustrated by a 'social media black market' in which some individuals, in quest of celebrity, buy fake 'followers' to claim larger market shares of public attention than they actually have.[81]

Jeremy Bentham must, therefore, be situated not only as the central theorist for the much-admired publicity of justice's 'soul,' but also as the touchstone for modern public relations, advertising, and propaganda. Misinformation, disinformation, manipulated information, and too much information are all also aspects of the experiences of 'publicity.'

If one set of concerns centers on accuracy, manipulation, and deception, another is about personhood and privacy. Tensions between free expression and privacy have preoccupied law for a long time, and the development of virtual exchanges has underscored the complexity of the impact of infor-

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77 Nancy Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' in Craig Calhoun (ed), *Habermas and the Public Sphere* (MIT Press 1992).

78 See eg Jane Mansbridge, 'The Descriptive Political Representation of Gender: An Anti-Essentialist Argument' in Jytte Klausen and Charles S. Maier (eds), *Has Liberalism Failed Women?: Assuring Equal Representation in Europe and the United States* (Palgrave Macmillan 2001) 19.

79 See eg Jonathan Crary, *Techniques of the Observer: On Vision and Modernity in the Nineteenth Century* (MIT Press 1992).

80 Examples are provided by many. See eg Karen Eltis, 'The Judicial System in the Digital Age: Revisiting the Relationship Between Privacy and Accessibility in the Cyber Context' (2011) 56 McGill Law Journal 289.

81 Nicholas Confessore, Gabriel J X Dance, Richard Harris, and Mark Hansen, 'The Follower Factory' *New York Times* (New York, 27 January 2018) <https://www.nytimes.com/interactive/2018/01/27/technology/social-media-bots.html> accessed 26 August 2018.

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mation flows. A leading contemporary example addressing the trade-offs is *Google Spain Sl. v Agencia Española de Protección de Datos*, decided in 2014 by the Court of Justice of the European Union (CJEU) and shaping what has come to be referred to as a 'right to be forgotten.'[82] The Court concluded that webmasters had an obligation to take information off the web because of EU directives obliging deletion of 'personal data … no longer necessary … to the purpose for which they were collected;' that mandate, however, had to be balanced with rights of 'freedom of expression and of information.'[83]

I raise this case as part of this introduction to a discussion of the functions of the public and the private in dispute resolution to make several points. First, *Google Spain* reflects the pain that new technologies make possible. The ease of crossing all geographical boundaries when obtaining and exchanging information contrasts to what some refer to as the 'practical obscurity' of the 'public' records of courts.[84] Before electronic materials, documents in many jurisdictions were 'public' in the sense that third parties were entitled to read them. Yet, if the materials were in file drawers inside courthouses, individuals had to have the resources for labor-intensive site visits, and further dissemination required yet other costs.

Thus, and second, *Google Spain* reminds us that search engines create new opportunities and provide, as Robert Post put it, a 'virtual communicative space in which democratic public opinion is now partially formed.'[85] Google does not just stockpile information; it organizes it. In these respects, search engines provide some of the functions Bentham

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82 The term 'right to be forgotten' was foregrounded in the CJEU's press office's release about the opinion. See Press Release, Court of Justice of the European Union, Press Release No 70/14, Judgment in Case C-131/12 (13 May 2014) 1–2. The decision itself noted that Spanish Court had referred a question on the scope of the 'derecho al olvido' (the right to be forgotten). Case C-131/12 *Google Spain SL v Agencia Española de Protección de Datos* [2014] OJ C 212/04, para 20. [hereinafter *Google Spain*].

83 *Google Spain* (n 82) paras 4, 94. The case had been filed by Costeja Gonazlez, who argued that an old report about the auction of his repossessed home had ceased to have relevance. He sought to prevent the report from being available by searching Google. Ibid paras 14–16. See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, repealing 95/46/EC [hereinafter 2016 Data Protection Regulation].

84 See Karen Eltis (n 80) 303. The term was also used in the decision in *United States (Department of Justice) v Reporters' Committee for Freedom of the Press*, 489 US 749, 762, 780 (1989).

85 See Robert Post (n 53) 990.

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ascribed to courts, which also compile and disseminate information. Google has its methods of deciding what materials to put up and the order of retrieval,[86] just as courts have rules on what documents are made public, the decorum required for in-person hearings, and the evidentiary boundaries of what is admissible.

Third, Google and other search engines are not only potential stand-ins *for* courts as 'communicative spaces,' but in practice, they *are* also courts, rendering decisions balancing data protection rights and public access to the information in question. After the decision in *Google Spain*, the company created an ad hoc Advisory Council that proposed guidelines for how the company should make its rulings[87] when individuals or governments requested that information be taken down.[88] Because refusals to delist are appealable to data protection agencies at the national level, Google, as a repeat player, may have presumptions to take down information rather than invite public appeals of its refusal to do so.[89] Moreover, refusing to delist can, under the General Data Protection Regulation in effect in the spring of 2018, also result in fines of not more than four percent of global revenues – which creates yet other incentives for data controllers to delist.[90]

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86 Google's choices about much of what it does are seen as protected, as is the press, under the First Amendment. See eg *e-ventures Worldwide, LLC v Google, Inc*, No 214CV646FTMPAMCM, 2017 WL 2210029 (MD Fla 8 February 2017) 4.

87 See Luciano Floridi, Sylvia Kauffman, Lidia Kolucka-Zuk, Frank La Rue, Sabine Leutheusser-Schnarrenberger, José-Luis Piñar, Peggy Valcke, and Jimmy Wales, 'Report of the Advisory Council to Google on the Right to be Forgotten' (6 February 2015) <https://static.googleusercontent.com/media/archive.google.com/en//advisorycouncil/advisement/advisory-report.pdf> accessed 26 August 2018.

88 See Google, 'Transparency Report: Government Requests to Remove Content' <https://transparencyreport.google.com/government-removals/overview?removal_requests=group_by:reasons&lu=removal_items&removal_items=group_by:reasons> accessed 1 March 2018.

89 See eg Daphne Keller, 'The New, Worse "Right to be Forgotten"' (27 January 2016) Stanford Center for Internet and Society Blog, <http://cyberlaw.stanford.edu/publications/new-worse-%E2%80%98right-be-forgotten%E2%80%99> accessed 26 August 2018 ('A platform that simply erases users' content on demand risks nothing:'); Daphne Keller, 'Empirical Evidence of "Over-Removal" By Internet Companies Under Intermediary Liability Laws' (12 October 2015) Stanford Center for Internet and Society Blog <http://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws> accessed 26 August 2018.

90 See General Data Protection Regulation (n 83) arts 48, 83(5); see also Daphne Keller, 'The Right Tools: Europe's Intermediary Liability Laws and the 2016 Gen-

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Fourth, dipping into Google's self-reports of what it does reflects its quest to be perceived as legitimate in its court-like role. Google has embraced a form of Bentham's publicity principles and a commitment to human decision-making – recorded in its publication it calls a 'Transparency Report.' In this document, Google reported that it makes decisions on a 'case-by-case basis,' that it sometimes asks for more information, and that no requests are 'automatically rejected by humans or by machines.'[91]

Further, Google described the process as 'complex,' requiring evaluation of factors such as the 'requester's professional life, a past crime, political office, position in public life,' and the authorship of the materials.[92] Examples of delisting included requests at the behest of the wife of a deceased individual about alleged sex offenses. Illustrative of refusals to delist were decisions declining to do so for individuals who were in political life.[93] Google reported that, from 2014 through the winter of 2018, it had received 665,000 requests for delisting almost two and a half million URLS and that it had removed more than forty percent – about 900,000 URLs.[94]

Fifth, Google's processes illustrate the privatization of court-like services. Google is one of many companies running its own in-house dispute resolution system. Another example comes from EBay, which described dealing with sixty million disputes annually – said to yield a high satisfaction by its users.[95] Companies may, like Google, employ their own, in-house decision-makers, or they may hire third-party firms, such as Modria, (once used by EBay and now a part of Tyler Technologies) that services a large number of U.S. courts. Many other companies require using mechanisms for dispute resolution which they select, and many in the United States outsource to the American Arbitration Association.

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eral Data Protection Regulation' (forthcoming) Berkeley Technology Law Journal, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2914684> accessed 26 August 2018.

91 See Google, 'Search Removals Under European Privacy Laws' 2 <https://transparencyreport.google.com/eu-privacy/overview> accessed 26 August 2018 [hereinafter 'Search Removals Under European Privacy Laws'].

92 Ibid. See also Jennifer Daskal, 'Borders and Bits' (2018) 71 Vanderbilt Law Review 179, 212-13.

93 'Search Removals Under European Privacy Laws' (n 91) 3.

94 Ibid 1 (reporting taking down 43.3% of the requested URLs). That document includes a chart mapping the requests from July 2014 to (as of my reading) February 2018. Ibid 2. See also Post (n 53) 988.

95 Ernest Ryder (n 5) para 5. Ethan Katsh and Oma Rabinovich-Elny, *Digital Justice: Technology and the Internet of Disputes* (OUP 2017) 35.

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Sixth, the privatization of providers of dispute resolution currently includes leaving to those private providers the decision about what to make public. The primary source of information about private courts such as that run by Google comes from them. The 'corporation as courthouse' is not an open space in which third parties can freely enter.[96] Google and other corporate dispute resolution systems (some of which may be run by nonprofit companies) have concluded that some forms of transparency are requisite but have not embraced the principles that 'all courts shall be open' and that every 'person can freely come and attend.' Rather, we have Google's self-reports,[97] augmented by what it must tell webmasters,[98] what

96 Rory Van Loo, 'The Corporation as Courthouse' (2016) 33 Yale Journal on Regulation 547, 554–569, 578–585.

97 See eg Theo Bertram, Eli Burstein, Stephanie Caro (and nineteen co-authors, all 'affiliated with Google'), 'Three Years of the Right to be Forgotten' (Google 2018) <https://drive.google.com/file/d/1H4MKNwf5MgeztG7OnJRnl3ym3gIT3HUK/view> accessed 26 August 2018. This article offered a 'retrospective measurement of the 2.4 million URLs' sought to be delisted from May 2014 until the end of 2017. The variables included the countries from which requests come, entities like governments, media, and other directories in which information appears, and the 'prevalence of extraterritorial requests.' Ibid 1, 3.

The Google authors report that their 'results dramatically increase transparency … and reveal the complexity of weighing personal privacy against public interest when resolving multi-party privacy conflicts that occur across the Internet.' Ibid 1. For example, they reported that 20% of the URLs sought to be delisted involved what they called a 'requester's legal history,' while 33% were about 'personal information.' France, Germany, and the UK accounted for more than 50% of the requests, and some of the requests came from law firms and 'reputation management services.' Ibid 2.

98 A 2016 article reported that Google notified web publishers in about one-quarter of delisting cases after delisting. Aleksandra Kuczerawy and Jef Ausloos, 'From Notice-and-Takedown to Notice-and-Delist: Implementing Google Spain' (2016) 14 Colorado Technology Law Journal 219. Google and other third-party intermediaries may be held liable for providing identifying information to webmasters. For example, in September 2016, the Spanish Agencia Española de Protección de Datos fined Google 150,000 euros for disclosing identifiable information when it informed webmasters that their URLs had been deindexed for particular individual names. Agencia Española de Protección de Datos, Resolucion R/02232/2016 (14 September 2016) <http://www.agpd.es/portalwebAGPD/resoluciones/procedimientos_sancionadores/ps_2016/common/pdfs/PS-00149-2016_Resolucion-de-fecha-14-09-2016_Art-ii-culo-10-16-LOPD.pdf> accessed 26 August 2018.

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can be gleaned from reports posted about outcomes of these adjudicatory-like decisions and by way of the press, scholars' analyses, and litigation.[99]

As noted, under European law, if Google or other web platforms decline to delist,[100] individuals can appeal to national data regulatory bodies, and those cases may make their way to the CJEU.[101] Further, webmasters who receive Google's notice of delisting may also request that Google review a

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99 See eg Sylvia Tippman and Julia Powles, 'Google Accidentally Reveals Data on "Right to be Forgotten" Requests' *The Guardian* (London, 14 July 2015) <https://www.theguardian.com/technology/2015/jul/14/google-accidentally-reveals-right-to-be-forgotten-requests> accessed 26 August 2018; Julia Powles, 'Google's Data Leak Reveals Flaws in Making It Judge and Jury Over Our Rights' *The Guardian* (London, 14 July 2015) <https://www.theguardian.com/technology/2015/jul/14/googles-data-leak-right-to-be-forgotten> accessed 26 August 2018; James Ball, 'EU's Rights to be Forgotten: Guardian Articles Have Been Hidden By Google' *The Guardian* (London, 2 July 2014) <https://www.theguardian.com/commentisfree/2014/jul/02/eu-right-to-be-forgotten-guardian-google> accessed 26 August 2018; Gail Sullivan, '"Right to be Forgotten" Gets Real as Google Wipes Stories from Search Results' *Washington Post* (Washington, 3 July 2014) <https://www.washingtonpost.com/news/morning-mix/wp/2014/07/03/google-erases-unflattering-news-stories-because-of-right-to-be-forgotten-is-this-like-burning-books-in-a-library/?utm_term=.a42a4b803b4f> accessed 26 August 2018.

As noted, questions about delisting that reach courts provide insights because of third-party rights to those venues. See eg 'Court Rejects "Right to be Forgotten" Demand' *Japan Times* (Tokyo, 1 February 2017) <https://www.japantimes.co.jp/news/2017/02/01/national/crime-legal/top-court-rejects-right-forgotten-demand/#.WnuvhpM-frl> accessed 26 August 2018; Alex Hern, 'ECJ to Rule on Whether "Right to be Forgotten" Can Stretch Beyond EU' *The Guardian* (London, 20 July 2017) <https://www.theguardian.com/technology/2017/jul/20/ecj-ruling-google-right-to-be-forgotten-beyond-eu-france-data-removed> accessed 26 August 2018. See generally Paul Fleischer, 'Three Years of Striking the Right (to Be Forgotten) Balance' (Google Blog, 15 May 2017) <https://www.blog.google/topics/google-europe/three-years-right-to-be-forgotten-balance/> accessed 26 August 2018.

100 Google has provided information on the factors it relied upon when deciding not to delist. See Q3 2015: Common Material Factors Involved in a Decision Not to Delist a Page (Google, November 2015) <https://storage.googleapis.com/transparencyreport/faqs/eu-privacy/Google_EU_privacy_data_nov 2015.pdf> accessed 26 August 2018.

101 For example, pending before the European Court of Justice of the European Union is the question of whether 'sensitive personal data' – such as the political allegiance of an individual, or a past criminal conviction reported in the press – should be used generally as the factor that outweighs the public interest in obtaining the data. See Request for a preliminary ruling from the Conseil d'État (France) lodged on 15 March 2017, Case C-136/17 *GC, AF, BH, ED v Commission nationale de l'informatique et des libertés (CNIL)* [2017] OJ C 168/33. The ques-

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decision; those efforts can open windows to third-parties to learn about disputes.[102] And in principle, the many resulting issues are questions of EU law – some of which reach Member State courts and the CJEU.[103] But absent the web engines offering full disclosures or legal mandates for third-party access, we have no way to assess how, in its tens of thousands of decisions, Google is implementing the EU requirement to balance personal privacy and public rights to information.

Seventh, I have used the example of delisting to underscore the layers of questions about the public/private divide. Google's Transparency Report provides a kind of public accounting, albeit without any means of independent inquiries. That report reflects the vitality of publicity as a method of legitimatization. Google wants to be seen – by some versions of

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tions referred include whether 'the prohibition imposed on other controllers of processing data caught by arts 8(1) and (5) of Directive 95/46, (1) subject to the exceptions laid down there, also apply to this operator as the controller of processing by means of that search engine;' and if so, whether an operator can 'refuse a request for "de-referencing", if it establishes that the links at issue lead to content which, although comprising data falling within the categories listed in Article 8(1), is also covered by the exceptions laid down by Article 8(2)(a) and (e) of the directive.' Another question is, 'whether or not publication of the personal data on the web page at the end of the link at issue is lawful, must the provisions of Directive 95/46 be interpreted as requiring the operator of a search engine, when the person making the request establishes that the data in question has become incomplete or inaccurate, or is no longer up to date, to grant the corresponding request for "de-referencing".'

102 'European Privacy Requests Search Removals FAQs' (Google 2018) <https://support.google.com/transparencyreport/answer/7347822> accessed 26 August 2018.

103 Pending as I write is Case C-507/17 *Google Inc v Commission nationale de l'informatique et des libertés*, [2017] OJ C 347/30 (lodged 21 August 2017). At issue in this case is the scope of the obligation to delist, in terms of whether it applies to the venue from which the person searches and to the domains searched; some Member States have concluded that the requirement extends to domains beyond the one linked to their borders. Questions include the scope of the obligation and the relevance of variables such as the venue from which the search is launched and the domain linked to particular Member States. See, eg, Case C-398/15 *Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Manni* [2017] OJ C 144/07 (judgement from 9 March 2017) and Opinion of AG Bot. The CJEU held that national courts had the responsibility of determining the possible existence of 'legitimate and overriding reasons' which might justify limiting third parties' access to data concerning Mr Manni from publicly available companies' registers. Ibid Judgement para 63. See also Christian Kohler, 'Conflict of Law Issues in the 2016 Data Protection Regulation of the European Union' (2016) 52 Rivista di diritto internazionale private e processuale 653.

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Bentham's Tribunal of Public Opinion – as a decent, fair decision-maker. But even if all the decisions made by Google were done by a state-empowered 'public' court, some limits on public access would be necessary to avoid doing harm to the people sought to be protected by this right of privacy.

In short, the challenges of balancing public and private interests mandated by the CJEU are enormous in a world lacking 'practical obscurity.' Return then to Bentham's enthusiasm for 'publicity' and realize that he is far from the only great analyst who now seems endearingly innocent. So too were most commentators, entrepreneurs, and inventors who, just a decade ago, assumed the web's great egalitarian force without foreseeing the hacking and manipulation that has ensued. Few forecast how predatory actors could invade systems of openness – grabbing information about individuals' finances and health records, terrorizing specific people, altering market information, controlling streams of knowledge, and influencing and undermining elections. Nor were the myriad of questions in view about how to manage the information; whether to provide free materials or charge for access; how to think through propriety interests in content control; and whether to constrain the power of webmasters to render court-like decisions.

Likewise, constitutional drafters mandated open courts in an era when vast numbers of potential claimants were legally barred from using them because of race and gender subordination. Today, even as egalitarian norms have generated rights of access by all, the ability to pursue rights (what US sociologists have termed 'naming, blaming, and claiming') remains constrained by limited knowledge and economic resources. And many constitutions are silent on key questions of subsidies for courts and for their users, as well as on how to balance public and private interests in the dispute resolution fora that they create.

3. *The Demand Curve, Doctrinal Openness, Functional Privatization, and the Cost of Courts*

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

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

Figure 2

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

The artist saw himself as offering up a modern version of the Virtue, Justice. He wrote that he had abjured the standard attributes of scales, sword and book and instead had personified Justice's strength as 'protector' and

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'avenger' – garbed in the colors – red, white, and blue – of the American flag.[104]

But spectators in the 1930s in that courthouse saw something else. A local reporter described the figure as a 'barefooted mulatto woman wearing bright-hued clothing.'[105] The federal judge who was to sit in front of the mural described it as 'monstrosity,' resulting in a 'profanation of the otherwise perfection' of the courthouse.[106] That judge wanted the mural removed. In response, the artist argued he had not intended to make any political statements and offered to lighten the skin tones. Federal and State officials were interested in repainting, but after a national controversy erupted with protests from organizations of artists and the National Association for the Advancement of Colored People, that plan was cancelled. The denouement was that, as can be seen in Figure 2, brown drapes were placed on each side so as to hide the mural from view.[107] Despite the words – 'equal justice under law' – inscribed on the US Supreme Court's façade when its own courthouse building opened in 1935, the United States was far from providing equal justice.[108] The unwelcomed image of a 'mulatto justice' in the 1930s reflected how unwelcome people of color were in many US courts.

The substantive law and the rules of procedure changed in the wake of the political and social movements of the second half of the twentieth century, to which we here are, of course, the heirs. The impact of the 'rights revolution' can be seen from a 1999 revision of the constitution of the State of Delaware.

> All courts shall be open; and every person for an injury done him or her in his or her reputation, person, movable or immovable posses-

104 Letter from Stefan Hirsch, Artist, to Forbes Watson, Advisor to the Section of Painting and Sculpture of the Treasury Department (18 May 1938) (on file with GSA Archives, Public Building Services, Fine Arts Collection, 477, Stefan Hirsch); see also Judith Resnik and Dennis Curtis, *Representing Justice* (n 73) 111–13.

105 Marlene Park and Gerald E. Markowitz, *Democratic Vistas: Post Offices and Public Art in the New Deal* (Temple University Press 1984) 61, 90 n 30; see also Karal Ann Marling, *Wall-to-Wall America: A Cultural History of Post Office Murals in the Great Depression* (University of Minnesota Press 1982) 64–65.

106 Judith Resnik and Dennis Curtis, *Representing Justice* (n 73) 112.

107 Ibid 112-13.

108 See Judith Resnik and Dennis E. Curtis, 'Inventing Democratic Courts: A New and Iconic Supreme Court' (2013) 38 Journal of Supreme Court History 207, 233.

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> sions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense. …[109]

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

The Delaware text reflects that, since Bentham wrote, courts have opened their doors in a deeper sense of accessibility. Employees can now call for legal accountings by their employers, just as prisoners can now challenge their custodians. Individuals ('vulnerable persons,' as some of the European case law puts it[110]) can seek protection from abusive family members, and women are no longer supposed to be 'chastised' (beaten) by their husbands. Twentieth-century egalitarian movements produced a mix of constitutional and statutory law that not only recognized all persons as entitled to equal treatment, but also understood the terms of equality in different ways and welcomed an array of new participants into courts.

These new rights and these new participants turn courts into one of several *democratic venues*, obliged to treat all persons with respect and requiring state agents – judges – to do so as well. In using the word 'democracy,' I am not focused (as many others are) on the role played by lay jurors, temporarily holding the state's power to render judgment.[111] The aspect of 'the democratic' of interest here is how courts can provide opportunities for the public to watch state actors in action, as they accord (or fail to provide) litigants, lawyers, and witnesses dignified treatment. The public also can see that disputants (be they employee or employer, prisoner or prison official) are required to treat each other civilly as they argue in public about their disagreements, misbehavior, wrongdoing, and obligations. Litigation is a social practice that forces dialogue upon the unwilling (including the government) and momentarily alters configurations of authority.

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109 Delaware Constitution (1999) s 9.

110 See eg *Valiuliene v Lithuania*, App No 33234/07 (ECHR, 26 March 2013).

111 See eg Tatjana Hörnle, 'Democratic Accountability and Lay Participation in Criminal Trials' in Antony Duff, Lindsay Farmer, Sandra Marshall, and Victor Tadros (eds), *The Trial on Trial: Judgment and Calling to Account* (vol 2, Bloomsbury 2006), 135–53.

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A body of law, denoted by my phrase 'doctrinal openness,' reinforces this proposition.[112] The 'right to a public hearing' for criminal and civil proceedings is a familiar refrain in European law. The US Supreme Court has many times insisted that criminal trials and related proceedings be open to the media and the public in general. Lower courts recognize a right of the public to observe civil trials and the hearings related to those processes.[113] Thus, as I explained at the outset, the right of access to courts has come to reference both the right of individuals to bring cases to courts and the right of third parties to watch. While litigation is often styled as a triangle, with the judge at the apex dealing with opposing plaintiffs and defendants, adjudication ought to be mapped as a square, with a fourth line required to denote the audience.

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

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112 Others in this symposium address this obligation in Europe. See eg Maciej Szpunar 'Right to a Public Hearing according to Art. 6 ECHR and Art. 47 of the Charter of Fundamental Rights of the EU: Constitutional Perspectives' in this Volume. See generally Jens Hillebrand Pohl, 'The Right to be Heard in European Union Law and the International Minimal Standard – Due Process, Transparency and the Rule of Law' (SSRN, 9 November 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3070106> accessed 26 August 2018; *Waste Management, Inc v Mexico*, ICSID Case No ARB (AF)/00/3 (30 April 2004).

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

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

Before examining more about privatization, I want to underscore another aspect of publicity that does work *for* and *in* courts. Statutes and regulations direct judiciaries to publish a wealth of data about themselves. In the United States, public records name every judge appointed in the federal and state systems. Statistics on case filings are likewise available, and such data collection began more than a century ago.[114] The National Center for State Courts regularly offers comparative analyses of state court workloads.[115] European data on costs per case and justice investment appears more extensive, as it provides measures across the Member States on a host of metrics in terms of investments in and outputs of the justice systems.[116]

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114 For the history of the development of this administrative apparatus, see Judith Resnik, 'Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III' (2000) 113 Harvard Law Review 924; David S Clark, 'Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century' (1981) 55 Southern California Law Review 65; Peter G Fish, The Politics of Federal Judicial Administration (Princeton University Press 1973) 91–95. The current governing statutes are 28 USC ss 601, 604, 610 (2015), and under those provisions, the Director of the Administrative Office publishes reports annually. See eg United States Court, Judicial Business 2013 <http://www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx> 26 August 2018.

115 See Court Statistics Project 'State Court Caseload Statistics' (National Center for State Courts 2018) <http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx> accessed 26 August 2018.

116 See European Commission, *The 2017 EU Justice Scoreboard* (2017) 18-36 <http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2017_en.pdf> 26 August 2018. Concerns about the data and its uses comes from Adriani Dori, 'The EU Justice Scoreboard: Judicial Evaluation as a New Governance Tool' (2015) MPILux Working Paper 2 <https://www.mpi.lu/fileadmin/mpi/medien/persons/Dori_Adriani/Dori_The_EU_Justice_Scoreboard_-_Judicial_Evaluation_as_a_New_Governance_Tool_25_8.pdf> accessed 26 August 2018.

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This documentation is not only predicated on ideologies promoting open courts; the documentation is embedded in the political economy *of* courts. Judges need to convince their coordinate branches to provide funding, and the statistics on demand for services are regularly submitted as evidence of the need for support. In the US, this public data production has worked well for the federal courts, with its tiny sliver of adjudication. The federal judiciary continues to be successful in maintaining their budget allocations even as other segments of the government have suffered cuts.[117] State courts, where the bulk of litigation – more than 95% –are less well-funded; about 3% of state budgets go to their courts systems, and many states have insufficient funds to maintain services.[118]

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

Below, I provide two graphs to capture this volume, and these images also underscore the ways in which photographs of court buildings and their iconography no longer suffice to depict the world of adjudication. Figure 3, *Comparing the Volume of Filings: State and Federal Trial Courts, 2010*, shows cases filed in the United States as of 2010. The high bar, denoting about 48 million cases, represents filings related to contract, tort, and family cases in state courts. In contrast, despite the visibility of the US federal court system, it receives a very small set of cases. About 360,000 cases

117 For fiscal year 2017, the federal judiciary requested (and received) USD 7.0 billion in discretionary appropriations, a 3.2% increase above fiscal year 2016 funding. United States Courts, *Judiciary Transmits Fiscal Year 2017 Budget Request to Congress* (12 February 2016) <http://www.uscourts.gov/news/2016/02/12/judiciary-transmits-fiscal-year-2017-budget-request-congress> accessed 26 August 2018. For fiscal year 2018, the courts requested USD 7.2 billion, a 3.2% increase over the previous year. United States Courts, *Federal Judiciary Seeks Funds to Support Court Operations in Coming Year* (17 May 2017) <http://www.uscourts.gov/news/2017/05/17/federal-judiciary-seeks-funds-support-court-operations-coming-year> accessed 26 August 2018.

118 See eg Justice at Stake and National Center for State Courts, 'Funding Justice: Strategies and Messages for Restoring Court Funding' (2013) <http://www.justiceatstake.org/media/cms/Funding_Justice_Online2012_D28F63-CA32368.pdf> accessed 26 August 2018.

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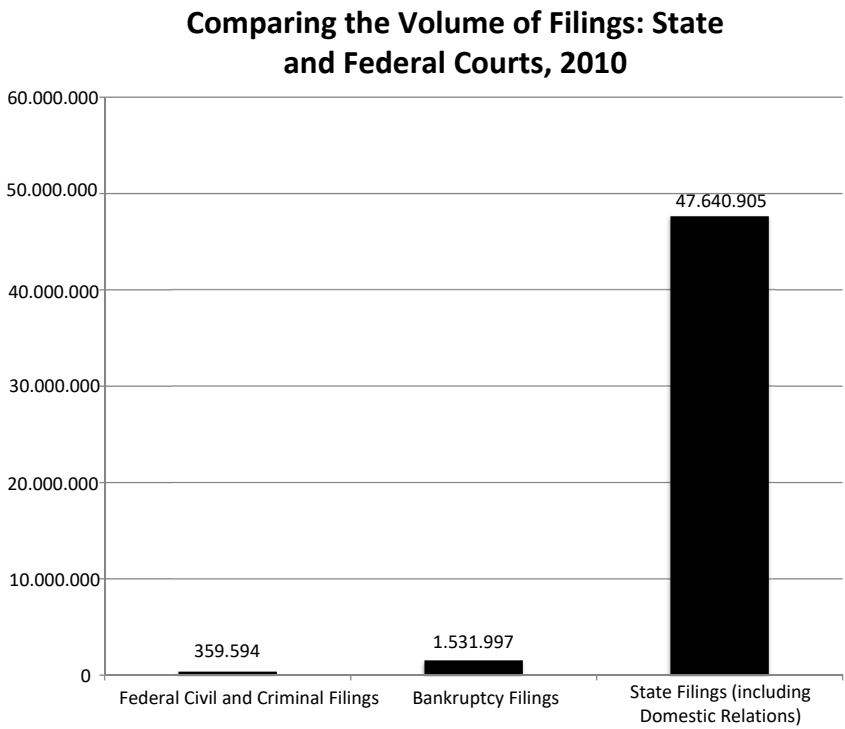
are filed a year, and bankruptcy filings in 2010 were about 1.5 million and have since declined considerably.[119]

Figure 3



Sources: Administrative Office of the U.S. Courts, Caseload Statistics, 2010. Data on state filings come from the National Center for State Courts, Court Statistics Project, National Civil and Criminal Caseloads (2010). 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.

119 In 2017, 790,830 bankruptcy petitions were filed, which was part of a seven-year decline in filings. John Roberts, '2017 Year-End Report on the Federal Judiciary' 15-16 (Public Information Office, US Supreme Court, 31 December 2017) <https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf> accessed 26 August 2018.

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Figure 4

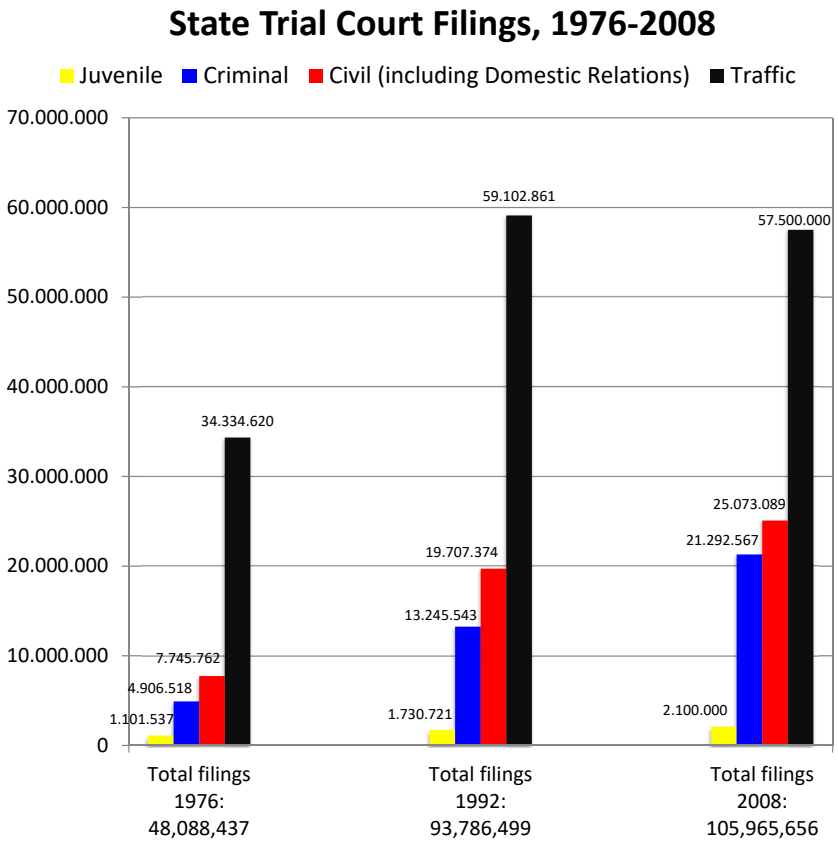

Figure 4, State Trial Court Filings, 1976-2008, maps the growth during a few decades of litigation in the state courts. This graph also disaggregates traffic, juvenile, civil, and criminal filings. As of 2008, more than 100 million cases were filed in state courts.

In many jurisdictions, not only have the numbers risen in terms of rights and the persons seeking them, but so have the fees charged to individuals using the system. The government, as a repeat player, turns both to legislatures and to users for support. Proponents of expanded services seek to fund new programs, from ADR and ODR to methods to divert individuals from the criminal justice system and better court-based facilities such as areas for children. One way to do so is by fee-for-service pricing.

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For example, a 2016 European volume praising ODR as a means of facilitating the pursuit of claims. The authors commented that, although waivers or subsidies may be required in some instances, 'charging users seems to be the only known way forward towards 100% access to justice.'[120] Rules being developed on such charges reflect Galanter's repeat player analysis. The individuals in need of services are often one-shot players, with limited ability to argue against the creation of new fee schedules. The sums may be relatively small 'surcharges,' yet the cumulative impact can result in thousands of dollars of expenses. In many jurisdictions, fees are not pegged to income or to the stakes of a lawsuit. Rather, the fee structure becomes a regressive tax used to finance courts.

Lawsuits on both sides of the Atlantic have been filed to protest the burgeoning reliance on user fees and the impact of court fines – now called 'court debt' or 'legal financial obligations' (LFOs). Some of the arguments rest on how fee systems violate obligations of governments to provide courts equally accessible by all. In 2014, for example, the Canadian Supreme Court found impermissible an escalating set of fees charged by British Columbia when litigants' trials lasted for more than three days.[121] Exempted under the rules were those who were 'indigent.' The Canadian Supreme Court relied on Section 96 of its Constitution Act of 1867 (providing that the 'Governor General shall appoint the Judges' of provincial courts)[122] to conclude that litigants had a right to '"Section 96 courts."'[123] As a consequence, British Columbia could not charge hundreds of dollars if doing so imposed an 'undue hardship' on persons of limited means.[124]

In 2017, the UK Supreme Court took a similar approach when it invalidated the high fees imposed by the government on claimants in its

120 HiiL, 'ODR and the Courts: The Promise of 100% Access to Justice?' (2016) 54 <http://www.onlineresolution.com/hiil.pdf> accessed 26 August 2018 [hereinafter HiiL, 'ODR and the Courts']. The monograph argues that using ODR lowers the costs and thereby would overall result in a reduction of fees by changing the 'dynamics' that had led governments to raise fees. Ibid 56.

121 *Trial Lawyers Association of BC v British Columbia* [2014] 3 SCR 31, paras 35–36 (Can).

122 Constitution Act, 1867 s 96 (Can).

123 *Trial Lawyers Association* (n 121) para 29, citing *MacMillan Bloedel Ltd v Sampson* [1995] 4 SCR 725, para 52.

124 Ibid paras 46, 52. Thereafter, British Columbia amended its fee rules. See British Columbia Supreme Court Civil Rules 20-5(1). That rule authorizes judges to waive fees if imposing an 'undue hardship' unless the judge determines that 'no reasonable claim or defense' is made, or the case is otherwise abusive. Ibid.

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Employment Tribunals.[125] While the schedule varied with the kind of claims brought by employees, fees ran from GBP 1200 to GBP 7200 at the first instance level, to be paid in different stages for filing, hearings, and the like. In contrast, fees in the UK's small claims courts were pegged to the value of the claim and ranged from GBP 50 to GBP 745.[126]

Remissions (fee waivers) were available in the Employment Tribunals. But the UK Supreme Court found the increased fees unlawful, given that a 'right of access to the courts is inherent in the rule of law' and that the administration of justice was not 'merely a public service like any other.'[127] The UK Supreme Court spoke not only of the value of producing precedent, but also emphasized the need of the commercial sector to know about the ability to enforce rights or 'that if they fail to meet their obligations, there is likely to be a remedy against them.'[128] That knowledge, in turn, 'underpins everyday economic and social relations.'[129]

Like the Canadian Supreme Court, the UK Court reasoned that indigency was not the only basis on which fees had to be waived. Rather, the question was the impact of fees 'in the real world'; when low- or middle-income households had to forego 'the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees cannot be regarded as affordable.'[130] In short, in the UK and Canada, courts have determined that amounts set have been too high for people of modest means, as well as the indigent, are impermissible.

In the United States, the focus has been on the poor. Challenges to court fees were, in the 1970s, a facet of broader efforts to define poverty as a 'suspect classification' under the Equal Protection Clause of the Fourteenth Amendment to the US Constitution. The US Supreme Court rejected that proposition in a case that had argued that property-based

125 *R (UNISON) v Lord Chancellor* [2017] UKSC 51 para 117 (Lord Reed).

126 Ibid paras 16–20; see also Abi Adams and Jeremias Prassl, 'Vexatious Claims: Challenging the Case for Employment Tribunal Fees' (2017) 80 Modern Law Review 412, 414, 418.

127 *R (UNISON) v Lord Chancellor* (n 125) para 66. Lady Hale's opinion focused on the discriminatory disparate impact of the fees. Ibid paras 121–34.

128 Ibid para 71 (Lord Reed).

129 Ibid. The court added: 'That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable.' Ibid.

130 Ibid para 93.

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taxes for education resulted in unequal educational opportunities for children living in poor neighborhoods.[131]

Yet a line of decisions takes poverty into account when the courts are involved. Filing fees are one context. Statutes in the federal and most state courts provide for fee waivers if individuals qualify as 'in forma pauperis.'[132] In the 1970s, however, Connecticut did not provide waivers for individuals seeking divorces. A class of 'welfare recipients residing in Connecticut' argued that, by failing to create a method by which to waive the sixty dollars for filing and service that was required to obtain a divorce, the state had violated their federal constitutional rights.[133]

Justice Harlan, writing for the Court in *Boddie v Connecticut*,[134] agreed that the combination of 'the basic position of the marriage relationship in this society's hierarchy of values and the … state monopolization' of lawful dissolution resulted in a due process obligation for the state to provide access.[135] Although the concurrences argued for broader principles that would have applied beyond the context of divorce,[136] Justice Harlan's language shaped a narrow obligation to waive fees. For example, the Court thereafter refused to require fee waivers when individuals sought to challenge a reduction in welfare benefits or to file for bankruptcy.[137]

Concern about the impact of poverty on criminal defendants arise not only through the questions of fee waiver but also about state-paid lawyers for impoverished individuals, mandated in *Gideon v Wainwright* in 1963, as well as fees after conviction, when fines were imposed. The US Supreme Court in the 1970s and 1980s concluded that the inability to pay a fine could not be the basis for continuing to keep a person, who had completed a sentence, in prison.[138] Likewise, the Court ruled that a lack of resources to pay a civil or criminal fine or other monetary sanctions could not be the basis for incarceration without a judge learning about whether the person

131 See *San Antonio Independent School District v Rodriguez* 411 US 1 (1973).

132 Standards for qualifying as poor enough for a waiver vary widely, including in the federal courts. See Andrew Hammond, 'Pleading Poverty in the Federal Courts' (forthcoming 2019) 128 Yale Law Journal.

133 Ibid 372.

134 *Boddie v Connecticut* 401 US 371 (1971).

135 Ibid 347.

136 Ibid 383 (Justice Douglas concurring); ibid 387 (Justice Brennan concurring).

137 See *Ortwein v Schwab* 410 US 656, 658–61 (1973); *United States v Kras* 409 US 434, 446 (1973); see also Judith Resnik, 'Fairness in Numbers: A Comment on *AT&T v Concepcion*, *Wal-Mart v Dukes*, and *Turner v Rogers*' (2011) 125 Harvard Law Review 78, 86.

138 *Williams v Illinois* 399 US 235 (1970).

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had the capacity to obtain the money to pay or was wilfully refusing to pay.[139]

In the last decades, an array of ad hoc charges tacked on at municipal, county, and state levels have generated new debt for individuals of modest means.[140] As the kinds and numbers of court assessments have multiplied in civil, criminal, juvenile, and traffic filings, lawsuits are again arguing that money is an impermissible barrier to courts or an unlawfully exploitative sanction imposed by courts. One locus of attention is the use of money bail, which even when set at levels under USD 1000 can sometimes keep in jail a person found eligible for pre-trial release. A few courts have held that it is unconstitutional to do so.[141] In addition, some lower courts have concluded that states cannot automatically suspend the drivers' licenses of individuals who owe fees imposed by courts.[142] Some courts have also held unlawful court-imposed fees because the benefits accrued to the judges deciding to levy them.[143]

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139 *Beardon v Georgia* 461 US 660 (1983).

140 See generally Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* (Russell Sage 2016). See also Marie Claire Tran-Leung, 'Debt Arising from Illinois' Criminal Justice System: Making Sense of the Ad Hoc Accumulation of Financial Obligations' (2009) Shriver Center 1 <http://povertylaw.org/files/docs/debt-report.pdf> accessed 26 August 2018.

141 *ODonnell v Harris County* 227 F Supp 3d 706 (SD Tex 2016), affd in part, revd in part, *ODonnell v Harris County* 882 F 3rd 528, 538 (5th Cir. 2018); In re Humphrey No A152056, 228 Cal Rptr 3rd 513 (Cal Ct App 2018); appeal pending; *People v Mullen* 2018 IL App (1st) 152306, 2018 WL736120 (5 February 2018).

142 *Stinnie v Holcomb* No. 3:16-CV-00044, 2017 WL 963234 (WD Va 13 March 2017), appealed dismissed, case remanded, No 17-1740, 2017 WL 963234 (4th Cir 23 May 2018); *Fowler v Johnson* No CV 17-11441, 2017 WL 6379676 (ED Mich 14 December 2017).

143 See eg *Cain v City of New Orleans* No 15-4479, 2017 WL 6372836 (ED La 13 December 2017) 21–22. The court discussed *Tumey v Ohio* 273 US 510 (1927), in which money raised by fines levied 'was divided between the state, the village general fund, and two other village funds.' Ibid 22. As in that famous Prohibition-era case, the federal district court in *Cain* concluded that the judges' 'direct pecuniary interest in the outcome' created financial motives to convict. Ibid 22, 25 (quoting *Tumey*, 273 US at 535). The court's subsequent decision certifying a class and denying summary judgment is at 281 F Supp 3rd 624, 658-659 (ED La 2017). In a challenge to a gun-user fee, litigants argued that because the fees go to general revenues and not to the service provided, the fee impermissibly imposes on the constitutional right to bear arms. See Petition for Writ of Certiorari, *Bauer v Becarra* No 17-719, 2017 WL 5495938 (9 November 2017), *cert denied*, 138 S Ct 982 (20 February 2018). The argument was that the 'cost-recovery principle ensures that the government may not leverage constitutionally protected conduct as a general revenue-raising measure.' Ibid 1. Applying those

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Litigation has been one response, interrelated with political organizing to change legislation and policies. The numbers of poor people in state courts have prompted many jurisdictions to commission task forces on 'access to justice,' and what some of them have learned is the difficulty of knowing what courts cost. Illustrative is a chart, described as a 'Recipe of Civil Court Assessments' (figure 5) from a 2016 effort commissioned by the Illinois judiciary. That state does not have a 'unified' system; rather each county decides on the fees to charge, which is why the task force spent a good deal of time researching and mapping the fees and surcharges.

In addition to local fees, the state has imposed 'add-ons' – resulting in fees of several hundred dollars – levied unless a person can show that he or she is 'indigent.' Moreover, not only are plaintiffs charged to file cases; in some states (including Illinois and California), defendants have to pay to file their answers.[144] The state-to-state variation for different kinds of claims is substantial. For example, in California, child support claims cost USD 435; in New York, no fees are charged to individuals seeking support.[145]

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propositions to courts may be attractive for some, but the problem identified in *Cain* raised the question of its viability for courts; if the fees go back to the judges or the courts on which they sit, that kind of self-interest would be impermissible.

144 In California, the fees as of 2017 ran from USD 225 to USD 435, and in Illinois from USD 15 to USD 110. See Superior Court of California, *Statewide Civil Fee Schedule* (2017) 5–6 <http://www.fresno.courts.ca.gov/fees_schedule/documents/Statewide%20Civil%20Fee%20Schedule%20January%202017.pdf> accessed 26 August 2018; Statutory Court Fee Task Force, *Illinois Court Assessments: Findings and Recommendations for Addressing Barriers to Access to Justice and Additional Issues Associated with Fees and Other Court Costs in Civil, Criminal, and Traffic Proceedings* (2016) 10 <www.illinoiscourts.gov/2016_Statutory_Court_Fee_Task_Force_Report.pdf > accessed 26 August 2018.

145 Superior Court of California, County of San Diego, *Family Law Fees*, <http://www.sdcourt.ca.gov/portal/page?_pageid=55,1524419&_dad=portal&_schema=PORTAL> accessed 26 August 2018. In Los Angeles County, it costs USD 435 to file for child support if a child support agency does not intervene and USD 424 for the child interview portion of child custody evaluation. Superior Court of California, County of Los Angeles, *Civil Fee Schedule* (1 July 2016) 4 <http://www.lacourt.org/forms/pdf/fees/fee-schedule-2016_rev.pdf> accessed 26 August 2018.

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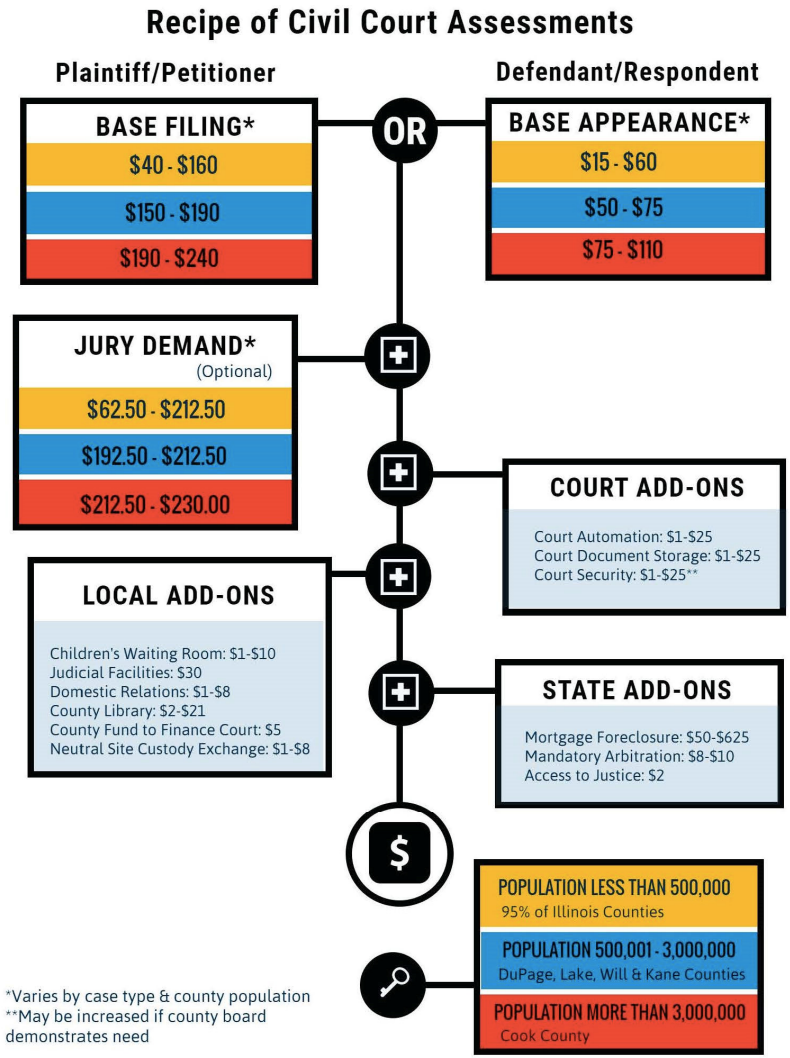
Figure 5



Of course, filing fees are the tip of the iceberg. Disputants pay vastly more for lawyers and experts. Thus, four important facets of contemporary civil litigation in the United States need to be brought into focus. A first is that many people are in court without lawyers. About a third of the civil filings

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in the federal courts are brought by individuals lacking lawyers;[146] on appeal, more than fifty percent who seek review do so without lawyers.[147] Research on state courts identified a set of about 650,000 civil cases in which at least one side in three-quarters of the cases had no lawyer.[148] Most often that party was the defendant.[149]

The second facet of US litigation is that remarkably few cases actually involve much adjudication. The National Center on State Courts evaluated almost a million cases dealt with between 2012 and 2013. Most of the civil cases involved debt collection, in which debtor-defendants were rarely represented.[150] Almost all of the decisions took place without adjudication, defined broadly to encompass summary judgments and court-annexed arbitration as well as trials on the merits. Low level complaints involving misdemeanors and traffic cases are heard in local and municipal courts, where dispositions take place in densely packed modestly-appointed rooms that are largely populated by individuals with limited or no resources and provided counsel (or not) through state funds. Dozens of cases are disposed of in a day, and virtually all without trials.

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146 The federal district court database provides information on unrepresented litigants (termed 'pro se filings') beginning in 2005: United States Courts, *Civil Pro Se and Non-Pro Se Filings* (2005–2010) <http://www.uscourts.gov/report-names/judicial-business?tn=c-13&pt=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D=> accessed 26 August 2018. Some 25% of civil cases are filed by unrepresented plaintiffs. See United States Courts, US District Courts – *Civil Pro Se and Non-Pro Se Filings* (30 September 2016) <http://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2016.pdf> accessed 26 August 2018.

147 United States Courts, *US Courts of Appeals – Pro Se Cases Filed* (2014) tbl 2.4 <http://www.uscourts.gov/sites/default/files/table_2.04_0.pdf> accessed 26 August 2018.

148 National Center for State Courts and State Justice Institute, *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts* (2015) iii [hereinafter State Court 2012–2013 Civil Litigation].

149 Ibid iv. In 1992, attorneys had represented both parties in 95% of the cases; in 2012–2013, attorneys were present in 24% of the cases. See ibid 31.

150 Ibid 31–33. Specifically, about two-thirds of the filings involved contract claims; more than one half of that set of claims were landlord-tenant and debt collection. Ibid iii. Those numbers reflect a change in the kinds of cases coming to court and in the modes of disposition. Twenty years ago, in a parallel study, the National Center found that about half of the claims analyzed were tort cases; the NCSC's 2012–2013 data put tort cases down to 7%. In about three-quarters of the more recent judgments analyzed, the sums were under USD 5,200, and the study reported that overall, 4% of the filings were disposed of by trials.

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In federal court, the statistic that has become familiar is that one-in-one-hundred civil cases starts a trial. The shorthand is the 'vanishing trial.' Opportunities for the public to watch proceedings other than trials are also diminishing. Research on 'bench presence' counts the hours that federal judges spend in open court, whether on trial or not. One study reported a 'steady year-over-year decline in total courtroom hours' from 2008 to 2012 that continued into 2013.[151] 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.'[152]

The numbers of unrepresented individuals and the dearth of adjudication may seem counter-intuitive, given the public face of courts. But a third facet of adjudication in the United States helps to explain that visibility. Collective actions infuse resources into the system. Since the 1960s, the federal courts have facilitated collectivity through rules authorizing class actions as well as pre-trial consolidation as 'multi-district litigation' (MDL) proceedings, sometimes including cases certified as class actions. As of 2016, of the 325,000 pending civil cases in the federal system, about a third were part of an MDL. A single judge is assigned to manage the pretrial phases of what, formally, are tens of hundreds of individual cases but functionally are handled in the aggregate.[153] Thus, while courts in the United States are populated by many people with no lawyers, much of the visible litigation happens through scaling-up by way of collective actions in which lawyers provide representation because of the economies of scale. Illustrative are several of the lawsuits I mentioned that challenge the system of pricing of court services.

Apex courts are a fourth facet that merit attention. The large buildings and the media coverage of decisions by the highest courts convey the impression of a well-funded set of government services. But the reminder is that the cases that reach those venues are few in number. The United States Supreme Court, for example, has extraordinary resources and decides under a hundred cases a year.

151 Jordan M Singer and William G Young, 'Bench Presence 2014: An Updated Look at Federal District Court Productivity' (2014) 48 New England Law Review 565, 565.

152 Ibid 566.

153 Details are provided in Judith Resnik, 'Lawyers' Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes' (2017) 85 Fordham Law Review 1899, 1912–16.

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4. Reconfiguring Processes – From ADR to ODR

My abbreviated account of decades of litigation and doctrine has been in service of explaining the backdrop driving the changes producing ADR and ODR. In part, these new modes of dispute resolution come in response to the success of courts – welcoming new claimants and providing innovative remedies in the wake of the expansion of government functions.

These developments highlight yet other ways in which Bentham's era and ours diverge. In Bentham's days, the repeat players shaping court practices were 'Judge & Co', the professional elites. Today, the repeat players range from social egalitarian movements to governments, corporations, and the media.[154] This array of repeat players has competing agendas. Some aim to redistribute the social services that courts provide by enlisting judicial power to achieve more egalitarian practices. Others seek to prevent use of court services.

John Rawls famously imagined a 'veil of ignorance' that would enable us to make rules that were more just by not knowing how they would affect us.[155] No such veil is at work here. Rather, entrenched and new interest groups – some understanding they are likely plaintiffs and others seeing themselves as defendants – are playing to promote what they take to be their self-interests through rules about openness, transparency, and privatization. The goal of all these groups is to redefine the contours of 'justice' systems.

This backdrop provides the frame for a brief overview of contemporary technologies and processes for decision-making in courts and in their alternatives/replacements. A first example is the economic commitment to courthouse construction. During the last decades of the twentieth century, governments reiterated beliefs in litigation through their significant investments in new and large courthouses; judges, lawyers, and architects succeeded in obtaining funds for signature buildings.[156] One translation of rising filings and a robust economy is figure 6, the federal courthouse in St. Louis Missouri, with its 29 stories and dozens of courtrooms.

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154 See generally Stephen B. Burbank and Sean Farhang, *Rights and Retrenchment: The Counterrevolution against Federal Litigation* (CUP 2017).

155 John Rawls, *A Theory of Justice* (Belknap 1971) 136–37.

156 National and transnational building projects produced important public buildings, including the vastly expanded Court of Justice for the European Union. See Judith Resnik and Dennis Curtis, *Representing Justice* (n 73) 225–46.

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Figure 6

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

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Just like the courthouse dating from the eighteenth century in Connecticut in figure 1, this twenty-first century building may also be at risk of becoming obsolete. In contrast to what that imposing building seems to offer – courtrooms and public hearings – the advice posted in 2014 on the website of the US Courts encourages private resolutions. In a text box, the judiciary counseled that, to 'avoid the expense and delay of having a trial, judges encourage the litigants to try to reach an agreement resolving their dispute.'[157] A translation of that admonition comes from the federal 'local rules' implementing the national regime in the District of Massachusetts. In a subpart entitled 'Settlement,' the court proposed that at 'every conference conducted under these rules, the judicial officer shall inquire as to the utility of the parties conducting settlement negotiations, explore means of facilitating those negotiations, and offer whatever assistance may be appropriate in the circumstances.'[158]

This rule provides instructions for the judges who sit in a courthouse (figure 7), designed by the architect Harry Cobb, opened in 1998, and adorned with Ellsworth Kelly panels.

The courthouse has twenty-five thoughtfully adorned courtrooms, as illustrated by Figure 8. Each of the four walls is marked by stencilled arches of equal size to denote the four sets of participants in adjudication – the judge, the plaintiffs, the defendants, and the public – forming the square that, as I discussed, ought to be substituted for the triangle often used to depict a judge and disputants, laid out to mimic scales.

157 That text was on the home page of United States Federal Courts website as of 2 April 2014.

158 Local Rules of the US District Court for the District of Massachusetts (March 2017) r 16.4 (a)–(b) <http://www.mad.uscourts.gov/general/pdf/combined01.pdf> accessed 24 January 2018.

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Figure 7

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

Moreover, as the interior courthouse photograph shows, ample room has been set aside for observers to watch what transpires. Yet, once again, these new buildings are harkening back to earlier eras. While many benches have been built into the courtrooms of this federal courthouse, rules of court have limited their relevance. As the excerpt from the federal district court of Massachusetts reflects, no place is written into its settlement practices for third party observation. That approach is not idiosyncratic. Across the country, published ADR rules rarely reference the public.[159] To

159 Judith Resnik, 'The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR' (2015) 15 Nevada Law Journal 1631.

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the extent third parties are mentioned, the context is usually an admonition that confidentiality is required of participants in court-based ADR processes.

Figure 8

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

The denouement, as one esteemed trial judge put it, is that the image of a federal judge sitting on the bench in a black robe 'presiding publicly over trials and instructing juries' is obsolete; it should be replaced by a picture of a person in business dress in 'an office setting without the robe, using a computer and court administrative staff to monitor the entire caseload and individual case progress.'[160] That point is made again, and celebrated, in a

160 The Honorable Brock Hornby, 'The Business of the US District Courts' (2007) 10 Green Bag 453, 462.

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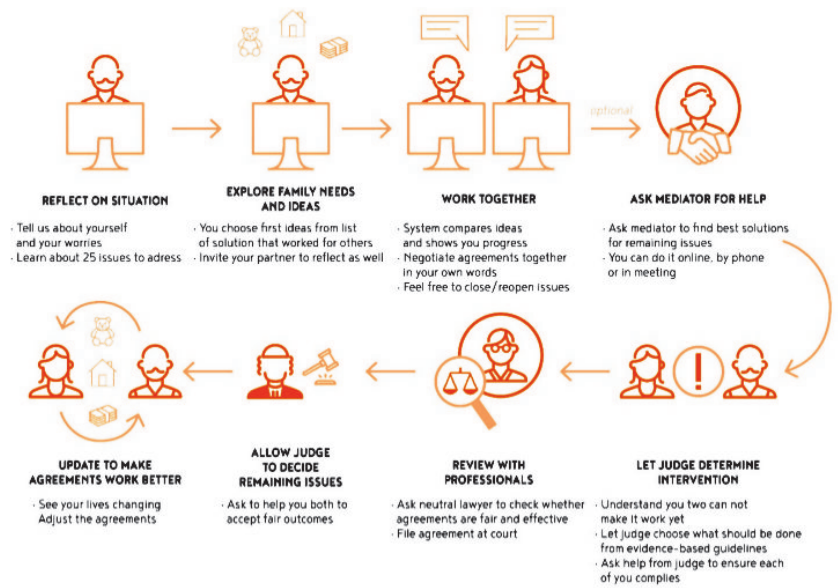
pictograph, borrowed from the 2016 Report entitled '*ODR and the Courts: The Promise of 100% Access to Justice?*'.[161]

Figure 9



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

The images and text outline steps for responding to conflicts. Depicted are individuals behind computers aiming to reach a resolution. In one of the eight frames, a person is labeled as a mediator, and in another, a person is labeled a judge. The public is not in sight.

The monograph aspires to have ODR promote users' 'fairness experience,'[162] and the referent is to disputants. Unlike the 2017 decision of the UK Supreme Court, requiring that filing fees be limited in employment

161 HiiL, 'ODR and the Courts' (n 120) 38.

162 Ibid 41. The monograph called for 'transparency of outcomes' but did not provide for transparency in process or discuss how outcome data was to be compiled and disseminated. The monograph spoke of concerns about how to scale up ODR to lower marginal costs (ibid 54) and to enable a 'respectful dialogue' (ibid 44). The monograph did not provide the metrics of respect.

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tribunals because everyone needs to know about the enforceability of rights, 'which underpins everyday economic and social relations,'[163] this monograph neither addresses the public nor describes how users and consumers can be understood as citizen-agents empowered to participate in a public commitment to fair dispute resolution processes.

The exclusion of the public is not inevitable. Some ODR processes, such as those in the courts of British Columbia, seek to preserve the principle of openness[164] even as ODR is becoming what is 'the court.' The 'Tribunal Decision Process' of the British Columbia's Civil Resolution Tribunal (CRT) aims to 'replace a model' of in-person open dispute resolution of property disputes (that had been 'generally open to the public') with an ODR process reliant on written submissions and available unless parties opt out.[165] The governing rules worry both about maintaining institutional openness and about individual privacy and the potential for appropriation of web-based information.[166]

Just as the US federal courts press the parties to focus on negotiation, so too does the CRT. No provisions are made for public access to the interactions because, as noted in the 'Access to Records and Information in CRT Disputes' provisions,[167] these exchanges in person often take place in private settings. As for the disputes that proceed to the Tribunal, the policy concluded that it was 'not practical to provide the public with the opportunity to observe the Tribunal Decision Process as it occurs.'[168] Instead, the policy offers 'transparency . . . by posting CRT final decisions on a publicly accessible website' and permitting public access, if fees are paid, to the 'evidence submitted.'[169]

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163 *R (UNISON) v Lord Chancellor* (n 125) para 71 (Lord Reed). The court also commented: 'That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable.' Ibid.

164 See generally British Columbia Civil Resolution Tribunal, 'Access to Records and Information in CRT Disputes: Policy 001-20151215' (2015) 1–5, 12–17 <https://civilresolutionbc.ca/wp-content/uploads/2017/02/Access-to-Info-in-CRT-Case-Records.pdf> accessed 26 August 2018 [hereinafter British Columbia CRT, Access to Records].

165 Ibid 2.

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

167 British Columbia CRT, 'Access to Records' (n 164) 1.

168 Ibid 2.

169 Ibid 2. To summarize, the negotiation and mediation phases are distinct from the Tribunal Decision Process, which is the phase where information can be pro-

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To summarize this aspect of my discussion, a good deal of court-based ADR/ODR/reconfiguration celebrates ODR as the answer to the 'global crisis' in access to justice. These new technologies are argued to advance one sense of openness – *accessibility* for disputants – in part through lowering the cost of the process by employing new technologies. Enthusiasm in many quarters runs high.[170] But much of the discussion of ODR and ADR ignores the other sense of openness – the role of third parties welcomed to observe. Also ignored is a role for collective action. The models are focused on single-file decision-making rather than on group-based information and resource sharing. This approach exemplifies the complacency I noted earlier. The implicit assumption is that *the law as we have it is good but what we are lacking is access to it*.

But what about how the law could/would/should change – in all directions? When rejecting high filing fees in the Employment Tribunal in the UK, the Supreme Court insisted that access to courts was not 'of value only to the particular individuals involved.'[171] The Court cited a 1932 ruling (*Donoghue v Stevenson*) as an example of an ordinary dispute resulting in a rule (that producers of consumer goods were under a duty to take care for the health and safety of the consumers of those goods) which was 'one of the most important developments' in twentieth-century UK law.[172] Theorists from Habermas to Pierre Bourdieu have analyzed the interplay between fact and law and the reflexivity that constructs our professional habitus. My concern is that this functional privatization has no mechanism built in to provide for iterative exchanges in courts and/or their replacements to produce and revise the reach and function of law. Moreover, these processes are shaping a new professional habitus in which few will have experiences of public interactions and collective actions.

Procedures always allocate authority. As Bentham instructed long ago, privatization takes away the public's authority to scrutinize, let alone to

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vided publicly. See 'Information Access & Privacy Policy' (Civil Resolution Tribunal, 2018) <https://civilresolutionbc.ca/resources/information-access-privacy-policy/#will-the-crt-share-my-information-with-the-public> accessed 26 August 2018.

170 For example, the UK's Courts and Tribunals Judiciary website describes two of the effects of ODR: increasing access to justice because it 'will be cheaper, more convenient, less forbidding' and lowering the cost to individual participants in disputes. Richard Susskind, 'What is ODR?' (Courts and Tribunals Judiciary, 2018) <https://www.judiciary.gov.uk/reviews/online-dispute-resolution/what-is-odr/> accessed 26 August 2018.

171 *R (UNISON) v Lord Chancellor* (n 125) para 69.

172 Ibid.

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discipline, the decision-making and the norms that undergird it. Just as I cannot know how Google is balancing the interests under EU law on data protection and access to information, I do not know the judgments made and the norms promoted in these ADR/ODR courts.

5. *Outsourcing*

What I have focused on thus far is the privatization of court-based processes. A brief account is in order of another form of ADR that mandates the use of arbitration in lieu of courts for claims arising out of employment and consumer relationships and predicated on statutory, constitutional, and common law rights.

The legislation that is at the base of this practice in the United States dates from 1925. The Federal Arbitration Act (FAA) was heavily influenced by transatlantic developments; the goal was to have courts enforce contracts crafted by businesses committing themselves to arbitrate.[173] The key repeat players propelling this statute were the Chamber of Commerce, the American Bar Association, and the New York Bar Association.[174]

For a period of about fifty years, the act was interpreted as applying only to genuine volunteers. In a 1953 US Supreme Court decision involving a form mandating arbitration between a securities broker and a customer, the Supreme Court explained that even if some buyers and sellers dealt 'at arm's length on equal terms,' the federal securities laws were 'drafted with an eye to the disadvantages under which buyers labor.'[175] Moreover, arbitrators' 'award[s] may be made without explanation of their reasons and without a complete record of their proceedings.'[176] Hence, one could not exam-

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

174 For a history of the development of the doctrine on the FAA, see Judith Resnik, 'Diffusing Disputes' (n 7) 2860–74.

175 *Wilko v Swan* 346 US 427, 435–36 (1953).

176 Ibid.

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ine 'arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact" … .'[177]

As this description reflects, the Court was concerned about inequalities in bargaining power; it was protective of the special role of courts, charged with enforcing the governing statutes through a process that included appellate oversight. This 1953 ruling reflects what I understand the law in the EU and in Canada and other jurisdictions continue to require: that arbitration clauses imposed unilaterally by large-scale commercial service and goods providers are not enforced against individual consumers.[178]

But in the 1980s, the US Supreme Court shifted its approach and held such mandates enforceable even when a less-well-resourced party objected to a boilerplate arbitration clause. At the time, the Court explained itself by noting that arbitration offered an 'effective' means of enforcing rights. Over the decades, the Court's doctrine has become increasingly insistent on using arbitration. The marketplace has responded through a proliferation of obligations to arbitrate.

To bring these mandates into sight, I provide two pages in Figure 10a/b taken from an exhibit in a Supreme Court case between the Equal Employment Opportunity Commission and Waffle House, describing itself on its form as 'America's place to work'; 'America's place to eat.'

177 Ibid.

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

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Figure 10 A/B

WAFFLE HOUSE®

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

MUST BE COM[illegible]TED IN THE RESTAURANT

APPLICATION FOR EMPLOYMENT

(PLEASE PRINT PLAINLY)

TO BE COMPLETED UPON EMPLOYMENT	
Work Location ______	Rate ______
Position ______	Date ______

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

Date June 22, 1994

Social Security No. ______

Name Baker (Last) Eric Scott (Middle) Telephone No. ______

Present Address ______ (No.) ______ (Street) Gaston (City) SC (State) 29053 (Zip)

Next of kin to be notified in event of emergency: Name Robert G or Sylvia G Baker

Relationship: Father/Mother Address: ______ Gaston SC 29053 Telephone No. ______

GENERAL INFORMATION

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

Race: White Birthdate: 10/27/74 Sex: M ✓ F ______ Height: 5 ft. 5 in. Weight [illegible] lbs.

Marital Status: Single ✓ Engaged ______ Married ______ Separated ______ Divorced ______ Widowed ______

Number of dependents including yourself ∅ Are you a citizen of the U.S.A.? Yes

Have you ever been bonded? NO If yes, on what jobs? ______

Have you ever been convicted of a crime in the past ten years? NO If yes, describe in full: [illegible]

[illegible]

Are you now or have you been a user of or addicted to: Drugs? [illegible] Alcohol to excess [illegible]

[illegible]

What kind of car do you drive? Make Buick Model Skyhawk Year 1985

Will you use your car to get to work? Yes

If not, what method of transportation will you use to get to work? ______

Position(s) applied for ______ Rate of pay expected $ ______ per/hr. $ ______ per/wk.

Would you work Full-Time ✓ Part-Time ______ Specify days and hours if part-time ______

Were you previously employed by Waffle House? NO If yes, when and where? ______

List any friends or relatives working for us and where NONE

If your application is considered favorably, on what dates will you be available for work? This week Friday 19 94

Are there any other experiences, skills, or qualifications which you feel would especially fit you for work with the Company? I Run A Crew, Work in The Food Business For 4 years.

Have you been refused a Health Permit to work at any occupation? NO If yes, explain fully: ______

Can you lift 50 lbs to shoulder height? YES

Are you able to remain standing on your feet for a full 7-10 hour shift? yes

Are you able to sweep, mop, etc.? yes

MILITARY SERVICE: Are you a veteran? NO If yes, dates of service ______ Branch: ______

Rank attained: ______ Date/Type of dismissal: ______

Are you a member of any Reserve organization or National Guard? NO

• IMPORTANT •
NOTICE TO APPLICANT

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

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

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

[illegible] any dispute or claim concerning Applicant's employment with Waffle House, Inc. or any subsidiary or Franchisee of Waffle House, Inc., [illegible] terms, conditions or benefits of such employment, including whether such dispute [illegible] shall be settled by binding arbitration. The arbitration proceedings shall [illegible] the Commercial Arbitration Rules of the American Arbitration Association [illegible] shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

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EXHIBIT A

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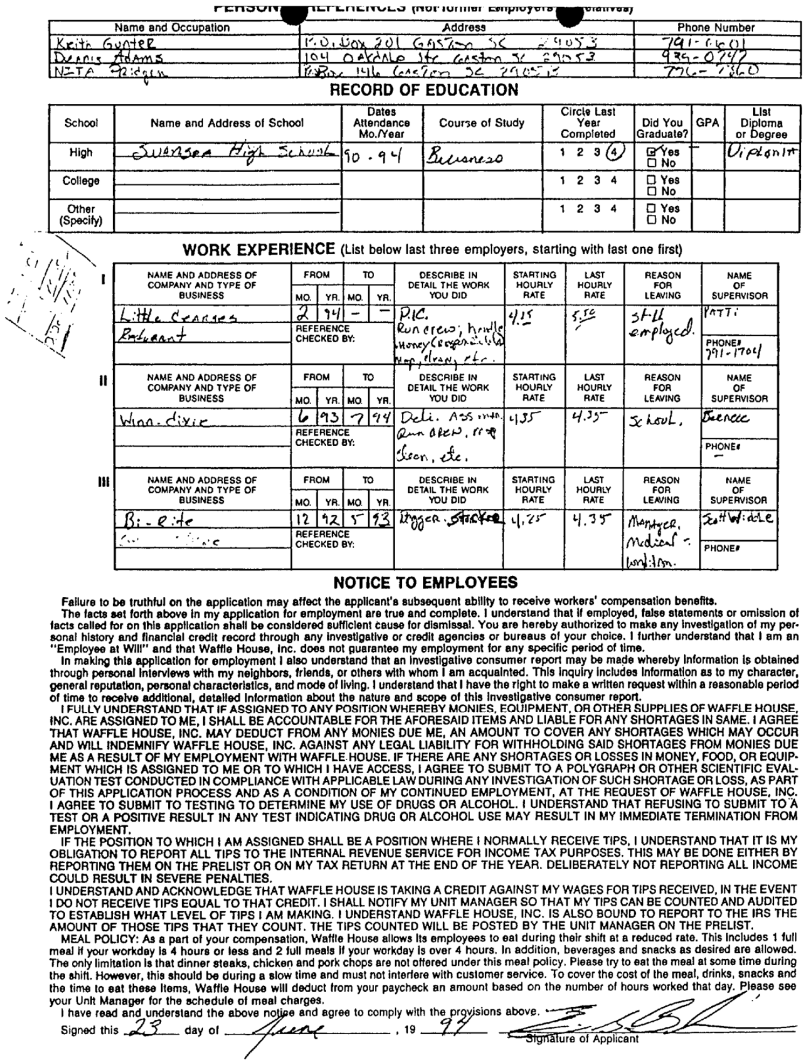

PERSON[illegible]REFERENCES (Not former Employers[illegible]atives)

Name and Occupation	Address	Phone Number
Krita Gunter	P.O. Box 201 Gaston SC 29053	791-6601
Dennis Adams	104 Oakdale Dr Gaston SC 29053	936-0747
NITA Pridgen	PoBox 1416 Gaston SC 29053	736-7560

RECORD OF EDUCATION

School	Name and Address of School	Dates Attendance Mo./Year	Course of Study	Circle Last Year Completed	Did You Graduate?	GPA	Dipl. or Degree
High	Swansea High School	90 - 94	Business	1 2 3 (4)	☒ Yes ☐ No	-	Diploma
College				1 2 3 4	☐ Yes ☐ No		
Other (Specify)				1 2 3 4	☐ Yes ☐ No		

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

	NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM MO.	FROM YR.	TO MO.	TO YR.	DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
I	Little Caesars Restaurant	2	94	-	-	P.I.C. Run crew, handle money, keep clean, etc.	4.15	5.50	Still employed.	Patti PHONE# 791-1704
	REFERENCE CHECKED BY:									
II	NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM MO.	FROM YR.	TO MO.	TO YR.	DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
	Winn-Dixie	6	93	7	94	Deli. Assist. mgr. Run ORDER, prep clean, etc.	4.35	4.35	School.	Brenda PHONE# -
	REFERENCE CHECKED BY:									
III	NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM MO.	FROM YR.	TO MO.	TO YR.	DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
	Bi-Lo	12	92	5	93	Bagger, Stocker	4.25	4.35	Manager, Medical - [illegible]m.	Keith Waddle PHONE#
	REFERENCE CHECKED BY:									

NOTICE TO EMPLOYEES

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

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

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

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

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

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

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

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

Signed this 23 day of June, 19 94 — Signature of Applicant

The micro-print on this job application is not easy to read, whether reproduced or in the original. Two key paragraphs are below. One is about inappropriate use of store equipment and taking food, and the other paragraph is about dispute resolution.

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> … I agree that Waffle House, Inc. may deduct from any monies due me, in an amount to cover any shortages which may occur and will indemnify Waffle House, Inc. against any legal liability for withholding said shortages from monies due me as a result of my employment with Waffle House. If there are any shortages or losses in money, food, or equipment which is assigned to me or to which I have access, I agree to submit to a polygraph or other scientific evaluation test conducted in compliance with applicable law … .
>
> The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc. … will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association . … 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.[179]

In the case in the US Supreme Court, Eric Baker was hired and then fired after he had a seizure at work. He went to the Equal Employment Opportunities Commission (EEOC), which can pursue both back pay and injunctive relief if the EEOC investigates and believes that federal discrimination laws are violated. Waffle House argued that because Baker had signed the job application, the EEOC was prevented from bringing a claim to help Mr Baker get back pay. The majority of the US Court disagreed – that such forms do not bind the government agency that had statutory authority to pursue both future and remedial relief.[180]

The next form, Figure 11, was sent to me several years ago by my cellular service but is not unique to that provider.

179 *EEOC v Waffle House, Inc* 534 US 279 (2002) (No 99-1823), excerpted from Waffle House Application for Employment, Joint Appendix at 58–59.

180 *EEOC v Waffle House, Inc* 534 US 279 (2002).

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Figure 11

DOCUMENT ACCOMPANYING THE PURCHASE OF A CELLULAR PHONE, 2002

INDEPENDENT ARBITRATION

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

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

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

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

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

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

The text prevents me from using courts and from being in class actions, whether in court or in arbitration. This image is another bad graphic, in that it cannot be easily read. Yet it is a good graphic, because there is no point in reading it. Doing so is a waste of time. When I called the provider

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to object to its terms, I was told that no negotiation was possible – take it or stop using that cell phone service.

Under the law of the EU, these terms would not be enforced. Several state courts in the United States shared that view. For example, California had both a statute and a decision holding such a class action waiver unenforceable, because in

> a consumer contract of adhesion [when] … disputes … involve small amounts of damages, … the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud."[181]

But the US Supreme Court read the 1925 FAA as preempting state courts from reaching that judgment.[182] In a case in which AT&T sought to enforce a class action ban, the Court concluded that such state laws were an 'obstacle' to the federal policy supportive of arbitration.[183] The Court's approach is not limited to consumers. The Supreme Court has also read the FAA mandate to govern claims of wrongful death of individuals in nursing homes – absent a showing that an individual was subjected to an unconscionable contract aside from the arbitration clause.[184]

Moreover, in 2018, the Court concluded that class action bans are enforceable despite provisions of the 1935 National Labor Relations Act that protect the right to pursue 'collective action.'[185] Under that ruling, employers can notify employees of new terms of employment that ban group-based litigation in any forum and can thereby impose single-file

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181 *Discover Bank v Superior Court* 113 P3d 1100, 1110 (Cal 2005) (quoting California Civil Code s 1668).

182 *AT&T Mobility LLC v Concepcion* 563 US 333 (2011).

183 *AT&T Mobility LLC v Concepcion* 563 US at 351-352: '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.'

184 See *Kindred Nursing Centers, LP v Clark* 137 S Ct 1421 (2017). The Supreme Court earlier held that the FAA contained no exception for personal injury or wrongful death claims in actions against nursing homes in West Virginia. *Marmet Health Care Center, Inc v Brown* 565 US 530 (2012). Some limits exist. Arbitrators concluded public law injunction actions were not arbitral. See American Arbitration Association, Order Regarding Claimant's Motion for Order for All Claims to Proceed in Court of Law, *DeVries v Experian Information Solutions* Civ No 01-17-0001-7722, following *McGill v Citibank* 393 P3d 85 (Ca 2017).

185 See *Lewis v Epic Systems Corporation* 138 S Ct 1612 (2018).

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arbitration clauses, including for claims by workers of wrongly withheld wages.[186] In short, that dense one-page mandate from a cell phone provider has become the new governing rules for dispute resolution for tens of millions of claimants.

Proponents of enforcing such mandates to arbitrate make two claims. The first is that the parties consented in a contract to forego courts and group-based actions. But what AT&T has on its website in terms of a 'customer agreement' belies the notion of genuine consent. The company states that it 'may change any terms, conditions … or charges … at any time.'[187] This assertion of unilateral control is why I have not, in this chapter, used the term 'contract' or 'agreement' when discussing such documents. They are neither negotiated nor negotiable.[188]

The second argument advanced is that arbitration is as effective a means of resolution or is a better method than courts. That position often invoked the language of 'access to justice.' Illustrative is the statement before the US Congress in 2017 by a lawyer for the Chamber of Commerce; he argued that arbitration 'empowers individuals, freeing them from reliance on lawyers' and making 'dispute resolution easy to access and claims easy to prosecute.'[189]

But does it? I have sought to find evidence of 'empowerment.' To do so, I honed in on the wireless provider AT&T because of its leadership role in enforcing class action bans. AT&T's mandates for consumer dispute resolution use the American Arbitration Association (AAA) to administer arbitration. Because the AAA complies with California requirements that arbitration providers post information on websites about consumer arbitra-

186 Ibid 1622–23; see also ibid 1633, 1646–48 (Justice Ginsburg dissenting).

187 AT&T, 'Wireless Customer Agreement' (24 January 2018) <https://www.att.com/legal/terms.wirelessCustomerAgreement.html> accessed 26 August 2018.

188 In the 1970s, Arthur Leff argued that contract theorists had made a category error when developing doctrines of unconscionability. Rather than a 'contract,' non-negotiable obligations were 'things,' to be regulated or not. See Arthur Allen Leff, 'Contract as a Thing' (1970) 19 American University Law Review 131, 132, 143; see also Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press 2013).

189 Examining the CFPB's Proposed Rulemaking on Arbitration: Is it in the Public Interest and for the Protection of Consumers?: Hearing Before the Subcommittee on Financial Institutions and Consumer Credit of the House Committee on Financial Services, 114th Cong 4 (2016) (Statement of Andrew Pincus, Partner, Mayer Brown LLP).

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tions,[190] I was able to learn about the numbers of consumers pursuing claims against AT&T through single-file arbitrations.

A first point is that in total across the United States, the AAA administers relatively few consumer filings; it reports providing about 1400 to 1600 nationwide, each year.[191] The second point is that by filtering information about thousands of posted claims, we could identify how many arbitration cases involved AT&T. From 2008–2017, the company had between 85-147 million customers. As the chart in Figure 12 summarizes, fewer than sixty people a year filed individual claims during this eight-year period.

As this chart also reflects, parallel findings come from the Consumer Financial Protection Bureau (CFPB), which analyzed consumer filings involving credit cards and loans. Again, hundreds of millions of people have credit cards, and the CFPB found about 400 filings per year during a three-year period.[192] In short, almost no consumers use arbitration to seek redress.

Of course, one explanation is that consumers have no basis for bringing claims because the companies are law-compliant. But regulatory actions brought against wireless providers belie that argument. In 2014, the US Government filed actions against the four major wireless providers in the United States; the federal government alleged overcharging of customers for services that were not provided and a failure, when customers complained, to provide compensation.[193] The companies settled with the government.

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190 For a discussion of the data and caveats on its potential for incomplete accountings, see Judith Resnik, 'Diffusing Disputes' (n 7) 2897–90; and Judith Resnik, 'Open Courts and Arbitration' (n 17) 647–656.

191 American Arbitration Association, 'Analysis of the American Arbitration Association's Consumer Arbitration Caseload: Based on Consumer Cases Awarded Between January and August 2007,' available at <https://perma.cc/LPG6-S6F9> accessed on 2 March 2015 ('Each year, the AAA administers approximately 1,500 consumer cases … '). The AAA does not publish 'statistics on [its] total consumer caseload,' but in 2017 had 3,547 new consumer arbitration filings. Email from Ryan Boyle, Vice-President, Statistics and In-House Research (6 March 2018).

192 Consumer Financial Protection Bureau, 'Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act s 1028(a)' (2015) s 1.4.2, 11 <http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf> accessed 26 August 2018.

193 See eg Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC v AT&T Mobility, LLC* No 1:14-CV-3227-HLM (ND Ga 8 October 2014) 2–3.

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Figure 12

Consumer Arbitration Filings with the American Arbitration Association
2009-2017

AAA Database – AT&T Wireless

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

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

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

Other explanations for the non-use of arbitration comes from the challenges of following the procedures put forth by the many private providers. Individuals have to find the relevant websites and navigate bodies of rules and supplementary protocols that apply to different kinds of claims.

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Further, the low value of individual claims has to be measured against the costs of filing. In the AT&T case in the US Supreme Court, the consumer sought to recoup USD 30 for an alleged violation of state consumer protection laws. In contrast, the AAA imposes a USD 200 administrative fee on consumers (and USD 1,700 on businesses), even as it also requires that employers and service providers absorb the costs of the arbitrators when employees and consumers seek redress.[194] Hence, if a consumer knew of the legal argument under the state law, that consumer would have to pay USD 200 to try to recoup USD 30.

And, of course, individuals may not know that they may have been wronged. Mandates to use arbitration function to suppress knowledge about others seeking redress. In the United States, many arbitration providers require that the proceedings be private; no third parties can attend without permission.[195] In addition, some documents imposing arbitration include confidentiality clauses. Judges enforce those clauses, even as some acknowledge the repeat player effect – that one side derives advantages from knowing the track record of past proceedings, while individual opponents do not.[196] This mix of a lack of knowledge and a need for energy and resources to figure out how to pursue remedies means that

194 American Arbitration Association, 'Consumer Arbitration Rules' (rules amended and effective September 2014, cost of arbitration effective 1 January 2016) 34 <https://www.adr.org/sites/default/files/Consumer%20Rules.pdf> accessed 26 August 2018 [hereinafter AAA Consumer Arbitration Rules]; American Arbitration Association, 'Consumer Arbitration Fact Sheet' <http://info.adr.org/consumer-arbitration/> accessed 26 August 2018.

195 See eg 'JAMS Comprehensive Arbitration Rules & Procedures' (*JAMS*, effective 1 July 2014) <https://www.jamsadr.com/rules-comprehensive-arbitration/> accessed 26 August 2018 (limiting public access to proceedings before the Judicial Arbitration and Management Services); Better Business Bureau, 'Rules of Conditionally Binding Arbitration' <https://www.bbb.org/bbb-dispute-handling-and-resolution/dispute-resolution-rules-and-brochures/rules-of-conditionally-binding-arbitration/#ConfidentialityofRecords> accessed 26 August 2018 ('It is our policy that records of the dispute resolution process are private and confidential.').

196 See eg *Guyden v Aetna Inc* 544 F3d 376, 384–85 (2d Cir 2008) (finding enforceable arbitration mandates imposed by an employer despite recognizing that 'in the context of individual statutory claims, a lack of public disclosure may systematically favor companies over individuals' (quoting *Cole v Burns International Security Services* 105 F3d 1465, 1477 (DC Cir 1997))); *Iberia Credit Bureau Inc v Cingular Wireless LLC* 379 F3d 159, 175 (5th Cir 2004) ('While the confidentiality requirement is probably more favorable to the cellular provider than to its customer, the plaintiffs have not persuaded us that the requirement is so offensive as to be invalid.'); *Parilla v IAP Worldwide Services VI, Inc* 368 F3d 269, 279–81 (3d Cir 2004) (finding no unfairness in employee confidentiality clause because

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many individuals 'lump it.' They do not proceed alone, and they are barred from collective action.

What I have just sketched is an array of repeat players seeking to reshape rules. The Chamber of Commerce and other business interests succeeded in limiting consumer and employee access to courts. In 2017, the Consumer Financial Protection Bureau (CFPB) proposed regulations that would have made unenforceable the *ex ante* waivers of both the use of courts and of class actions, if applied to consumers dealing with the financial products and services.

In addition, the CFPB also sought to require reporting on arbitration – databased on a website, with redactions if needed for individuals' privacy.[197] That proposed rule required information on the initial claim requested, the documents mandating arbitration, and communications between individual arbitrators and the program administrators related to problems if the service provider had not paid required fees.[198] (As I noted, a few states, such as California, have statutes requiring information on consumer arbitrations as well). But, the Chamber of Commerce was at the helm when opponents persuaded Congress (with the Vice President voting in the Senate) to enact a resolution in 2017 that the CFPB's proposed 'rule shall have no force or effect.'[199]

Audiences outside the United States may think that the law I have recounted reflects the exceptional, the aberrational, and the unwise approach of US lawmakers. But as political upheavals of the last few years

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'[e]ach side has the same rights and restraints … and there is nothing inherent about confidentiality itself that favors or burdens one party … in the dispute resolution process').

197 See Arbitration Agreements (proposed 24 May 2016) 81 Fed Reg 32,830, 32,838, 32,868 (to have been codified at 12 CFR Part 1040).

198 See ibid. The proposal is analyzed in Nancy A Welsh, 'Dispute Resolution Neutrals' Ethical Obligation to Support Reasonable Transparency' (unpublished manuscript on file with author, 14 November 2017). As she details, the proposal garnered 'strong support' from the American Bar Association's Section of Dispute Resolution. Ibid 7–9; see also Section of Dispute Resolution of the American Bar Association, 'Comment Letter on the Bureau of Consumer Financial Protection Proposed Rule on Arbitration Agreements' (29 July 2016) <https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/bars/dr-cfpb-comments_7-29-16.authcheckdam.pdf> accessed 26 August 2018 [hereinafter ABA Dispute Resolution Section 2016 Comments].

199 See Joint Resolution Providing for Congressional Disapproval under Chapter 8 of Title 5, United States Code, of the Rule Submitted by Bureau of Consumer Financial Protection Relating to 'Arbitration Agreements' (1 November 2017) Public Law no 115-74, 131 Stat 1243.

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make plain, we do not live in insulated cultures. Across many oceans, some repeat players hope to expand the use of collective actions, just as others aim to block that expansion.

Prompts in Europe for more collective methods of dispute resolution come from recommendations from the EU to provide more by way of consumer redress[200] and for Member States to provide some forms of collective action for data protection claims.[201] In addition, Member States have shaped a variety of their own rules on collective actions.[202]

The contours of permissible methods have been debated, including in the CJEU, which in the winter of 2018, interpreted consumer-protective provisions in its ruling in *Maximilian Schrems v Facebook Ireland, Limited*.[203] The underlying claim was that Facebook had 'committed numerous infringements of data protection provisions' under Austrian, Irish, and European law. Mr Schrems, a frequent litigant, filed in Austria, his home, against Facebook Ireland, and he also sought to be permitted to proceed on behalf of others, who had assigned claims to him.

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

201 See Regulation 16/679/EU on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data (effective April 2018) [2016] OJ L 119/01. Art 80 provides for two models of collective redress to be developed at the national level.

202 The Dutch are described as at the forefront of developing mechanisms, one for injunctive and the other for monetary relief. See Dutch Collective Settlements Act, including the 'WCAM' procedure by which liability can be established and individuals can then seek damages. Dutch Act on Collective Settlements, Law of 23 June 2005, Stb 340. That effort has been the subject of critique by the US Chamber of Commerce. See eg US Chamber Institute for Legal Reform, *The Growth of Collective Redress in the EU: A Survey of Developments in 10 Member States* (March 2017) 22–23, 42, 46, 52 <http://www.instituteforlegalreform.com/uploads/sites/1/The_Growth_of_Collective_Redress_in_the_EU_A_Survey_of_Developments_in_10_Member_States_April_2017.pdf> accessed 26 August 2018 [hereinafter *Growth of Collective Redress*].

203 Case C-498/16 *Schrems v Facebook Ireland Ltd* [2018] OJ C 104/09 [hereinafter *Schrems/Facebook*, 2018]. Mr Schrems has been described as an activist, using litigation as one means of bringing his concerns about data protection to public attention. See Case C-498/16 *Schrems v Facebook Ireland Ltd* [2018] OJ 2018/C 104/09, Opinion of AG Bobek, paras 9–17 [hereinafter *Schrems/Facebook*, 2017 Opinion of AG Bobek]. See also Case C-362/14 *Schrems v Data Protection Commissioner* [2015] OJ C 398/06.

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Under EU law, special jurisdictional provisions entitle consumers to file in their own domicile rather than go to the defendant's domicile.[204] Facebook challenged Schrems' reliance on that rule because he had two Facebook accounts, one for personal interactions and another for his professional work as a critic of Facebook and a lecturer on access to legal rights.[205] The consequence, according to Facebook, was that Schrems was not eligible to bring an action as a 'consumer' and hence would have been required to file in Ireland.[206] The CJEU held that the test of a consumer was 'objective,' albeit not static, and that being in a trade or profession for some activities did not necessarily deprive an individual of being a consumer in another.[207]

The second question before the CJEU was whether, when litigating in Austria, other users who had assigned their claims to Schrems could be included in that action. The CJEU concluded that the protocol enabling filing in a consumer's domicile was focused on the 'economically weaker' party rather than designed to enable collective actions.[208] The result was that Schrems could not continue on behalf of the seven assigned claims ref-

204 At issue were interpretations of Articles 15 and 16 of the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [2001] OJ L 12/01, which enabled a 'weaker party' to be protected by special rules. *Schrems/Facebook*, 2018 (n 203) paras 1–6.

205 Schrems has been described by others as a 'privacy activist,' and his non-profit organization uses 'targeted and strategic litigation' to enforce EU privacy protections. See Tobias Lutzi, 'Fifty Shades of (Facebook) Blue – ECJ Renders Decision on Consumer Jurisdiction and Assigned Claims in Case C-498/16 Schrems v Facebook' (*Conflict of Laws.net*, 26 January 2018) <http://conflictoflaws.net/2018/fifty-shades-of-facebook-blue-ecj-renders-decision-on-consumer-jurisdiction-and-assigned-claims-in-case-c-49816-schrems-v-facebook/> accessed 26 August 2018. Some 25,000 people had registered on the web to join him, and 50,000 were on a waiting list. *Schrems/Facebook*, 2017 Opinion of AG Bobek (n 203) 16.

206 Ibid paras 19–24. The Supreme Court of Austria had sent the reference to the CJEU to understand the meaning of the term 'consumer' under EU law and the impact of assigned claims.

207 Ibid paras 40–41.

208 Ibid paras 42–49; see also *Schrems/Facebook*, 2017 Opinion of AG Bobek (n 203) paras 119–123.

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erenced in the decision[209] or the tens of thousands of consumers reported to have assigned claims to him.[210]

The *Schrems* decision is but one example of the law being developed in Europe on the forms and functions of collective action. Worried about that focus, the US Chamber of Commerce published a monograph in 2017 about the 'growth of collective redress in the EU'[211] that, the Chamber argued, was part of a trend of 'making it easier to sue.'[212] The Chamber sought to bring attention to what it called 'early warning signals' of problems that Europe will face if 'US class action firms' were permitted to import US-style class actions. The Chamber warned against third-party financing, which it described as an 'explosive growth of a new and unregulated litigation funding industry' that would exploit 'loopholes' and result in inappropriately-filed lawsuits.[213]

In January of 2018, the EU Commission issued a report on the implementation of its 2013 recommendations for collective redress, and the EU Parliament has called for additional reports from experts.[214] The Chamber,

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209 As the Chamber explained, 'an assignment of claims such as that at issue in the main proceedings cannot provide the basis for a new specific forum for a consumer to whom those claims have been assigned' under Article 16(1) of the Regulation no 44/2001. *Schrems/Facebook*, 2018 (n 203) paras 48, 49.

210 *Schrems/Facebook*, 2018 (n 203) paras 46–69. This case related to the Austrian collective action mechanism; a related case coming via Ireland filed by Schrems is pending before the CJEU. See David Meyer, 'Facebook Just Lost a Privacy Court Fight to Its EU Arch-Enemy' (*Fortune*, 25 January 2018) <http://fortune.com/2018/01/25/facebook-max-schrems-privacy-cjeu/> accessed 26 August 2018. The issue of assignment entailed questions of using Article 16(a) Brussels I for consumers in the same domicile, in another Member State, or in a non-member state.

211 See *Growth of Collective Redress* (n 202) 1, 2; and calls for 'safeguards,' see US Chamber Institute for Legal Reform, *Supporting Safeguards: EU Consumer Attitudes Towards Collective Actions and Litigation Funding* (September 2017) 1 <http://www.instituteforlegalreform.com/uploads/sites/1/EU_Paper_Web.pdf> accessed 26 August 2018. The monograph spoke about a 'perceived "access to justice deficit"': *Growth of Collective Redress* (n 202) 2.

212 Ibid 19.

213 'Experience with collective redress, including the notorious US class action system, demonstrates that mechanisms for the aggregation of lawsuits are prone to abuse, including the filing of weak or meritless claims.' Ibid 6.

214 See The Council and the European Economic and Social Committee, 'Report from the Commission to the European Parliament,' Brussels, 25 January 2018, Com (2018) 40 final <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0044&rid=9> accessed 26 August 2018.

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a successful repeat player in the United States, aims to replicate its impact in Europe as the EU considers the parameters of collective actions.

6. #MeToo, Aggregation, and the Pulls and Pushes of Publicity

Return then to my overarching themes: the political economy of procedural and substantive rules of law, the roles played by repeat players, litigant asymmetries, the centuries-old calls for reforms of court processes, and the functions of publicity and privatization. Two points need to be clarified in conclusion. First, what procedures repeat players take to be in their interest is not fixed. Second, democratic commitments to participation in the social order that prescribes rules of conduct demand forms of openness for any process that has the power to impose legally-binding judgments.

Many contemporary repeat players have pushed for private and individualized procedures. But in earlier eras, similarly situated repeat players saw collective public actions as in their interests. The dynamics that can drive change can be seen from the history of collective action and privatization in the United States.

As in cases like *Schrems*, one impetus for the creation of the US class rule in 1966 was to help consumers who, individually, did not have the 'effective strength.'[215] Another was to make enforceable injunction remedies for civil rights plaintiffs, calling for racial desegregation of schools.[216] But the 1966 Federal Class Action Rule was also built on innovations from decades earlier, when the banking industry was pressing for collective action.

In the 1940s, banks in New York lobbied its legislature to authorize them to pool assets in trust, so that smaller sums of money could be managed more economically and with a wider range of investment opportuni-

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215 Benjamin Kaplan, 'A Prefatory Note' (1969) 10 Boston College Industrial and Commercial Law Review 497, 497. I provide some of the history of the drafting of the 1966 revisions to Rule 23 in Judith Resnik, 'Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation' (2017) 92 New York University Law Review 1017, 1019–31 [hereinafter Judith Resnik, 'Reorienting the Process Due']; and Judith Resnik, '"Vital" State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts' (2017) 165 University of Pennsylvania Law Review 1765, 1788–95 [hereinafter Judith Resnik, '"Vital" State Interests'].

216 Judith Resnik, '"Vital" State Interests' (n 215) 1790–91. See also David Marcus, 'The History of the Modern Class Acton, Part II: Litigation and Legitimacy, 1981–1994' (2018) 86 Fordham Law Review 1785.

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ties. Yet the banks worried that by merging funds, thousands of beneficiaries could potentially file claims objecting to investment decisions. To avoid that problem, the banks succeeded in obtaining a statute creating a special procedure, called a 'settlement of accounts.' Banks were authorized by the state to file a kind of declaratory action against all the beneficiaries. Upon that filing, a court would appoint a guardian *ad litem* (a kind of class representative) to protect the beneficiaries. Once the banks received a judgment that the investments had been prudent, that decision would be *res judicata* and preclude subsequent claimants.

The legal questions produced by that statute were whether New York State could create a representative structure and could exercise jurisdiction to bind beneficiaries all over the United States. In *Mullane v Central Hanover Bank*, decided in 1950, the US Supreme Court held that given the 'vital interest of the State' in this form of collective investment opportunity, New York State could constitutionally craft a new procedure to reach those beneficiaries.[217] A law review essay at the time described the ruling as 'jurisdiction by necessity.'[218] *Mullane* changed US law on territorial jurisdiction by relying on the presence of the trust in New York to permit the state to reach outside its boundaries so as to bind absentees who had not affirmatively agreed to participate.

While upholding the NY collective action procedure, the Court also found that the statutory system for providing notice to absentees was wanting. New York had required that information about this procedure be provided in the initial investment documents and through newspaper publication.[219] The Court held that the bank had the obligation to send the best notice 'practicable under the circumstances'; given that it had the names and addresses of living beneficiaries, mailed individual notice was required.[220]

In short, in its 1950 *Mullane* decision, the Supreme Court redefined the 'process due' in terms of state court jurisdiction over individuals who neither resided in nor affirmatively consented to participate in a group pro-

217 *Mullane v Central Hanover Bank & Trust Co* 339 US 306, 313 (1950).

218 George B Fraser, Jr, 'Jurisdiction by Necessity - An Analysis of the *Mullane* Case' (1951) 100 University of Pennsylvania Law Review 305.

219 *Mullane* 339 US at 309–310. The relationship of notice to representation is complex. See Robert G Bone, 'The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions' (2011) 79 George Washington Law Review 577; Jay Tidmarsh, 'Rethinking Adequacy of Representation' (2009) 87 Texas Law Review 1137.

220 *Mullane* 339 US at 319.

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ceeding.[221] When shaping the 1966 federal class action rule, its drafters used that model but expanded on it. The federal class action rule did not oblige courts to inform individuals at the outset of the pendency of cases seeking injunctive relief but were to reach individuals through notice if a class was certified for monetary damages.[222]

Critics of today's class actions in the United States complain that millions of notices are mailed, while few people reply. But the value of those notices has to be understood in the term that Jeremy Bentham provided – publicity. But those individuals rarely respond to required notices. Yet these notice requirements put the fact of claiming into the mailboxes of millions and onto the public screen.[223] Mandating notice forces knowledge about aggregate claims into the public sphere and produces the debates ongoing today about class actions' fairness and utilities.

The development of class actions undermines another dichotomy, which put disputants in one category and the public in another. Collective actions blur those lines, as the absentees are deemed to be parties (and bound, under US law) but they are also in some ways observers. No one expects participation from the hundreds or the thousands affected by the judgments.

Just as collective actions are a form of publicity, banning class actions is one way to privatize process and to cut off claims. Thus, the efforts to limit collectivity are part of the larger project making enforcement of legal obligations less likely. But collective actions are not only in service of individuals who would not otherwise make their way to court. Courts need the resources that come with group-based litigants. And courts need to have all sectors of the social order use them in order to protect their own legitimacy in democratic politics.

Figure 13 brings me to my closing point, about the need to build the public into the dispute resolution system. The pictogram below comes from the same volume on ODR that has the eight frames shown in Figure 9.[224]

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221 See Judith Resnik, 'Reorienting the Process Due' (n 215) 1037–39.

222 For details of history and of distinctions drawn, see Judith Resnik, '"Vital" State Interests' (n 215) 1788–95.

223 My discussion assumes that aggregation is taking place under the supervision of a court, and hence has a layer of regulation which non-court aggregates lack. See Linda Mullenix, 'Reflections from a Recovering Aggregationist' (2015) 15 Nevada Law Review 1455.

224 HiiL, 'ODR and the Courts' (n 120) 11.

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Figure 13

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

The judge is shown weighing the law symbolized through the books against the claims of disputants who are shown as two people. Missing in this triangle are all of us – whether part of aggregates in collective actions or in the audience. Unlike the courtroom shown in figure 8, the federal courthouse in Boston, no benches are lined up for another set of participants – the public – to view the disagreements about what law means, how it applied, and whether it should change. No stick figures represent a dialogue among disputants, decision-makers, and the many public(s) sitting both to be educated and to educate those authorized to impose judgment.

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These pictures of the new court-based ODR do not reflect a need to demonstrate the propriety of the exercise of authority entailed. In contrast, Google's reports on 'transparency' acknowledge a need to explain itself, but as of now, it controls all the information on what it decides to report.

My goal is not to impose an unfettered public on ODR and on the replacements for courts but to transpose the norms of public engagement in courts to their replacement/alternatives. Openness under these conditions requires the many publics to behave respectfully whenever present, be the procedures styled ADR, ODR, or something else. Google's 'Transparency Report' aims to account for its decisions, but until it is obliged – rather than choosing – to provide information and until underlying materials are made available in some form, Google's private authority remains unbounded. The challenge is to craft rules to recognize the risks and harms of dissemination of private information on the web while also recognizing the risks and the harms of outsourcing the authority to decide on how to do so.[225]

Moreover, rules need to permit collective actions not only in courts that are live but also online and, if mandates to arbitration remain in force, in that forum as well. Doing so is not fanciful, as class action arbitrations in the United States have taken place with rules that the AAA modeled on the federal class action provisions. Binding absentees is an evident concern,[226] and one response has been to craft a 'hybrid,' in which judges certify classes and arbitrators rule on other claims.[227]

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225 See David S. Ardia, 'Privacy and Court Records: Online Access and the Loss of Practical Obscurity' [2017] University of Illinois Law Review 1385, 1387; Karen Eltis (n 80); Nancy S. Marder, 'From "Practical Obscurity" to Web Disclosure: A New Understanding of Public Information' (2009) 59 Syracuse Law Review 441; see also British Columbia CRT, *Access to Records* (n 164) 1–5, 12–17.

226 Whether absentees can be bound is a question that, as of this writing, is before a federal appellate court. See *Jock v Sterling Jewelers, Inc* 2018 WL 418571 (SDNY 15 January 2018); appeal pending, No 18-153 (18 January 2018). The lower court judge had held that an arbitrator had no power to bind absentees unless they opted into the proceedings.

227 See also Lindsay R. Androski, 'A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses' (2003) University of Chicago Legal Forum 631, 632–33; Carole J. Buckner, 'Due Process in Class Arbitration' (2006) 58 Florida Law Review 185, 191; Joshua S. Lipshutz,'The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits' (2005) 57 Stanford Law Review 1677, 1692. Using aggregation in settlements more generally raises yet other issues. See Robert Bone, 'Replacing Class Actions with Private ADR: A Comment on "Settlement, ADR, and Class Action Superiority"' (2012) 5 Journal of

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Generating more methods to create group-based litigation to provide resources for litigants and to seek public processes requires political will. The question is whether repeat players do or will understand the utility of a system that includes both public access and collective action. Above, I pulled together a range of rules pressed by repeat players aiming to privatize process.

Yet pressures for some form of interaction with the many vectors of the public also must be part of an analysis of the contemporary situation. As I have discussed, Google understands itself as needing to explain something – to be 'transparent' – about its delisting decisions. Likewise, UNCITRAL rules for investment arbitration have embraced 'transparency' as the way to shore up its authority.[228] These self-imposed disclosure obligations could be founded in a political commitment to enable oversight, from concerns to ward off regulation, or to gain a market share as competition emerges – such as the potential to create a Multilateral Court for Investment Disputes[229] and the prospect that the CJEU could have authority over arbitral fora when member states are parties.[230]

Rejection of privatization is vivid in the context of the popular mobilization of '#MeToo.' The outpouring of stories about predatory behavior shows that secrecy has its costs, both for third parties who might have

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Tort Law 127; Andrew Bradt and Theodore Rave, 'The Information-Forcing Role of the Judge in MDL' (2017) 105 California Law Review 1259.

228 Information is also emerging through online reporters and databases (ORDs) that create windows into investor-State dispute settlements and can be understood through different lenses in terms of their impact and utility. See Pietro Ortolani, 'Online Reporters and Databases: Four Narratives of their Role in Investor-State Disputes' in Freya Baetens (ed), *Unseen Actors in International Adjudication* (CUP, forthcoming).

229 See 'Recommendation for a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes', Commission Decision No COM/2017/0493 (Renault), 1988 OJ L 220/30 (3 September 2017). See also Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas da Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira* [2014] ECR I-1754; Case C-555/13 *Merck Canada Inc v Accord Healthcare Ltd, Alter SA, Labochem Ltd, Synthon BV, Ranbaxy Portugal* [2014] ECR I-92.

230 The claim is that because states permit such proceedings, those arbitrators become courts of a Member State from which references can be taken. Judgment of 12 June 2014 in Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas da Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira* [2014] ECR I-1754; Order of 13 February 2014 in Case C-555/13 *Merck Canada Inc v Accord Healthcare Ltd, Alter SA, Labochem Ltd, Synthon BV, Ranbaxy Portugal* [2014] ECR I-92.

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avoided being put in harm's way and for those directly involved. The suppression of the results of investigations into misbehavior has resulted in a reiterated *cri de coeur* for accountability.

These pressures have had an impact. In the fall of 2017, members of the US Congress proposed to protect court-based remedies for sexual harassment claims filed by employees by exempting them from being routed exclusively to closed arbitration.[231] Arbitration providers are likewise concerned about their market share and reputation. They have new incentives to distinguish arbitration from 'closed' proceedings per se, and some are reconsidering how to treat sexual harassment claims. Those worries were given new grounding when Microsoft announced it would discontinue arbitration requirements for sexual harassment claims. The public sector weighed in soon thereafter, in an unusual letter sent to the congressional leadership in February of 2018 by all fifty state Attorneys General. They 'strongly support[ed] appropriately-tailored legislation to ensure that sexual harassment victims have a right to their day in court.'[232]

The appeal of a day in court ought to be seen for those accused as well as for those accusing individuals of misbehavior. #MeToo exemplifies the ways in which the dissemination of information without the constraints of legal process makes it hard to sort among different kinds of harms, to probe the accuracy of information, and to calibrate sanctions.[233] This rebellion against secrecy should therefore serve as a reminder of what court-based, public processes can offer: deliberate decision-making that insists on due process norms of even-handedness and that requires analysis of liability and remedies appropriate to the misconduct, when established.

The need for regulated disclosure and mechanisms to constrain dissemination of information have to be put into the context of the risk of the exercise of power without any sense of a need to account for that authority.

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231 Parallel bills were introduced in December of 2017 in the US House of Representatives and in the Senate. See Ending Forced Arbitration of Sexual Harassment Claims [6 December 2017] HR 4570; S 2203, 115th Cong.

232 Letter from Pamela Jo Bondi, joined by all the other Attorney Generals to the Congressional Leadership, regarding 'Mandatory Arbitration of Sexual Harassment Disputes' (National Association of Attorneys General, 12 February 2018) <https://www.mass.gov/files/documents/2018/02/12/NAAG%20letter%20to%20Congress%20Sexual%20Harassment%20Mandatory%20Arbitration.pdf> accessed 12 February 2018.

233 These are issues for courts and for administrative decision-making in colleges and universities as well. See Alexandra Brodsky, 'A Rising Tide: Learning About Fair Disciplinary Process from Title IX' (2017) 66 Journal of Legal Education 822.

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Not only does the act of rendering judgments require knowledge, but assessing the justice of those judgments requires that third parties be able to understand particular cases, watch interactions, and know the systems in which individual judgments are made. Without some forms of public access, one cannot know whether fair treatment is accorded regardless of litigants' status, and that the remedies required are appropriate.

Without oversight, one cannot ensure that judges are independent of parties. Without independent judges acting in public and treating disputants in an equal and dignified manner, outcomes lose their claim to legitimacy. And without public accountings of how legal norms are being applied, one cannot consider the need for revisions of underlying rules, remedies, and procedures by which to decide claims of right. We lose the very capacity to debate what our forms and norms of fairness are. Whether we call it 'court,' or 'ADR,' or 'ODR,' without openness, we cannot decide whether the processes or resolutions are just.

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