

Reinventing Courts as Democratic Institutions

Judith Resnik

Abstract: Eighteenth-century constitutional commitments guaranteeing rights-to-remedies were shaped when members of the propertied classes were the prototypical litigants and governments' criminal justice systems were nascent. Twentieth-century egalitarian norms expanded the imagination of what justice could produce, and courts turned into sites of democracy. The particular and peculiar practices of adjudication produce, redistribute, and curb power among disputants who disagree in public about the import of legal rights. But new procedures – alternative dispute resolution (ADR) – encourage, and sometimes require, disputants to mediate or to arbitrate disputes privately as a predicate to or in lieu of using the public forum of courts. Some initiatives delegate adjudication to administrative tribunals, and others outsource binding decision-making to private providers. The resulting fragmentation and privatization of adjudication have profound implications for the newly minted democratic character of courts. The durability of courts as active and disciplined sites of public exchange ought not to be taken for granted. Like other venerable institutions of the eighteenth century – such as the postal service and the press, which served in parallel fashion to disseminate information and support democratic competency – courts are vulnerable.

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The idea that courts are a modern invention may seem counterintuitive. References to judges and to adjudication abound in classical and biblical sources, and the contemporary landscape is replete with courthouses, often marked by statues of the Renaissance Virtue Justice to differentiate their function from that of other government buildings. Courts seem so obviously central that the novelty of their contemporary incarnation, their social welfare implications, and the fragility of the aspirations that they have come to represent can easily be lost.

Adjudication in democratic polities is remarkably different than the traditions from which it emerged. In ancient times, judges were loyal servants of the state; audience members were passive spectators watching rituals of power; and only certain persons were eligible to participate as disputants, witnesses, and decision-makers. In contrast, today's judges are independent actors in complex and critical relation-

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doi:10.1162/DAED_a_00284

ships with the government and the public, and women and men of all colors are eligible to fill all the seats in the courtroom, including on the bench. Social and political movements of the last three centuries brought about these changes, transforming adjudication into a democratic practice to which all persons have access.

The choice of the adjective *democratic* requires explanation. In discussions of courts, the term democracy is often used to reference the jury, which enables citizens to serve as judges, or to argue that judicial review of legislation is undemocratic because it can override majoritarian political processes.¹ My focus is neither on juries nor on voting. Rather, my argument is that courts have themselves become sites of democracy because the particular and peculiar practices of adjudication produce, redistribute, and curb power among disputants who disagree in public about the import of legal rights.²

The quotidian activities of ordinary litigation oblige disputants to treat each other as equals and to provide one another with information. After listening to public exchanges (structured to enable parity between disputants) and upon evaluating the interactions of fact and norm, juries render verdicts or judges provide justifications for their decisions. The mandate of courts to operate in public endows their audience with the capacity to and the authority of critique. The redundancy produced when different litigants raise or defend similar claims can prompt debate about the underlying legal rules. Thus, the processes of adjudication develop and revise governing norms through popular participation in egalitarian practices that constrain public and private power.³

As with other democratic exchanges, the outcomes in courts are highly variable. Litigation has contributed to the recognition of new rights, such as prohibitions on household (“domestic”) violence and af-

firmation of same-sex marriages. But court decisions are also used to argue for cut-backs. Damages verdicts by juries, perceived to be unduly high, have prompted some legislatures to enact monetary caps on civil remedies, and vivid trials for terrible crimes have helped to produce more retributive sentencing laws, imposing long prison terms on convicted defendants.

In addition to serving the political functions of redistributing power and contributing to debates about norm development, courts ought to be categorized as the constitutionally mandated services that they are. Discussions of the federal constitution typically focus on its instructions protecting the citizenry *from* government (such as prohibitions on “abridging the freedom of speech” and on “unreasonable searches and seizures”⁴) rather than on textual commitments *obliging* the government to ensure security and safety. The general view is that “negative” rather than “positive” liberties abound.

Yet the structures of government – courts included – are themselves a species of positive rights, imposing affirmative obligations that governments provide services.⁵ Dozens of state and federal provisions (both constitutional and statutory) require governments to create courts and specify methods for selecting judges, the number required for decisions, their tenure in office (and other mechanisms for protecting judicial independence), and the parameters of jurisdiction. In addition, constitutions provide details about the procedural rights of criminal defendants and civil litigants, and build in roles for jurors, witnesses, the public, and, more recently, victims. Courts are thus a constitutionally obliged, substantive entitlement – a regulated government service that is, at a formal level, universal in its availability.

Below, I sketch the rise of adjudication in the United States and the implications of

egalitarian access for the law and practices of courts. I then turn to the contemporary challenges facing courts. As legislatures expanded the ranks of rights holders and the reach of criminal law, the numbers of persons in courts swelled. Governments responded by creating more judgeships, more courthouses, and more prisons. Further, the egalitarian social movements of the twentieth century not only produced universal rights *to* courts but also generated new rights *in* courts. In response to the large numbers of indigent litigants, drawn in either as criminal defendants or seeking to file civil cases, judges interpreted constitutions as requiring additional, targeted services, such as waiving filing fees or providing free lawyers for certain subsets of disputants.

In addition to expanding the capacities of courts and their users, other reforms aim to alter how courts do their work. Judges have, in recent years, adopted a managerial stance, pressing lawyers and litigants to focus on settlement in both civil and criminal cases.⁶ Courts and legislatures have also crafted new procedures – alternative dispute resolution (ADR) – to encourage, and sometimes require, that disputants mediate or arbitrate disputes as a predicate to or in lieu of using the public forum of courts. Some of these initiatives entail delegation of adjudication to administrative tribunals, and others outsource binding decision-making to private providers.

The resulting fragmentation and privatization of adjudication have profound implications for the newly minted democratic character of courts, which is now at risk. Courts are monumental in ambition and often in physical girth. But their durability as active and disciplined sites of public exchange, accessible to ordinary litigants, ought not be taken for granted. Like other venerable institutions of the eighteenth century – such as the postal service and the press, which served in parallel fashion to

disseminate information and support democratic competency – courts are vulnerable.⁷

Thus, this discussion of courts reflects the context in which they operate. Courts' current obligations to provide services and subsidies are examples of the success of a range of egalitarian regulatory policies, just as the cutbacks are part of a broader deregulation agenda that prefers private ordering to public oversight. If courts are to endure as democratic sites of norm contestation, the public and private sectors will have to renew political commitments to the facets of adjudication that render it an egalitarian opportunity for redistributing and constraining power.

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

– The 1776 Delaware Declaration of Rights⁸

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.

– Alabama Constitution of 1819, art. I, sec. 14⁹

English practices – including the echoes of the Magna Carta heard in the excerpts above from state constitutions – provide the backdrop for the American development of rights-to-remedies and open courts.

The 1676 Charter of the English Colony of West New Jersey required that “in all publick courts of justice for trials of causes, civil or criminal, any person or persons . . .

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may freely come and attend.”¹⁰ Jury trials were the procedural structure that undergirded openness, as local citizens sat in judgment of their neighbors.

One of the major political theorists of obligatory public processes was Jeremy Bentham; he argued that a host of institutions ought to operate under the principle of “publicity,” so that the “Tribunal of Public Opinion” could assess the results.¹¹ Through publicity (“the very soul of justice”¹²), judges, while presiding at trial, would themselves be “on trial.”¹³

The idea of public oversight of judges – coupled with legal protections for judicial independence – was a departure from Renaissance conceptions of judges, who were beholden to the monarchs who appointed them. The public’s new authority to judge judges (and, inferentially, the government) helped to turn “rites” into “rights.” The more that spectators were active participants (“auditors,” to borrow again from Bentham¹⁴), the more courts could serve as a venue for the dissemination of information.

Twentieth-century theorists of the “public sphere” focus on civic institutions that facilitate the exchange of views about governance.¹⁵ Their definitions ought to expand to embrace courts, which, while government-supplied, are venues in which private and public disputants set forth arguments in spaces open to the public, thereby providing opportunities for the formation of popular opinions about law’s impact.

As the constitutional excerpts quoted above illustrate, new states in North America constitutionalized “publicity” with mandates such as “all courts shall be open,”¹⁶ often linked to guarantees of rights-to-remedies for harms to property and person. Yet a reminder is in order, forecast by the excerpt from Alabama’s 1819 Constitution: courts were not then venues in which all persons were equal. Indeed,

courts were institutions centered on the protection of property and status-conventional relationships, as was made painfully clear by the U.S. Supreme Court’s 1857 *Dred Scott* decision, which held that Harriet and Dred Scott could not seek redress in courts because they lacked legal personhood and juridical capacity.¹⁷

The idea that courts are both *sources* of the recognition that all persons are equal rights holders and *resources* for the array of humanity is an artifact of the first and second Reconstructions. Not until well into the twentieth century did U.S. law and practice fully embrace the propositions that race, gender, and class ought not preclude access to courts. Only in recent decades have women and men of all colors been able to serve as jurors and judges, and all participants come to be understood as entitled to equal dignity and respect.¹⁸ While my focus is on the United States, these premises have a transnational sweep, as illustrated by the 1966 United Nations Covenant on Civil and Political Rights, declaring that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”¹⁹

Not only did all persons gain entitlements to courts, but the import of phrases such as rights-to-remedies for “every injury to person, property, or character” changed. Forms of harm gained new recognition as legally cognizable injuries: examples include rights to be free from discrimination; rights for consumers, employees, and members of households; protection for the environment, for criminal defendants, and (if “every person” is to retain its robust meaning) for detainees at Guantánamo Bay.

It was the interaction between the constitutional obligations of earlier eras and developing commitments to equality that turned courts into universal entitlements and, on occasion, pressed them to be de-

liberately redistributive as well. Once the government obliged itself to show “equal concern for the fate of every person over which it claims dominion” (to borrow Ronald Dworkin’s description of equality’s entailments),²⁰ courts had new tasks. The promises of access and remedies become illusory when courts charge entry fees that systematically exclude sets of claimants, and when the resources of disputants are profoundly asymmetrical.

But what forms of access ought to be subsidized, which asymmetries should be addressed, and what costs imposed on users? These questions about a lack of resources – both individual and institutional – to pursue and to entertain claims are not new. In 1793, Jeremy Bentham inveighed against court fees, which he described as a “tax upon distress.”²¹ Bentham’s proposed solutions included an “Equal Justice Fund” supported by “the fines imposed on wrongdoers,” by government, and by charities.²² Bentham suggested subsidies not only for the “costs of legal assistance but also the costs of transporting witnesses” and the production of evidence.²³ Moreover, to lower expenses, Bentham suggested that a judge be available “every hour on every day of the year,” and that courts be put on a “budget” to produce one-day trials and immediate decisions.²⁴

In the United States, the challenges of impoverished litigants came to the fore as the ranks of rights-holders swelled during the twentieth century. Legislatures, creating new civil causes of action and criminal sanctions, were major sources of the upsurge. Both state and federal legislatures enacted various measures to deal with the volume, such as channeling certain claimants to small-claims courts, to workers’ compensation regimes, and to administrative agencies, so as to provide simplified processes and charge low or no filing fees. Other legislative initiatives included the creation in 1974 of the federally funded

Legal Services Corporation, which offered free lawyers to low-income civil litigants, and the enactment in 1976 of the Civil Rights Attorney’s Fees Awards Act, which required losing defendants in certain cases to pay winning plaintiffs’ lawyers’ fees.²⁵

In addition to these statutory responses, courts identified constitutional obligations for subsidies. Indigent litigants invoked the Sixth Amendment right to counsel, the First Amendment’s protection of the right to petition government for redress, and the Due Process and Equal Protection Clauses, as they argued that the U.S. Constitution mandated that the government equip them to function in court. In a series of decisions, the U.S. Supreme Court responded by requiring fee waivers, subsidized lawyers, or forensic experts for specified populations – identified by a mix of means-testing, the subject matter in dispute, the stakes, and resource asymmetries between parties.

For example, states must provide free lawyers to poor criminal defendants facing incarceration.²⁶ Courts have also required that states waive fees for filing or transcripts on appeal if indigent litigants are at risk of losing their status as parents.²⁷ In addition, courts shaped procedures such as class actions to ease litigants’ expenses by authorizing aggregation of claims, thereby creating economies of scale for lawyers to pursue remedies on behalf of large numbers of people in one case.

The interest in easing access does not stem from concerns about equal treatment alone. Politics – ancient and modern, autocratic and democratic – rely on courts to maintain peace and security and to sustain commercial stability. Because enforcement of court orders rests largely on voluntary compliance, courts need the public to accept the rulings as legitimate. The coherence of adjudication comes under strain when litigants are patently unable to participate.

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The law recognizes this dependency in various ways. For example, criminal prosecutions cannot proceed unless defendants are able to understand the charges levied against them and assist in their own defense.²⁸ Similarly, governments want civil litigants to be able to use their courts. As Justice John Marshall Harlan explained in 1971 when ruling that the Constitution required that a state waive filing fees for poor persons seeking divorce:

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitely settle their differences in an orderly, predictable manner.²⁹

The constitutional law mandating free lawyers and fee waivers has been hailed by some commentators as central to the functioning of courts in egalitarian constitutional democracies and criticized by others as an illicit judicial extrapolation of substantive due process rights.³⁰ Yet the parameters of such rights are narrow, as exemplified by the 2011 decision, *Turner v. Rogers*. The Supreme Court concluded that, while fair procedures were required, the Due Process Clause did not oblige a state to provide a lawyer to an indigent father facing twelve months of detention for civil contempt for the failure to pay child support to his child's mother. (The Court did not decide whether, had the civil contemnor's opponent been the state rather than a private party, government-funded counsel would have been required.³¹)

As *Turner* illustrates, constitutional and statutory interventions fall far short of the needs of the many poor people who are in court. California has tallied 4.3 million people in civil cases without the assistance of lawyers. New York has counted 2.3 million civil litigants without lawyers, in-

cluding almost all tenants in eviction cases and debtors in consumer credit cases, and 95 percent of parents in child support matters. The high volume of criminal dockets is reflected in other numbers. More than two million people are currently incarcerated in the United States, and another five million are under other forms of government supervision.³² The upsurge in criminal prosecutions in the last decades has imposed substantial burdens on states, many of which are unable to fund adequate legal services for defendants.³³ In light of their own financial challenges, states have imposed new fees, fines, and special assessments, which raise the specter of a resurgence of "debtors' prisons" populated by individuals held in contempt for failure to comply with payment orders.³⁴

Yet a chronicle of these many needs ought not to eclipse how much money has been invested in courts – reflecting the depth of commitments to the ideal of a "day in court." Even if underfunded, judiciaries have been remarkably successful in attracting impressive amounts of public funds and private investments. Quantification is difficult because courts have various streams of income and a diversity of services falls under their purview. Some states have central budgeting, others rely on county-level funds, and not all provide detailed reports on sums received in fines and fees. Further, the budgets of some judiciaries also include allocations for public defenders, probation officers, security officers, and other services.

Private sector investments are yet harder to tally. Litigants spend money to investigate facts, to do research, and to argue the law. Institutional litigants also invest in courts by bringing a series of cases or filing *amicus* briefs to shape specific doctrines and by supporting or trying to block individuals for judgeships (whether obtained through appointments or elections). The amounts spent on and by auxiliary industries – in-

cluding lawyers, administrators, notaries, forensic experts, probation, and information services – are also difficult to estimate.

With such caveats, the federal court system offers one way to see the scope and range of government support for the judiciary over the course of the last centuries. In the middle of the nineteenth century, fewer than forty federal trial judges sat in courtrooms around the entire United States. Then, no buildings owned by the federal government bore the name “courthouse” on the front door. Rather, federal courtrooms were tucked inside federal buildings called “custom houses,” or in spaces borrowed from states or private entities.

Beginning after the Civil War, the federal government authorized an ambitious building program to use new construction as a means of establishing a federal presence around the country. Congress funded new facilities that often combined post offices and courthouses. By 2010, more than 550 federal courthouses (so named) had

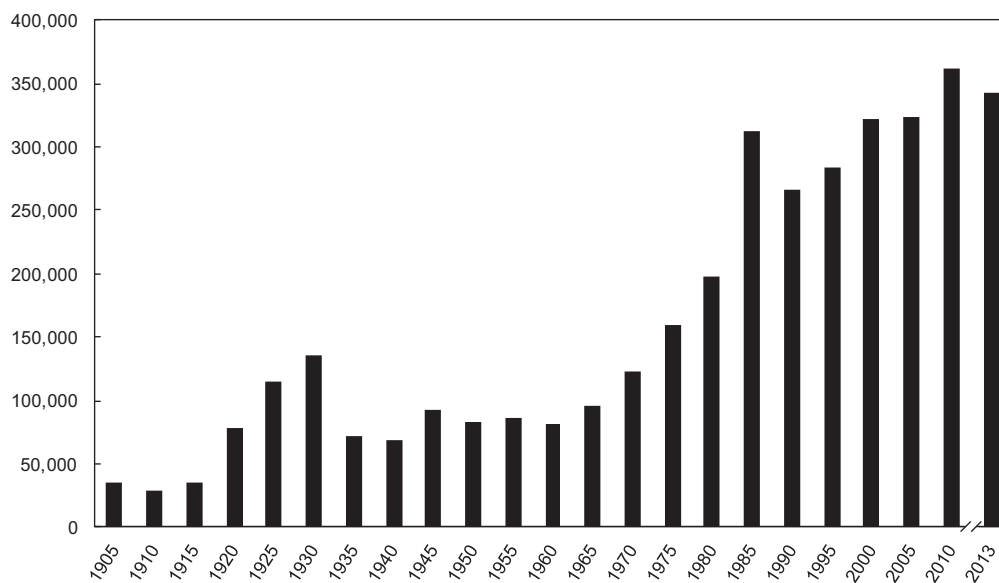
been built to provide chambers for 650 life-tenured trial judgeships and some 160 appellate judgeships, as well as for 700 statutorily created magistrate and bankruptcy judges and thousands of staff. Those judges had jurisdiction over a wide array of matters; between 1960 and 1990, Congress created more than 450 new causes of action.

The funds reflect success in attracting a wide range of users eager for services. In 1901, some 30,000 cases were brought before the federal courts; in 2001, ten times as many cases were filed.³⁵ At the twentieth century’s beginning, the majority of cases were criminal filings by the federal government; by the end of the twentieth century, civil cases dominated the docket. The federal courts now handle 350,000 to 400,000 civil and criminal filings annually, and a million-plus bankruptcy petitions. Figure 1 maps that expansion by charting the number of federal court filings over the past hundred years.

To support that expansion, the United States judiciary budget grew from \$145

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Figure 1
Numbers of All Civil and Criminal Cases Commenced in U.S. District Courts: 1905 – 2013³⁶



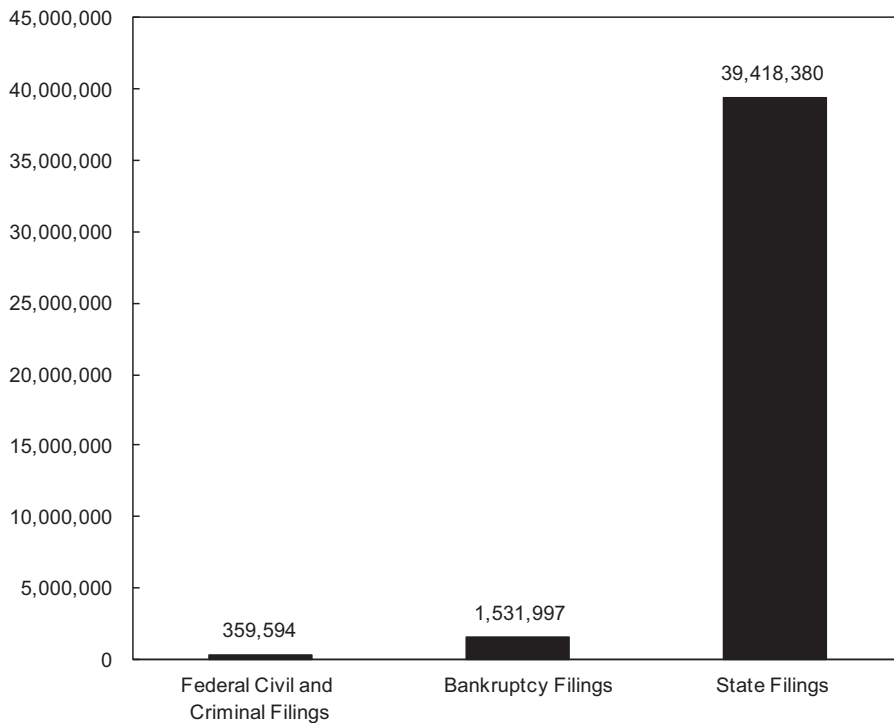
million (under one-tenth of 1 percent of the federal budget) in 1971 to \$5.7 billion (two-tenths of 1 percent) in 2005. During that interval, court staff doubled from about 15,000 to more than 30,000.³⁷ In light of recent cuts to government budgets, the federal judiciary has scaled back slightly, but it continues to garner funds close to earlier allocations – about \$6.6 billion in 2013, with requests for \$7.04 billion in 2014.

State courts provide vastly more services and do so with fewer resources (measured by judges' salaries, caseloads, and support staff) than the federal bench does. State legislatures allocate between 0.5 and 3 percent of their budgets to courts,³⁸ and most state judiciaries report serious shortfalls. The economic challenges stem from the volume; more than forty million civil and criminal cases (and another fifty million if one counts traffic, juvenile, and family

cases) are filed annually in state courts.³⁹ Figure 2 – a chart offering a comparison of filings in state and federal courts in 2010 – provides a snapshot.

Democracy has not only changed adjudication, it has challenged it profoundly. The responses by some, as exemplified in this volume by Judges Jonathan Lippman and Robert Katzmann, sitting respectively in the state and federal courts, are to find new ways to expand legal services so as to make good on promises of open and accessible courts.⁴⁰ Other initiatives aim not to supply lawyers but help self-represented litigants manage themselves, in part through new technologies⁴¹ and simplified procedures.⁴² Further, courts are expanding their repertoire through “problem solving courts” – such as “drug courts,” “re-entry courts,” “juvenile courts,” and “mental health courts” – as well as through

Figure 2
Comparing the Volume of Filings: State and Federal Courts, 2010⁴³



targeted programs, such as “business courts,” with specialized and experienced judges, aiming to appeal to commercial disputants.⁴⁴

Courts were, in short, a growth industry during the twentieth century, welcoming private and public enforcement of government regulations. But concern about volume, coupled with criticism of such regulatory efforts, has produced other initiatives, focused not on enhancing access to courts but on routing disputants *away from* courts and toward alternatives.

Three techniques – all of which are privatizing process and becoming legally entrenched through legislation, court rules, and judicial doctrines – mark this new landscape. The first technique is the reconfiguration of procedures in courts to change the role of the judge from public adjudicator to private manager. Revised federal rules encourage judges to try to convince lawyers and litigants to settle, rather than to litigate, cases that have been filed. The developments in the United States have parallels elsewhere, as “multitasking judges” have become the byword in many jurisdictions.⁴⁵ England was once the model for capacious legal aid and for a variety of administrative or tribunal adjudications enabling multiple “paths to justice.”⁴⁶ But in the 1990s, England and Wales promulgated revamped litigation “protocols” aiming to promote settlements.⁴⁷ In 2010, the English government mounted a campaign against what it termed “unnecessary” litigation and pushed to close courthouses, cut back legal aid, and reduce tribunals’ work.⁴⁸

A second mode of ADR is the devolution of adjudication from courts to administrative agencies. In 2008, four times more judges (often called hearing officers or administrative judges) sat in federal agencies than in federal courts. These administrative judges rendered tens of thousands of deci-

sions in disputes, such as claims brought by recipients of government benefits, veterans, employees, and immigrants.⁴⁹ Because agencies have modeled their decision-making processes after those of courts, this evolution has, in some respects, served to increase the domain of adjudication. Yet, unlike judges sitting in courts, administrative judges have less independence, because Congress and the executive branch may seek to affect their decision-making. Further, and again unlike court-based judges, administrative judges work at sites that are often inaccessible to outsiders; hence the public can neither provide a buffer against interference nor evaluate the processes and outcomes.

A third ADR method is outsourcing – sending disputants to the private sector. Illustrative of these obligations is Figure 3, my own cell phone “contract.” The fine print obliges me to waive rights to court and to class actions, whether in court or in arbitration. Claims may only be brought against the service provider individually, and exclusively through a private arbitration process designated by the provider (run, in this instance, by the American Arbitration Association).

Because it is a bad graphic, readers may well be frustrated by the poor visual quality of this document. Yet graphically, it makes the point perfectly. Reading it, thinking about its terms, and trying to negotiate it are a waste of time. The illegibility is economical because the provisions are “take it or leave it” boilerplate, avoided only by not buying that phone service. Calling this document a “contract” is thus a misnomer, for it is neither bargained for nor subject to bargaining.⁵⁰ In some polities, such a one-sided imposition of terms prohibiting claimants from using courts before any dispute arose would be unenforceable, as it once was in the United States.⁵¹

Indeed, in 2005, the California Supreme Court, like many other state judiciaries,

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Your Cellular Service Agreement

Please read carefully
 before filing in a safe place.

YOUR CELLULAR SERVICE AGREEMENT

This agreement for cellular service between you and [your] wireless [company] sets your and our legal rights concerning payments, credits, changes, starting and ending service, early termination fees, limitations of liability, settlement of disputes by neutral arbitration instead of jury trials and class actions, and other important topics. PLEASE READ THIS AGREEMENT AND YOUR PRICE PLAN. IF YOU DISAGREE WITH THEM, YOU DON'T HAVE TO ACCEPT THIS AGREEMENT.

IF YOU'RE A NEW CUSTOMER, THIS AGREEMENT STARTS WHEN YOU OPEN THE INSIDE PACKAGE OF ANY CELL PHONE YOU RECEIVED WITH THIS AGREEMENT. . . . IF YOU DON'T WANT TO ACCEPT AND BE BOUND BY THIS AGREEMENT, DON'T DO ANY OF THOSE THINGS. INSTEAD, RETURN ANY CELL PHONE YOU RECEIVED WITH THIS AGREEMENT (WITHOUT OPENING THE INSIDE PACKAGE) TO THE PLACE OF PURCHASE WITHIN 15 DAYS.

IF YOU'RE AN EXISTING CUSTOMER UNDER A PRIOR FORM OF AGREEMENT, YOUR ACCEPTING THIS AGREEMENT IS ONE OF THE CONDITIONS FOR OUR GRANTING YOU ANY OF THE FOLLOWING CHANGES IN SERVICE YOU MAY REQUEST: A NEW PRICE PLAN, A NEW PROMOTION, ADDITIONAL LINES IN SERVICE, OR ANY OTHER CHANGE WE MAY DESIGNATE WHEN YOU REQUEST IT (SUCH AS A WAIVER OF CHARGES YOU OWE). . . . YOU CAN GO BACK TO YOUR OLD SERVICE UNDER YOUR PRIOR AGREEMENT AND PRICE PLAN BY CONTACTING US ANY TIME BEFORE PAYING YOUR FIRST BILL. AFTER WE MAKE THE CHANGE YOU REQUESTED. OTHERWISE, IF YOU PAY YOUR BILL, YOU'RE CONFIRMING YOUR ACCEPTANCE OF THIS AGREEMENT. IF YOU DON'T WANT TO ACCEPT THIS AGREEMENT, THEN DON'T MAKE SUCH A CHANGE AND WE'LL CONTINUE TO HONOR YOUR OLD FORM OF AGREEMENT UNLESS OR UNTIL YOU MAKE SUCH A CHANGE. . . .

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.

concluded that class action waivers were “unconscionable” 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.’”⁵² But in 2011, in *AT&T v. Concepcion*, a bare majority of the United States Supreme Court displaced state law and held that a 1925 federal statute, authorizing enforcement of contract clauses requiring arbitration, was to be interpreted to apply to these materials. Therefore, federal law preempted state laws by requiring consumers to use the arbitration program selected by the cell-phone service and to proceed exclusively by way of single-file

(“bilateral”) arbitrations.⁵³ In the same year, in *Wal-Mart v. Dukes*, the Court imposed stringent requirements on class actions; for those individuals not otherwise precluded by arbitration mandates, the Court limited their ability to pool resources by litigating in the aggregate.⁵⁴ With the devolution of adjudication to agencies, the outsourcing to private providers, and the reconfiguration of court-based processes toward settlement in both civil and criminal cases, the occasions for public observation of and involvement in adjudication are diminishing. In the federal courts of the United States, trial rates have dropped over the last few decades and continue to do so. In 2001, trials began in

only two out of every hundred civil cases filed, and by 2012, that rate had declined to about 1.2 trials out of every hundred.

The parallel on the criminal side is the dominance of plea bargaining: in 2012, 97 percent of the indictments against criminal defendants in federal court ended with pleas.⁵⁵ This phenomenon is now encoded in the moniker of the “vanishing trial.”⁵⁶

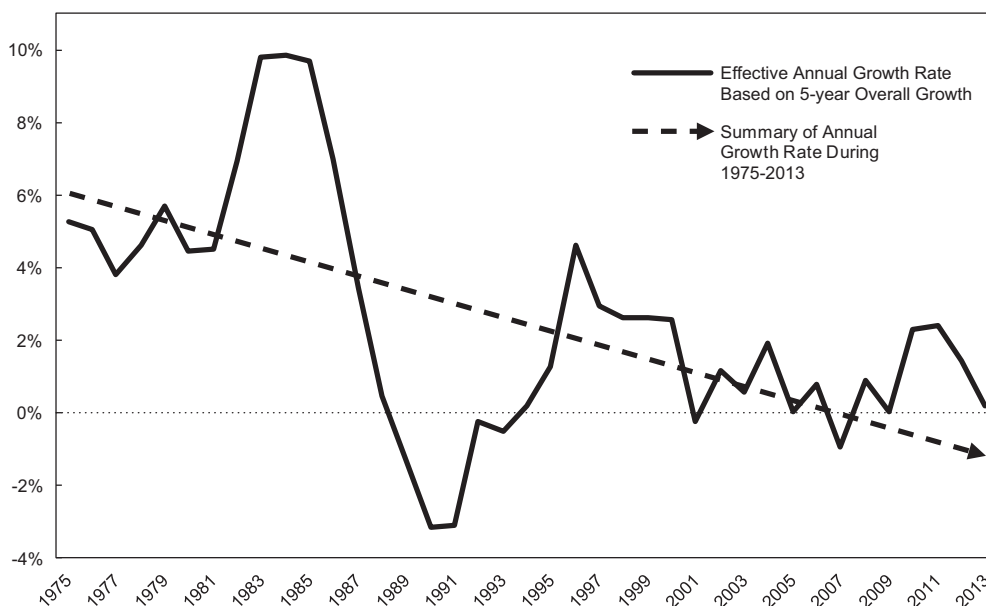
Modes of conclusion are not the only changes in recent decades. Filings in federal courts have also leveled off, as can be seen in Figure 4, which maps the rate of growth of federal filings from 1975 to 2013. Recall that Figure 1 charted the expansion of the federal judicial system in the twentieth century, as the rising numbers of civil filings supported requests for more funds and new judgeships. In contrast, demand for the services of the federal district court during more recent decades appears to be flattening. That shift makes it more difficult to argue that current funding levels for courts and their staff ought to be maintained or augmented.

The growth of ADR can be understood through different lenses.⁵⁷ One account is that it offers a second-best response to systemic overload; although courts are the preferable service, the level of demand requires alternatives, augmenting resources through providing more methods to resolve disputes. Another view is that party-based settlements have become more dominant because the trial-based court system has run its course as a mode of resolution; procedural innovations that require pre-trial information exchanges among parties, such as “discovery,” enable disputes to conclude without the need to bring witnesses before either judge or jury.⁵⁸

Yet another understanding of the rise of ADR is that it represents a profound critique of the contemporary litigation system. Court procedures, the costs of lawyers, and the volume of claims have resulted in a justice system seen by some to be overburdened, overreaching, and overly adversarial. Some critics seek a gentler, more user-friendly process, reliant on me-

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Figure 4
Growth Rate of Federal Court Filings: 1975 – 2013⁵⁹



Downloaded from http://direct.mit.edu/daed/article-pdf/143/3/9/1830453/daed_a_00284.pdf by guest on 28 March 2023

diation in search of compromises. Others complain that the risk of being sued chills productive economic exchanges and useful social interactions. Too-easy access, they charge, sparks unnecessary social conflict. Alternative forms of resolution, they assert, are more accurate, less expensive, and more generative. Energetic enthusiasts coming from different vantage points (and sometimes funded by repeat-player defendants) have successfully lobbied legislatures and argued to judges to mandate moving dispute resolution outside of courts.⁶⁰

One could read these developments as aspirations to manage conflicts through new ways of protecting rights and fashioning remedies. Alternatively, one can describe these reforms as political backlash. To borrow Marc Galanter's terms, "repeat players" found the glare of open courts and plaintiffs' successes to be disruptive to business practices and to governance policies; they successfully "played for the rules" by limiting the reach of courts and by constricting access to public adjudication.⁶¹ The success of such efforts can be measured in various ways, such as by analyses of Supreme Court decisions from 1970 to 2010 that demonstrate how many of the Court's rulings cut off opportunities for individuals to enforce rights.⁶²

The cell phone document reproduced in Figure 3 encodes what is fundamentally wrong with the form of the alternative that it imposes. By precluding class actions and making unavailable aggregation as a means of reducing access barriers for small-value claims, private providers have aborted *ex ante* (before any dispute arises) the possibility of using judicial and group-based mechanisms for redistributing resources. Further, the provider obliges consumers to use confidential dispute resolution services that limit the *ex post* effects of any claims that are pursued.⁶³ Other consumers may not know that they too have similarly been harmed. In addition to suppressing claims,

closure obliterates the chance for the public to learn about either the rights argued or what transpired.

Gone are Jeremy Bentham's "auditors" and the potential for his imagined Tribunal of Public Opinion to function, for no one can evaluate the exchanges between the decision-makers and the disputants. Lost are opportunities to assess whether procedures and decision-makers are fair; how resources affect outcomes; whether similarly situated litigants are treated comparably; and why one would want to get into (or avoid) court. Instead, a private transaction has been substituted and, unlike in public adjudication, control over the meaning of the claims made and the judgments rendered rests with the corporate provider of the service.

Those put at risk by these doctrinal and statutory developments are not only the claimants, who had hoped to use courts to argue about their rights, but also judges and courts themselves. The leadership of both federal and state courts are outspoken in their concerns that funding for court budgets and judicial salaries is inadequate.⁶⁴ As the Chief Justice of the United States reported at the end of 2013, federal court staffing was down to its lowest level since 1997, defense lawyers' funding had been reduced, and expansion of courthouse facilities had halted. Yet the ability to argue for more support is undercut when ADR is promoted to be better than what courts can provide.

Indeed, because courts now have competitors, litigants *with* resources may choose private providers whom they pay directly for their services. Concern about losing business can be seen in a statute enacted by the Delaware legislature, which, in 2009, aimed to maintain its "preeminence" in corporate dispute resolution by offering private access to Delaware's Chancery Court.⁶⁵ The legislature crafted a

new procedural option, available only if at least one disputant was registered as a corporation in the state, if none were consumers, and if the amount at stake was a million dollars or more. Disputants could then pay a \$12,000 filing fee and \$6,000 per day thereafter to purchase decision-making by the state's Chancery Court judges, sitting in their courthouses. These sums are larger than what ordinary litigants pay in the United States but, given that some private arbitrators charge higher daily fees, the Delaware system was, from some perspectives, a bargain.

What those sums also purchased was confidentiality, because the courthouse doors were closed to the public. Filings were not on the public docketing system and hearings were private. Yet the decisions rendered were enforceable as judgments and subject to review by the Delaware Supreme Court, which had not, as of 2013, provided rules about whether appeals would be confidential.

A group called the Delaware Coalition for Open Government, including civic and media entities, argued that Delaware's legislation violated the public's First Amendment right to observe court procedures. After a federal district judge agreed, Delaware's Chancery Court judges appealed and lost again; in 2013, a federal appellate court ruled, over a dissent, that "Delaware's government-sponsored arbitration" could not be held in a courthouse and yet be closed to the public.⁶⁶

Amid the high volume of filings, the demand for more services, and a spate of new architecturally important courthouses, the diminution of the aegis of adjudication and the incursions on courts' authority could be missed. But the turn toward alternatives puts new courthouses – built in cutting-edge contemporary designs and often garbed in glass to denote transparency – at risk of being anachronistic

or, as Delaware exemplifies, accessible only by a rarefied few. *Judith Resnik*

Michel Foucault famously described how nineteenth-century governing powers, eager to maintain control, moved punishment practices from public streets into closed prisons.⁶⁷ Today, much of adjudication is being removed from public view, rendering the exercise and consequences of public and private power harder to ascertain. This movement away from public adjudication is a problem for democracies because adjudication has important contributions to make to democracy. Now-classic explanations for adjudication's utilities come from Jeremy Bentham, who described courts as "schools" whose educative function was rooted in the disciplinary power imposed through the principle of publicity.⁶⁸

More recent theorists have identified other attributes of adjudication – that access to litigation gives individuals opportunities for participation and for efficacy,⁶⁹ and that procedural due process aims to ensure that government decision-making treats similarly situated claimants equally and recognizes their dignity.⁷⁰ Exploring what process is "due," the Supreme Court has focused on accuracy as well as on "fairness" to ensure that each side has an opportunity to be heard.⁷¹ Further, as Dennis Curtis and I have detailed, public exchanges among disputants, governments, and third parties make plain that norms develop through iterative applications – that rights are not fixed *ex ante*, but are shaped through such exchanges.⁷² Public courts demonstrate government commitments to forms of self-restraint and explanation, to the equality of all persons, and to transparent exercises of authority in the face of conflicting claims of right.

Eighteenth-century constitutional commitments guaranteeing rights-to-remedies were shaped when members of the prop-

ertied classes were the prototypical litigants and governments' criminal justice systems were nascent. Twentieth-century egalitarian norms expanded the imagination of what justice could produce. In many respects, courts and legislatures are only beginning to grapple with the challenges posed by the surge in criminal filings and by courts' own successes in attracting users. One way to read the many judicial and legislative decisions on court access and substantive rights is as a sprawling, many-decade debate, across and within jurisdictions, about what forms of subsidies to provide and how to allocate and ration services.

The last few decades have been dominated by voices – including many within the judiciary – declaring that public trials have outlived their usefulness and that the better course is to settle disputes. These claims are part of an intense conflict in the United States (and elsewhere) about regulation and privatization. As I have shown, courts are a form of government provision-

ing that can reallocate power and enable economically marginal individuals to gain rights. Courts have profound redistributive effects as arenas in which the state has tried to mitigate inequalities under the banner of due process, embroidered with equality commitments that “everyone” is a rights-holder.

Even if one is supportive of less government in other arenas, distinctive arguments remain for robust public funding for and regulation of courts. Governments need the infrastructure that courts provide; markets rely on the ability to enforce substantive entitlements; and democracies need the opportunities for public, multi-party interactions that adjudication entails. Courts are one way to link individuals, entities, groups, and government in a common quest for the much-contested content of justice. The diminution of opportunities to use open courts impoverishes the status of individuals and the effectiveness of government.

ENDNOTES

Author's Note: Thanks are due to Yale Law student research assistants Jason Bertoldi, Andrew Sternlight, Devon Porter, and Benjamin Woodring for their thoughtful and energetic help; and to Dennis Curtis, who joins me in continuing explorations of the role of courts.

- ¹ See, for example, John Hart Ely, *Democracy and Distrust* (Cambridge, Mass.: Harvard University Press, 1980).
- ² This analysis is developed in Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (New Haven, Conn.: Yale University Press, 2011). Examination of other venues providing political opportunities can be found in John R. Parkinson, *Democracy and Public Space: The Physical Sites of Democratic Performance* (Oxford; New York: Oxford University Press, 2012).
- ³ See Nancy Fraser, “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy,” in *Habermas and the Public Sphere*, ed. Craig Calhoun (Cambridge, Mass.: MIT Press, 1992), 109.
- ⁴ U.S. Constitution, First Amendment; and U.S. Constitution, Fourth Amendment.
- ⁵ A few scholars have noted that entitling individuals to a “taxpayer-salaried judge” and subsidizing access to courts constitutes “a highly visible gesture of inclusion.” See, for example, Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New

York: W. W. Norton, 1999), 45, 219; and David Sklansky, "Quasi-Affirmative Rights in Constitutional Criminal Procedure," *Virginia Law Review* 88 (6) (2002): 1229. Judith Resnik

- ⁶ See, for example Judith Resnik, "Procedure as Contract," *Notre Dame Law Review* 80 (2) (2004): 593; Judith Resnik, "Managerial Judges," *Harvard Law Review* 96 (1982): 374; William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge, Mass.: Belknap/Harvard University Press, 2011); and George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (Stanford, Calif.: Stanford University Press, 2004).
- ⁷ See generally Robert C. Post, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State* (New Haven, Conn.: Yale University Press, 2012).
- ⁸ Delaware Declaration of Rights, sec. 12 (1776). A parallel clause remains.
- ⁹ The current Alabama constitution, ratified in 1901, has an almost identical clause. See Alabama Constitution, sec. 13.
- ¹⁰ "Charter or Fundamental Laws of West New Jersey, Agreed Upon," chap. XXIII (1676), in *Sources of Our Liberties*, ed. Richard L. Perry (Chicago: American Bar Foundation, 1959), 188.
- ¹¹ See Jeremy Bentham, "Constitutional Code (1843)," in *The Works of Jeremy Bentham*, vol. 9, ed. John Bowring (Edinburgh, Scot.: William Tait, 1843), 41; Frederick Rosen, *Jeremy Bentham and Representative Democracy: A Study of the Constitutional Code* (Oxford: Clarendon Press, 1983), 26–27; and Anthony J. Draper, "'Corruptions in the Administration of Justice': Bentham's Critique of Civil Procedure, 1806–1811," *Journal of Bentham Studies* 7 (2004): 1.
- ¹² Jeremy Bentham, "Bentham's Draught For The Organization of Judicial Establishments, Compared with That of the National Assembly, with a Commentary on the Same," in *The Works of Jeremy Bentham*, vol. 4, ed. John Bowring (Edinburgh, Scot.: William Tait, 1843), 316.
- ¹³ See Jeremy Bentham, "Rationale of Judicial Evidence (1827)," in *The Works of Jeremy Bentham*, vol. 6, ed. John Bowring (Edinburgh, Scot.: William Tait, 1843), 355. And see generally Judith Resnik, "Bring Back Bentham: 'Open Courts,' 'Terror Trials,' and Public Sphere(s)," *Law & Ethics of Human Rights* 5 (2011): 2; and Frederick Schauer, "Transparency in Three Dimensions," *University of Illinois Law Review* 2011 (4) (2011): 1339.
- ¹⁴ *The Works of Jeremy Bentham*, vol. 6, 356.
- ¹⁵ See Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger (Cambridge, Mass.: MIT Press, 1991); and Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: Polity Press, 1996), 97–98.
- ¹⁶ See, for example, Connecticut Constitution, art. I, sec. 12 (1818).
- ¹⁷ *Scott v. Sandford*, 60 U.S. 393, 407 (1857); see also Lea VanderVelde, *Mrs. Dred Scott* (Oxford; New York: Oxford University Press, 2009), 232–319.
- ¹⁸ See generally Judith Resnik, "Asking About Gender in Courts," *Signs* 21 (4) (1996): 952.
- ¹⁹ International Covenant on Civil and Political Rights, art. 14, Dec. 19, 1966, G.A. Res. 2200A (XXI), U.N. Doc. 1/6316. See generally *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*, ed. Simon Shetreet and Christopher Forsyth (Leiden, Netherlands; Boston: Martinus Nijhoff, 2011).
- ²⁰ Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Belknap Press, 2011), 2.
- ²¹ 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 *The Works of Jeremy Bentham*, vol. 2, ed. John Bowring (Edinburgh, Scot.: William Tait, 1843), 573, 582.
- ²² See Philip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (Oxford; New York: Oxford University Press, 2006), 310.
- ²³ Rosen, *Jeremy Bentham and Representative Democracy*, 153–154.

- ²⁴ Thomas P. Peardon, "Bentham's Ideal Republic," *Canadian Journal of Economics and Political Science* 17 (1951): 184, 196.
- ²⁵ Judith Resnik, "Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation," *University of Pennsylvania Law Review* 148 (2000): 2119.
- ²⁶ See *Gideon v. Wainwright*, 372 U.S. 335 (1963); and Carol Steiker's discussion of *Gideon* in this volume.
- ²⁷ See *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); and *Gideon v. Wainwright*, 372 U.S. 335. The Supreme Court of Washington has held that court-imposed assessments, aiming to augment budgets, must be waived for indigent litigants seeking to revise child custody agreements. See *Jafar v. Webb*, 303 P.3d 1042 (Wash. 2013).
- ²⁸ See *Jackson v. Indiana*, 406 U.S. 715 (1972).
- ²⁹ *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).
- ³⁰ Compare Frank Michelman, "The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights, Part I," *Duke Law Journal* 1973 (1973): 1153, 1172–1177; with Frank H. Easterbrook, "Substance and Due Process," *The Supreme Court Review* 1982 (1982): 85.
- ³¹ *Turner v. Rogers*, 131 S. Ct. 2507 (2011).
- ³² The PEW Center on the States, *One in 31: The Long Reach of American Corrections* (Washington, D.C.: The Pew Charitable Trusts, 2009), http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.
- ³³ American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (Chicago: American Bar Association, 2004), 8, http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.
- ³⁴ See again *Turner v. Rogers*; and American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* (New York: American Civil Liberties Union, October 2010), http://www.aclu.org/files/assets/InForAPenny_web.pdf.
- ³⁵ These data are drawn from the Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics, <http://www.uscourts.gov/statistics/federaljudicialcaseloadstatistics.aspx>; and from the American Law Institute's *A Study of the Business of the Federal Courts* (Philadelphia: ALI, 1934). For additional details, see Judith Resnik, "Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist," *Indiana Law Journal* 87 (2012): 823.
- ³⁶ The information presented in Figure 1 comes from a variety of sources. Data for 1905–1998 are in William F. Shughart and Gökhan R. Karahan, *Determinants of Case Growth in Federal District Courts in the United States, 1904–2002* (ICPSR 3987), <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/3987>. Data for 1999–2012 are in Annual Reports of the Director of the Administrative Office of the U.S. Courts, published by the Federal Judicial Center, Historical Caseloads in the Federal Courts, http://www.fjc.gov/history/caseload.nsf/page/caseloads_private_civil. Data for 2013 are taken from the Administrative Office of the U.S. Courts, Judicial Caseload Indicators (2013), <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2013.aspx>. The numbers do not include bankruptcy filings.
- ³⁷ Russell Wheeler, "Chief Justice Rehnquist as Third Branch Leader," *Judicature* 89 (3) (2005): 116, 120.
- ³⁸ See generally National Center for State Courts, "2012 Budget Survey," 2012, http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/~media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/COSCA_Budget_Survey_all_states_2012.ashx.

- 39 Court Statistics Project, "Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads" (National Center for State Courts, 2010), 20, <http://www.courtstatistics.org/other-pages/~media/microsites/files/csp/ewsc-2008-online.ashx>. These challenges are the subject of the essay by Michael Graetz in this volume. Judith Resnik
- 40 See the essays by Robert A. Katzmann and Jonathan Lippman in this volume.
- 41 See Randall T. Shepard, "The Self-Represented Litigant: Implications for the Bench and Bar," *Family Court Review* 48 (4) (2010): 607.
- 42 See Gillian K. Hadfield's essay in this volume.
- 43 Information in Figure 2 on federal criminal, civil, and bankruptcy filings comes from the the Administrative Office of the U.S. Courts, Caseload Statistics, 2010, tables C-1, D-1 and F, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx>. The data on state filings come from the National Center for State Courts, Court Statistics Project, National Civil and Criminal Caseloads (2010), <http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx>. The number of state filings is an estimate, as states do not uniformly report data on all categories; further, the number of state cases graphed does not include juvenile, domestic, or traffic cases. Data for federal filings are reported for the twelve-month period ending in March of 2010; data for state filings are reported by different states for different twelve-month periods. The data challenges are discussed further in Stephen Yeazell's essay in this volume.
- 44 See, for example, Center for Court Innovation, *California's Collaborative Justice Courts: Building a Problem-Solving Judiciary* (Judicial Council of California, 2005), http://www.courts.ca.gov/documents/California_Story.pdf.
- 45 Tania Sourdin and Archie Zariski, eds., *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (New York: Thomson Reuters, 2013).
- 46 See Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* (Oxford; Portland, Ore.: Hart Publishing, 1999).
- 47 See Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Her Majesty's Stationery Office, 1996); and Simon Roberts, "Listening Concentrates the Mind: The English Civil Court as an Arena for Structured Negotiation," *Oxford Journal of Legal Studies* 29 (3) (2009): 457.
- 48 These developments are tracked in Hazel Genn, "What is Civil Justice For? Reform, ADR, and Access to Justice," *Yale Journal of Law & the Humanities* 24 (1) (2012): 397.
- 49 See Judith Resnik, "Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzle of Declining Trial Rates in Courts," *Journal of Empirical Legal Studies* 1 (3) (2004): 783.
- 50 Arthur Allen Leff, "Contract as Thing," *The American University Law Review* 19 (1970): 131 – 132; and Judith Resnik, "Fairness in Numbers: A Comment on *AT&T v. Concepcion*, *Wal-Mart v. Dukes*, and *Turner v. Rogers*," *Harvard Law Review* 125 (2011): 78.
- 51 See, for example, Directive of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR), 2013 O.J. L 165/63, para. 43.
- 52 *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (2005) (quoting California Civil Code sec. 1668 [West 2005]).
- 53 See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). In a unilateral provision that could be withdrawn, the cell phone provider promised to pay a \$7,500 minimum recovery and twice the amount of the claimant's attorney's fees to consumers if they won more than was offered at settlement (see p. 1744). The dispute resolution service capped filing fees at \$125 for arbitrations of \$10,000 or less. But given that many claims are less than that amount – the *Concepcions* alleged a \$30 overcharge – the ability to pursue a remedy (with or without lawyers) generally depends on the ability to aggregate claims.

- ⁵⁴ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).
- ⁵⁵ Of 86,095 criminal defendants, 83,614 pled guilty. See United States Courts, “U.S. District Courts – Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending March 31, 2013,” in *Federal Judicial Caseload Statistics*, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/Do4Mar13.pdf>.
- ⁵⁶ Marc Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,” *Journal of Empirical Legal Studies* 1 (3) (2004): 459.
- ⁵⁷ See, for example, Deborah R. Hensler, “Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-shaping Our Legal System,” *Pennsylvania State Law Review* 108 (1) (2003): 165; Carrie Menkel-Meadow, “Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases),” *Georgia Law Journal* 83 (1995): 2663; and Judith Resnik, “Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication,” *Ohio State Journal on Dispute Resolution* 10 (1995): 211.
- ⁵⁸ See John Langbein, “The Disappearance of Civil Trial in the United States,” *Yale Law Journal* 122 (3) (2012): 522.
- ⁵⁹ The information presented in Figure 4, like that of Figure 1, comes from a variety of sources. Data for 1975 – 1998 are in William F. Shughart and Gökhan R. Karahan, *Determinants of Case Growth in Federal District Courts in the United States, 1904 – 2002* (ICPSR 3987), <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/3987>. Data for 1999 – 2012 are in Annual Reports of the Director of the Administrative Office of the U.S. Courts, published by the Federal Judicial Center, Historical Caseloads in the Federal Courts, http://www.fjc.gov/history/caseload.nsf/page/caseloads_private_civil. Data for 2013 are taken from the Administrative Office of the U.S. Courts, Judicial Caseload Indicators (2013), <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2013.aspx>. The numbers do not include bankruptcy filings. Further, the effective annual growth rate described in Figure 4 reflects the annual rate of growth that would have occurred if filings had increased at a constant rate during the prior five years. This growth rate, based on actual growth in each of the five years, has been smoothed out to avoid the distractions of year-to-year volatility.
- ⁶⁰ See, for example, Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* (New York: Basic Books, 1988). For a critique of anti-litigation analyses, see Marc Galanter, “An Oil Strike in Hell: Contemporary Legends About the Civil Justice System,” *Arizona Law Review* 40 (3) (1998): 717.
- ⁶¹ Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change,” *Law and Society Review* 9 (1) (1974): 95.
- ⁶² Stephen Burbank and Sean Farhang, “Litigation Reform: An Institutional Approach,” *University of Pennsylvania Law Review* 162 (forthcoming 2014).
- ⁶³ In addition to mandates that hearings be private and confidential, arbitrators have the power to exclude persons not “essential” to the proceedings. See American Arbitration Association, “Commercial Arbitration Rules and Mediation Procedures,” 2013, https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased; and Better Business Bureau, “Rules of Conditionally Binding Arbitration,” in particular Rule 31, <http://www.bbb.org/council/programs-services/dispute-handling-and-resolution/dispute-resolution-rules-and-brochures/rules-of-conditionally-binding-arbitration/>.
- ⁶⁴ John G. Roberts, “2013 Year-End Report on the Federal Judiciary,” December 31, 2013, http://sblog.s3.amazonaws.com/wp-content/uploads/2013/12/2013_Year-End_Report.pdf. In fiscal year 2012, the federal judiciary obtained a 1 percent increase above the fiscal year 2011 level. See “FY 2012 Funding Approved,” *Third Branch* 43 (12) (December 2011): 1, http://www.uscourts.gov/news/TheThirdBranch/11-12-01/FY_2012_Funding_Approved.aspx.
- ⁶⁵ See Delaware Code Annotated, Title X, sec. 349 (2009); Del. Ch. R. 96 – 98.

- ⁶⁶ *Ibid.*; and *Delaware Coalition for Open Government, Inc. v. Strine*, 733 F.3d 510 (3d Cir. 2013), petition for certiorari was denied under the name *Strine v. Delaware Coalition for Open Government, Inc.*, 134 S. Ct. 1551 (2014). Judith Resnik
- ⁶⁷ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon, 1977), 8 – 11.
- ⁶⁸ See Draper, “Corruptions in the Administration of Justice.”
- ⁶⁹ See Michelman, “The Supreme Court and Litigation Access Fees.”
- ⁷⁰ Jerry L. Mashaw, “The Supreme Court’s Due Process Calculus for Administrative Adjudication in *Mathews v. Eldridge*: Three Factors in Search of a Theory of Value,” *University of Chicago Law Review* 44 (1) (1976): 44.
- ⁷¹ See, for example, *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970); and *Brady v. Maryland*, 373 U.S. 83 (1963).
- ⁷² Resnik and Curtis, *Representing Justice*.