A2J/A2K: ACCESS TO JUSTICE, ACCESS TO KNOWLEDGE, AND ECONOMIC INEQUALITIES IN OPEN COURTS AND ARBITRATIONS*

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I. DOCTRINAL OPENNESS AND FUNCTIONAL PRIVATIZATION

The topic of this symposium, *Secrecy*, suggests a focus on affirmative decisions shutting out the public by sealing records and closing courtrooms. My interest, in contrast, is in a broader set of processes that makes dispute resolution inaccessible and, in that sense, secret. My focus is on the problem of institutional privatization, as contrasted with questions of individuals' personal privacy. The kind of secrecy I discuss here has several sources including the promotion of alternative dispute resolution ("ADR") through in-chambers judicial management and settlement efforts; the design of some online dispute resolution ("ODR") and court-annexed arbitration programs; mandates to outsource dispute resolution to private providers; bans on pursuing relief through class actions; and the costs to individuals of pursuing claims.[1]

Rather than any "natural" states of open or closed dispute resolution, political and social movements shape laws endowing courts, ADR, ODR, and arbitration with their attributes. Today, we assume courts to be open and think of judicial management and of arbitration as closed. These assumptions are the product of rules, doctrine, and practices that are in motion. As I detail below, much of what takes place in courts increasingly happens outside the public purview, and yet some judges do pre-trial work in open court, on the bench and on the record.[2] Likewise, while privately provided

1. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2807–09 (2015) [hereinafter Resnik, *Diffusing Disputes*]; Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L.J. 1631, 1636–37 (2015) [hereinafter Resnik, *The Contingency of Openness in Courts*].

2. *See* Steven G. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849, 861–62 (2013). The Honorable Judge David Campbell of the District of Arizona, described doing pretrial conferences on the record and typically on the bench. *See* Judge David Campbell, Chairman, Advisory Comm. On the Fed. Rules of Civil Procedure, Address at the Univ. or Ariz. James E. Rodgers Coll. Of Law Civil Procedure Workshop (Oct. 5, 2017).

arbitrations are generally cloistered, some jurisdictions permit public access to court-annexed arbitration.[3]

A distinction therefore needs to be drawn between what I call the *doctrinal openness* of courts, familiar because of layers of custom, practice, rules, and law formally committed to public access, and the *functional privatization* of court-based activities and of some forms of arbitration that make interactions and outcomes inaccessible. The entrenchment of new rules of privatization reflect what Marc Galanter described as the ability of "repeat players" (the "haves" in his classic article) to come out "ahead" by using their resources and knowledge to structure procedures benefitting their interests rather than those of "one-shot" players.[4] Even as game metaphors give me pause given the impact that law has on our lives, Galanter's analysis locates how reiterative involvement provides insights into, and the potential for authority over, the procedures that have substantive impacts on rights and remedies.

Repeat players (such as governments, businesses, and lawyers regularly in court) have by definition a visibility that one-shot players lack. It may, therefore, be surprising to learn that federal and state courts are filled with one-shot participants, appearing without lawyers to represent them. Between 2005 and 2016, unrepresented litigants filed about a quarter or more of the civil claims filed in federal courts.[5] More than half of appeals in federal courts are pursued by individuals

3. Illinois is one example; its thousands of court-annexed arbitrations take place in courts or arbitration centers open to the public. *See infra* notes 19, 147–50, and accompanying text.

4. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98–103 (1974); Joel B. Grossman, Herbert M. Kritzer & Stewart Macaulay, *Do the "Haves" Still Come Out Ahead?*, 33 LAW & SOC'Y REV. 803 (1999). Galanter's analysis focused on courts and did not compare the impact of repeat playing and resources in obtaining or structuring the rules for other services, such as health care. *See* Richard Lempert, *A Classic at 25: Reflections of Galanter's "Haves" Article and Work It Has Inspired*, 33 LAW & SOC'Y REV. 1099, 1108 (1999).

5. The term used in the federal data collection is pro se. *See* U.S. COURTS, CIVIL PRO SE AND NON-PRO SE FILINGS, BY DISTRICT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2016, http://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2016.pdf [https://perma.cc/9AAL-EGHM] [hereinafter 2016 PRO SE U.S. DISTRICT COURT FILINGS. The federal court database details all pro se filings since 2005. *See* U.S. COURTS, CIVIL PRO SE AND NON-PRO SE FILINGS (2005–2010), http://www.uscourts.gov/report-names/judicial-business?tn=c-13&pt=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D= [https://perma.cc/NES9-E9W3] [hereinafter 2005–2010 U.S. DISTRICT COURT PRO SE FILINGS].

lacking lawyers.[6] Studies of state courts identify higher percentages of lawyer-less litigants. The National Center for State Courts ("NCSC") sampled cases in ten major counties and, in about three quarters of some 650,000 cases analyzed, at least one side was not represented by an attorney.[7]

Lawyers are the proverbial repeat players, and one way to bring lawyers into cases is through government funding for those who cannot afford them. Congress did so in 1974, when it created the Legal Services Corporation ("LSC").[8] But during the subsequent decades, Congress provided budget allocations insufficient to meet the demand for these legal services.[9] In 2016, the LSC reported that individuals eligible for its services regularly "received inadequate or no legal help."[10]

Another major infusion of lawyering resources comes from class actions. Aggregation responds to the problem that some claims have what economists call "negative value," meaning that the expenses of recovery are larger than the direct loss incurred. As Benjamin Kaplan, the principal drafter of the 1966 revision to the federal class action rule put it, group-based litigation enabled individuals, lacking "effective strength" individually to pursue their claims, to join together and seek redress.[11] Repeat players also saw the value in aggregation

6. U.S. COURTS, U.S. COURTS OF APPEALS—PRO SE CASES COMMENCED AND TERMINATED, BY CIRCUIT AND NATURE OF PROCEEDING, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2016, http://www.uscourts.gov/sites/default/files/data_tables/jb_b9_0930.2016.pdf [https://perma.cc/V4T3-DBMA] [hereinafter U.S. APPELLATE COURT PRO SE FILINGS].

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

8. *History*, LEGAL SERVS. CORP., https://www.lsc.gov/about-lsc/who-we-are/history [https://perma.cc/U4G5-R4EG].

9. LEGAL SERVS. CORP., REPORT OF THE PRO BONO TASK FORCE 1–2 (2012), https://www.lsc.gov/sites/default/files/attach/2015/09/Report-ProBonoTaskForce-2012.pdf [https://perma.cc/XZ4G-2HNT]. As the LSC reported, "at least 50% of people seeking help from LSC-funded organizations—and eligible to receive it—are turned away because of insufficient resources." *Id*.

10. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/T3FZ-KUHK].

11. Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969). I provide some of the history of the drafting of the 1966 revisions to Rule 23 in Judith Resnik, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. REV. 1017, 1019–31 (2017) [hereinafter Resnik, *Reorienting the*

because grouping claims together offered economies of scale and the possibility of obtaining closure about their liabilities.[12]

But federal legislation and recent decisions of the U.S. Supreme Court have erected barriers to the use of collective actions. As of 1996, LSC lawyers cannot bring class actions.[13] As of 2011, federal and state courts must enforce class-action bans that manufacturers, employers, and service providers impose on their less well-resourced counterparts, consumers, and employees.[14] These clauses (inserted in job applications and consumer product information) typically mandate that if disputes arise, claimants may not pursue their rights in courts but can only proceed, single-file, in dispute resolution systems designated by employers or manufacturers. Arbitration clauses sometimes also permit consumers and employees to use small claims courts, again without collective actions.[15]

Resource asymmetries among classes of litigants are therefore central to discussions of how *functional privatization* has become so salient a feature of dispute resolution in the United States. Proponents of class action bans understand that group-based proceedings—whether in courts or in arbitration—are engines of publicity. The number of people involved undermines the capacity to keep private the allegations of misbehavior and the decisions reached about their legality.[16] Moreover, as I detail below, the insertion of mandates *to* arbitrate in employee and consumer documents has not resulted in a mass *of* arbitrations. Rather, amidst tens of millions of consumers and

Process Due]; and Judith Resnik, *"Vital" State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLS in the Federal Courts*, 165 U. PA. L. REV. 1765, 1788–95 (2017) [hereinafter Resnik, *"Vital" State Interests*].

12. Resnik, *"Vital" State Interests*, *supra* note 11, at 1778–80, 1788–96.

13. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321, 1321–53 (codified at Class Actions, 45 C.F.R. § 1617.3 (2015)); *see also* Judith Resnik, *Lawyers' Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 FORDHAM L. REV. 1899, 1921–22 (2017).

14. I analyze the development of the law on such bans in Resnik, *Diffusing Disputes*, *supra* note 1, at 2863–74. *See also* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 33–40, 130–35 (2013); Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis* 66–69 (Univ. of Ill. Coll. of Law Legal Studies, Research Paper No. 18-12, 2017).

15. *See, e.g.*, CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), at 15–17 (2015), [hereinafter CFPB 2015 ARBITRATION STUDY], http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/32YD-S2JB].

16. This suppression of claims is one factor in the flattening filings in both state and federal courts. *See* Resnik, *supra* note 13, at 1902–21.

employees, almost none file arbitration claims. And if they do, they are often subjected to confidentiality clauses directing them not to discuss either processes or outcomes.

Repeat players have thus largely succeeded in persuading courts to approve confidentiality clauses even as judges acknowledge the advantages derived from one side knowing the track record of past proceedings, while individual opponents do not.[17] The silencing of opponents, coupled with the relocation of dispute resolution to private providers that have no commitments to open access, has reoriented dispute resolution. The norms that undergird the various new rules diffuse and privatize process; in practice, the result is often cutting off the ability to bring claims in any forum.[18]

In the title of this Article, I use "A2J," because it (or "ATJ") is the shorthand for state and federal task forces aiming to improve "access to justice."[19] These projects are largely focused on enabling claimants

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

18. Resnik, *Diffusing Disputes*, *supra* note 1, at 2852–54. Efforts to stop the use of collective actions in Europe are likewise underway through efforts of the Institute for Legal Reform ("ILR"), related to the U.S. Chamber of Commerce, as illustrated by its monographs emphasizing the "risks" of collective redress. *See* U.S. CHAMBER INST. FOR LEGAL REFORM, THE GROWTH OF COLLECTIVE REDRESS IN THE EU: A SURVEY OF DEVELOPMENTS IN 10 MEMBER STATES 1 (2017), http://www.instituteforlegalreform.com/uploads/sites/1/The_Growth_of_Collective_Redress_in_the_EU_A_Survey_of_Developments_in_10_Member_States_April_2017.pdf [https://perma.cc/2YMQ-WSZ3]. The Chamber calls for "safeguards." U.S. CHAMBER INST. FOR LEGAL REFORM, SUPPORTING SAFEGUARDS: EU CONSUMER ATTITUDES TOWARDS COLLECTIVE ACTIONS AND LITIGATION FUNDING 1 (2017), http://www.instituteforlegalreform.com/uploads/sites/1/EU_Paper_Web.pdf [https://perma.cc/J6QY-EB4M].

19. *See Access to Justice Commissions*, AM. BAR ASSOC., https://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/atj-commissions.html [https://perma.cc/5UQ3-54L5]; *Office for Access to Justice*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atj [https://perma.cc/7AH8-PQSG]. Several states have established access to justice commissions. *See, e.g.*, 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

to come *to* court or otherwise obtain assistance related to legal claims. These task forces have done essential work in clarifying the need for legal advice, in detailing the layers of court assessments that limit access, and in seeking to build coalitions among repeat and one-shot players. But these task forces have not often focused on how to shore up the public dimension of the disputing that is done *in* courts as well as in courts' alternatives.

I link "A2J" to "A2K"—"access to knowledge"—to underscore the inter-dependencies of the two. Not only does the act of rendering judgments require knowledge, but assessing the justice of those judgments also requires that third parties be able to understand particular cases, watch interactions, and know the systems in which individual judgments are made. Access-to-justice initiatives therefore need to become yet more ambitious by going beyond helping people find more "paths" to obtain redress and persuading legislatures to fund lawyers and courts to reduce the burdens on individuals.[20] To turn access *into* justice, the agendas of A2J have to include generating practices and constitutional doctrine insistent on making dispute resolution processes and outcomes open to the public.

Without public access, one cannot know whether fair treatment is accorded regardless of litigants' status. Without public participation, no one can see how norms of equal treatment can be turned into dignified interactions among litigants and decision-makers. 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.

Courts and arbitration are creatures of our own making, refashioned regularly through politics producing legal change. By

CIVIL, CRIMINAL, AND TRAFFIC PROCEEDINGS 1 (2016), www.illinoiscourts.gov/2016_Statutory_Court_Fee_Task_Force_Report.pdf [https://perma.cc/Y9GX-TS24] [hereinafter ILLINOIS COURT ASSESSMENTS 2016]; CONN. JUDICIAL BRANCH ACCESS TO JUSTICE COMM'N, FIRST ANNUAL REPORT 1 (2012), https://www.jud.ct.gov/committees/access/ATJ_AnnualReport.pdf [https://perma.cc/KZV4-R28Z]; *In re* Okla. Access to Justice Comm'n, __ P.3d __, __, 2014 WL 1047142, at *1 (Okla. Mar. 13, 2014).

20. *See* HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW 249–64 (1999).

toggling back and forth in this Article between court-based adjudication, arbitration, and other forms of ADR, I show the degree to which the processes interact, how practices, regulations, and constitutional doctrine shape—and reshape—the normative expectations of each, and why a retrieval of public processes, consistent with protection of individuals' privacy, is imperative for the body politic.

A roadmap to what follows is in order. In Part II, I address a predicate question: why, in a world replete with information sources, does it matter if people can go to court and use dispute resolution processes accessible to the public? After exploring the normative values at stake, I reflect in Part III on why we understand ourselves to be entitled—as a matter of "right"—to have courts be public and open venues. I then turn to an array of practices in courts and arbitration that diminish the occasions on which the public has anything to watch.

In Part IV, I discuss how the closing off of ADR and ODR interact with bans on class actions, confidentiality clauses, and a host of "legal financial obligations" ("LFOs"), all of which make dispute resolution inaccessible and aspects of it secret. Part IV also shows some of the impact. I add to the documentation on the use of arbitration by mining publicly available databases that reflect how unusual single-file consumer claims are. To the extent ODR creates new routes to redress, the versions practiced in the United States have not built in third-party access to welcome observers or to enable assessment of its processes or outcomes. The pressures on courts to finance their own services are another way in which access is limited; a host of assessments deter litigants from using courts. Filing suit also imposes costs on opponents. Defendants in both criminal and civil proceedings are often put at risk of incurring financial obligations that make those with resources complain of a need to capitulate, especially if faced with class action plaintiffs. For less well resourced defendants, lawsuits can put them into cycles of debt or pressure them into defaulting even when they have potential defenses to assert.[21]

Part V turns to the need to reframe constitutional doctrine so as to constrain the functional privatization of dispute resolution. Current approaches rely on the tradition of access to trials as the benchmark. Given the rarity of trials, preserving public practices requires revising

21. *See* Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 208–14, 223–32 (2014); *infra* notes 260–273.

the legal inquiries to focus on the utilities of open dispute resolution as it now takes place, whether in person or through exchanges of materials online.

I close in Part VI with the reminder that making courts accessible is in the interests of individual and repeat players. In the nineteenth century, creditors pressed for constitutional protection of open courts and rights to remedies to ease pursuit of debtors. In the twentieth century, banks saw collective actions as useful when marketing new economic products because aggregation enabled limiting repetitive disputes about the propriety of investment decisions.[22] Governments likewise depend on courts to validate their authority and to enforce their norms.

Reminders of the utilities of public court procedures in the twenty-first century come from "#MeToo"—an explosion of claims in the fall of 2017 in which individuals described their experiences of having been sexually harassed and of having been silenced out of fear of retribution or by virtue of settlements that mandated confidentiality.[23] The reiterative *cri de coeur* is for accountability, which reflects how, in the past, the results of investigations into misbehavior have often been closed off.

Evidence that these remarkable public declarations about sexual predatory behavior could show repeat players the importance of public processes is emerging. Members of Congress have proposed legislation to protect access to court-based remedies for employees alleging sexual harassment; the bill would exempt them from being routed exclusively to arbitration, with its connotations of closed proceedings.[24] What the #MeToo movement has already exemplified is that a myriad of barriers make it difficult to bring claims against more powerful opponents and that, if claims are pursued, secrecy has often been part of the price of the resolution. The outpouring of stories

22. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 307–08 (1950); *infra* notes 317–326 and accompanying text.

23. *See, e.g.*, Samantha Schmidt, *#MeToo: Harvey Weinstein Case Moves Thousands to Tell Their Own Stories of Abuse, Break Silence*, WASH. POST (Oct. 16, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/10/16/me-too-alyssa-milano-urged-assault-victims-to-tweet-in-solidarity-the-response-was-massive/ [https://perma.cc/3AWS-5Z83].

24. Parallel bills were introduced in December of 2017 in the U.S. House of Representatives and in the Senate. *See* Ending Forced Arbitration of Sexual Harassment Claims, H.R. 4570, 115th Cong. (2017); Ending Forced Arbitration of Sexual Harassment Claims, S. 2203, 115th Cong. (2017). As discussed in Parts I and VI, arbitration is not intrinsically closed, and Congress and the courts can also bound the authority to impose blanket closures.

shows that secrecy has its costs, both for third parties who might not have been in harm's way and for those directly involved. #MeToo also 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. This rebellion against secrecy should therefore serve as a reminder of what public processes can offer: deliberate decision-making that insists on due process norms of even-handedness, screens information for reliability, and requires analysis of liability and remedies appropriate to the misconduct, when established.

The question that becomes vivid by mixing this recent blast of publicity with the expanding modes of privatization is whether public performance of the power to resolve disputes remains central to legitimating authority. My worry is that providers of both public and private dispute resolution seem not to believe in the need to demonstrate the propriety of their exercise of authority. To stem "secrecy in courts" requires finding ways to generate, anew, commitments that the power to issue binding decisions about legal misbehavior depends on welcoming the public as central participants in the processes of judgment.

II. THE NORMATIVE IMPORT OF OPEN COURTS IN DEMOCRACIES

"Open courts" is a phrase that references both the ability of third parties to watch proceedings and the ability of disputants to bring claims. As to the first sense of openness, a predicate question is whether claims for open courts are passé, in that many other institutions and technologies disseminate information about conflicts. As #MeToo makes plain, examples in this digital age are easy to provide. Another was when, in the spring of 2017, a video of airline employees dragging a seated, ticketed passenger from an airplane went "viral"[25]—a word apt to capture how information spread.

In addition to new technologies and more outlets, the relationship of the body politic to information has changed. The legal regime spawned by the New Deal and reflected in the Federal Rules of Civil Procedure is credited to progressives, confident that the production of information would bring clarity about facts, obligations, outcomes,

25. Avi Selk & Lori Aratani, *United Airlines CEO Apologizes for 'Horrific Event,' Promises Review of Policies After Passenger Violently Deplaned*, WASH. POST (Apr. 11, 2017), https://www.washingtonpost.com/news/dr-gridlock/wp/2017/04/11/amid-pr-fiasco-over-dragged-passenger-united-ceo-defends-his-crew/ [https://perma.cc/BW3G-KL8U].

and justice. Not only are we now subject to information-overload; we also live in a world of fact skeptics, "alternative fact" promoters, propaganda, and disinformation. The misuse of information is not novel, but the techniques for dissemination are, making plain that information per se is not an unvarnished public good. More than that, hackers and trollers abound, and revelations can unfairly subject individuals to harm.

Yet it is precisely this plethora of information that makes court-based production of *knowledge* (as contrasted to information) attractive. Once in the realm of adjudication, the modes of discourse are forced to change. A myriad of rules imposes codes of conduct for exchanges on paper and in person. Even as critics argue the decline of civility in the legal profession, court rules exclude "impertinent, or scandalous matter."[26] Parties are obliged to put forth specifics (often boringly repeated), and constitutional doctrine mandates that judges "hear the other side."[27] Further, eliciting competing accounts of what has transpired is built into the process. The relatively extravagant investment of resources (both public and private) in each case produces accounts of events linked to legal rights and obligations.

When judges do make decisions on the bench or in writing, they are locked into relying on records and into weighing the legal import of facts. Although a few jurists are known for writing sentences providing sound bites for the media,[28] judges are more often criticized for being hard to understand. In the last decades, courts have made efforts at translation, in part through hiring public information officers (organized enough so as to have their own acronym, "PIOs"), who send out press releases to explain the content of decisions.[29] In short, even given a world replete with multiple sources of information, courts are distinctive in producing a unique form of knowledge. Newspapers may cut fact-checking staff,[30] but courts cannot.

26. FED. R. CIV. P. 12(f).

27. *See* JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 288–305 (2011).

28. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 827–28 (2008) (Scalia, J., dissenting, joined by Roberts, C.J., Thomas and Alito, JJ.) ("[The majority's opinion] will almost certainly cause more Americans to be killed.").

29. *See Welcome from the President*, CONFERENCE OF COURT PUB. INFO. OFFICERS, https://www.ccpio.org/about/welcome/ [https://perma.cc/G73N-VR5K].

30. *See* Sydney Ember, *Times Staff Members Protest Cuts and Changes to News Operation*, N.Y. TIMES (June 29, 2017), https://www.nytimes.com/2017/06/29/business/media/new-york-times-staff-members-protest-cuts.html [https://perma.cc/7HYM-VQDZ].

A. Understanding the Function of the Public

What are the utilities and the politics of this form of knowledge production and its relationship to justice? The classic arguments for openness in courts date from the nineteenth century when Jeremy Bentham offered a fierce defense for what he termed "publicity," an attribute he advocated for all facets of government.[31] For Bentham, 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.[32]

Another was education, in that judges would want to explain their actions to those watching them.[33] Courts were therefore both "schools" and "theatres of justice."[34] And famously, Bentham lauded publicity's disciplinary powers: "the more strictly we are watched, the better we behave."[35]

The desired end point for Bentham was to enable the public to function as a "half real and half imaginary" Tribunal of Public Opinion able to know the process of decision-making and the bases for the outcomes and, therefore to assess whether the rules comported with its interests.[36] Bentham's interest in making elites accountable[37] relied on what Robert Post recently termed a populace's "democratic competency," stemming from "access to disciplinary knowledge."[38]

31. "Without publicity all other checks are insufficient: in comparison with publicity, all other checks are of small account." JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE: SPECIALLY APPLIED TO ENGLISH PRACTICE (1827), *reprinted in* 6 THE WORKS OF JEREMY BENTHAM 189, 351 (John Bowring ed., 1843) [hereinafter BENTHAM, RATIONALE OF JUDICIAL EVIDENCE]. Bentham (in)famously argued for the panopticon prison, but his commitment to disciplinary surveillance was not limited to that setting. He also proposed that the "doors of all public establishments ought to be thrown wide open to the body of the curious at large—the great *open committee* of the tribunal of the world." JEREMY BENTHAM, PANOPTICON; OR, THE INSPECTION-HOUSE (1791), *reprinted in* 4 THE WORKS OF JEREMY BENTHAM 37, 46 (John Bowring ed., 1843).

32. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, *supra* note 31, at 355.

33. *Id*. at 356–57.

34. *Id.* at 354–55.

35. JEREMY BENTHAM, FARMING DEFENDED (1796), *reprinted in* 1 WRITINGS ON THE POOR LAWS 276, 277 (Michael Quinn ed., 2001).

36. FREDERICK ROSEN, JEREMY BENTHAM AND REPRESENTATIVE DEMOCRACY: A STUDY OF THE CONSTITUTIONAL CODE 26–27 (1983); *see also* Fred Cutler, *Jeremy Bentham and the Public Opinion Tribunal*, 63 PUB. OPINION Q. 321, 321 (1999).

37. ROSEN, *supra* note 36, at 13–14.

38. ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 27 (2017). Post thus explored the propriety of some forms of regulation under the First Amendment in the United States as

Post argued that the need for this form of literacy explained commitments to free speech and a free press.[39] His concept also has application to courts, which serve as a training ground for such competence.

My account of the function of courts therefore adds to Bentham's claims about their educative, disciplinary, and informational utilities, and to Post's formulation of the mechanisms for developing democratic competency. I need to flag that when using the term "democracy" in the context of courts, I am not focused, as many others are, on the role played by lay jurors, temporarily holding the state's power to render judgment.[40] The aspect of "the democratic" in courts at issue here is that courts provide opportunities to watch state actors in action, as they accord (or fail to provide) dignified treatment to litigants, lawyers, and witnesses. 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.

Public access to courts enables observers to see what democratic precepts of equal access *to* the law and equal treatment *by* the law mean in practice. Bentham thought that courts provided education because 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 exercise of power that dispute resolution entails. 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* can occur in real time.

When Bentham wrote, courts were not venues available to all. Employees could not call their employers to account, and prisoners

he parsed the distinct values of "democratic legitimation" and "democratic competence." *See id.* at 27–60.

39. *See id*. at 61–93.

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

could not challenge their custodians. Individuals did not have protection from abusive family members, and gender and racial discrimination were licit. Twentieth-century egalitarian movements produced a mix of constitutional and statutory law that recognized all persons as entitled to equal treatment and thereby welcomed an array of new participants into the *democratic venues* that courts were becoming.[41]

B. Expanding Authority to Bring Claims

The aspirations for adjudication in public venues are, however, haunted by challenges in making its processes equally available across class lines. In Bentham's era, as in ours, the costs of litigation posed problems, which brings me to the second sense of openness, focused on the capacity of disputants to bring claims. Bentham called the fees imposed by courts a "tax on distress,"[42] as he promoted subsidies for those too poor to participate.[43] He also proposed the establishment of an "Equal Justice Fund," supported by using the "fines imposed on wrongdoers," government funds, and charitable donations.[44] Bentham wanted not only to subsidize the "costs of legal assistance but also the costs of transporting witnesses" and the production of other evidence.[45] To lower costs, Bentham proposed that judges be available "every hour on every day of the year,"[46] and he suggested that courts be on a time "budget" that would shorten proceedings to one-day trials and include immediate decisions.[47]

As the twentieth century ushered in new rights-holders, inequalities became yet more acute. The U.S. Supreme Court responded by insisting that courts be "open" in the sense of being

41. *See generally* RESNIK & CURTIS, REPRESENTING JUSTICE, *supra* note 27, at 288–89.

42. JEREMY BENTHAM, A PROTEST AGAINST LAW-TAXES (1793), *reprinted in* 2 THE WORKS OF JEREMY BENTHAM 573, 582 (John Bowring ed., 1843).

43. ROSEN, *supra* note 36, at 153–55.

44. *Id*. at 153–54; PHILLIP SCHOFIELD, UTILITY AND DEMOCRACY: THE POLITICAL THOUGHT OF JEREMY BENTHAM 310 (2006).

45. ROSEN, *supra* note 36, at 153–54.

46. Thomas P. Peardon, *Bentham's Ideal Republic*, 17 CAN. J. ECON. & POL. SCI. 184, 196 (1951). Rosen described Bentham's goal as having all persons, on foot, be able to reach a local judicial officer and return home without having to pay to find a place to sleep over night. ROSEN, *supra* note 36, at 149. To lessen expense, Bentham also proposed a system of "referees" or "arbitration" overseen by judges. *Id*. at 151.

47. *See* Anthony J. Draper, *"Corruptions in the Administration of Justice": Bentham's Critique of Civil Procedure, 1806-1811*, 7J. BENTHAM STUDIES 1, 19 (Jan.2004), http://discovery.ucl.ac.uk/1323720/1/007_Draper_2004.pdf [https://perma.cc/L96N-5KNJ].

accessible even to those who could not pay entry fees for certain kinds of claims. The canonical decision, *Boddie v. Connecticut*,[48] stems from the early 1970s, when a class of "welfare recipients residing in Connecticut" argued that, by failing to create a method by which to waive the sixty dollars for filing and service required to obtain a divorce, the state had violated their federal constitutional rights.[49]

In 1971, Justice Harlan agreed; he wrote for the Court 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.[50] Although the concurrences argued for broader principles that would have applied beyond the context of divorce,[51] Justice Harlan's language shaped a narrow obligation to waive fees that permitted other exclusionary fees to remain in place. For example, the Court thereafter refused to require fee waivers when individuals sought to challenge a reduction in welfare benefits or when filing for bankruptcy.[52] The parameters of the constitutional constraints on court charges has, as detailed in Part IV, returned to the fore as the kinds and numbers of court assessments have multiplied, with jurisdictions raising fees and "surcharges" in civil, criminal, and traffic filings.

Other constitutional democracies have taken a broader view of the obligation to reduce economic barriers to courts. Recent decisions from both the Supreme Courts of Canada and of the United Kingdom are illustrative. In 2014, the Canadian Supreme Court found impermissible an escalating set of fees charged by British Columbia when litigants' trials lasted for more than three days.[53] Relying on Section 96 of its Constitution Act of 1867 (providing that the "Governor General shall appoint the Judges" of provincial courts),[54] the Court

48. 401 U.S. 371 (1971).

49. *Id*. at 372.

50. *Id*. at 347.

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

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

53. Trial Lawyers Ass'n of B.C. v. British Columbia, [2014] 3 S.C.R. 31, paras. 35–36 (Can.).

54. Constitution Act, 1867, 30 & 31 Vict., c 3 §96 (U.K.), reprinted in R.S.C. 1985, app. II, no. 5 (Can.).

concluded that litigants had a right to "section 96 courts."[55] As a consequence, British Columbia could not charge hundreds of dollars if doing so imposed an "undue hardship," even for persons who were not "indigent" and therefore not exempt under the statute.[56]

In 2017, the U.K. Supreme Court took a similar approach when it invalidated the high fees imposed by the government on claimants in its Employment Tribunals.[57] While the schedule varied with the kind of claims brought by employees, fees ran from £1200 to £7200 at the trial level, to be paid in different stages for filing, hearings, and the like. In contrast, fees in small claims courts were pegged to the value of the claim and ranged from £50 to £745.[58]

Remissions (fee waivers) were available in the Employment Tribunals. But the U.K. Supreme Court found the increased fees unlawful, given that a "right of access to the courts is inherent in the rule of law" and that the administration of justice was not "merely a public service like any other."[59] The U.K. Supreme Court spoke not only of the value of producing precedent, but also emphasized that businesses

> need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations.[60]

Like the Canadian Supreme Court, the U.K. Supreme Court reasoned that obligations to pay fees ought not be tied only to poverty. 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

55. *Trial Lawyers Ass'n*, 3 S.C.R. para. 29.

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

57. R *(on application of UNISON)* v. Lord Chancellor [2017] UKSC 51, [117] (Lord Reed).

58. *Id.* [16]–[20]; *See also* Abi Adams & Jeremias Prassl, *Vexatious Claims: Challenging the Case for Employment Tribunal Fees*, 80 MODERN L. REV. 412, 414, 418 (2017). These economists modeled the impact of the tribunal fees on filings.

59. *R (on application of UNISON) v. Lord Chancellor,* [66]. Lady Hale's opinion focused on the discriminatory disparate impact of the fees. *Id.* {121}–{34} (Lady Hale).

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

regarded as an acceptable standard of living, the fees cannot be regarded as affordable."[61]

These decisions reflect an understanding of the need for governments to provide courts as a service, akin to roads and mail and, in some countries, to education and housing. Such affirmative obligations are often termed "social and economic rights." Yet, in contrast to more conventional social and economic rights, courts support the flourishing not only of individuals but also of the governments that deploy them. States rely on courts to justify their power, to implement their norms, and to protect their economies.

It is the mix of state needs for legitimacy and demands for equal treatment that has produced the proposition that individuals who are poor as well as those with resources ought to have access to courts, at least for certain kinds of claims. These are the changes that democracy has pressed upon courts, now understood as intrinsically obliged to offer rights of court access and of dignified and equal treatment for all participants.

This account is of course aspirational. Treating all people fairly requires work, and responding to economic disparities among litigants is challenging. Moreover, lawsuits can be used exploitatively, imposing costs on defendants who ought not to have been brought into court. The difficulties of calibrating rules to respond to that strategic interaction while protecting access for meritorious claims are legion. Many court systems have tried to address these problems, as reflected in repeated waves of procedural reforms including the creation of small claims courts, worker compensation systems, and today's forms of ADR.

In addition, beginning in the 1980s, state and federal judiciaries chartered task forces to explore how gender, race, and ethnicity affected the courts; that research found systemic problems.[62] In more recent decades, the focus has shifted to the high costs of legal services and to the proliferation of assessments imposed by courts to fund themselves and municipal services more generally.[63] As

61. *Id.* [93].

62. For an overview of these tasks forces and their findings, see generally Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS 952 (1996) [hereinafter Resnik, *Asking About Gender in Courts*].

63. *See, e.g.*, Gillian K. Hadfield & Jamie Heine*, Life in the Law-Thick World: Legal Resources for Ordinary Americans, in* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 21, 21–51 (Sam Estreicher & Joy Radice eds., 2016); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 42–62 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/

discussed in Part IV, a spate of litigation, court-based A2J task forces, and many articles document the ways in which governments use courts to extract fees, sometimes to support their own programs and sometimes as sources of general revenue. That mix makes public oversight one mechanism for interrupting some of the burdens imposed by LFOs.

III. MAKING COURTS AND ARBITRATION PUBLIC OR PRIVATE

A. That All Persons "May Freely Come Into, and Attend"

Old and new provisions mandate what today goes under the moniker of "sunshine" in the courts. The history of the public performance of state power long predates the U.S. Constitution. The 1676 Charter of the English Colony of West New Jersey is one example, providing that "in all publick courts of justice for tryals of causes, civil or criminal, any person or persons . . . may freely come into, and attend."[64]

By the eighteenth century, the new states in North America had embraced this idea, turning "rites"—the rituals of public performance of power—into "rights"—the authority of observers to insist on their place in courts. Several early state constitutions echo the Magna Carta, with clauses promising remedies for harms to persons and their property and adding the words "all courts shall be open."[65] For example, Alabama's 1819 Constitution provided that "[a]ll 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."[66] A similar provision can be found in Missouri's 1820 Constitution:

> That courts of justice ought to be open to every person, and certain remedy afforded for every injury to person, property, or character; and that right and justice ought to be administered

ferguson_police_department_report.pdf [https://perma.cc/2MV5-CNFU].

64. CONCESSIONS AND AGREEMENTS OF WEST NEW JERSEY (1677), *reprinted in* SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 184, 188 (Richard L. Perry & John C. Cooper eds., 1959).

65. *See, e.g.*, CONN. CONST. of 1818, art. I, § 12; *see also* Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 923 (2012).

66. ALA. CONST. of 1819, art. I, § 14. An almost identical clause can be found in the current Alabama Constitution, ratified in 1901. *See* ALA. CONST. art. I, § 13.

> without sale, denial, or delay; and that no private property ought to be taken or applied to public use without just compensation.[67]

The caveat is that "every person" was not all of "us." Indeed, Missouri's 1820 Constitution expressly protected slave owners by providing that its general assembly had no power to "to pass laws . . . [f]or the emancipation of slaves without the consent of their owners."[68]

The protection of property holders was not limited to slave owners. Historians identify the insertion of rights-to-remedy clauses as stemming from creditors' concerns that "renegade legislatures" could try to protect debtors by limiting contract obligations.[69] Thus, these clauses are early examples of Galanter's repeat players, seeking rules (in this instance of access to courts) to protect their interests in property and status-conventional relationships. (And, as detailed in Part IV, recent data on state court users suggest the growing dominance of creditors' claims.)

The idea of courts as *sources* of the recognition of all persons as equal rights-holders and as ready *resources* for the array of humanity is an artifact in the United States of both the first and second Reconstruction. Not until well into the twentieth century did U.S. law and practice fully embrace the proposition that whatever one's race, gender, or class, courts had to welcome all entrants.[70] "Every person" came to reference all of "us" as a result of twentieth-century aspirations that democratic orders provide "equal justice under law," a phrase etched in 1935 above the steps to the U.S. Supreme Court but not inclusive in the way we understand it today until decades thereafter.[71]

During the second half of the twentieth century, legislatures and courts recognized new kinds of harms as coming within the rubric of what constituted a legal injury. Rights to be free from discrimination are vivid examples, as are the developments of rights for consumers,

67. MO. CONST. of 1820, art. XIII § 7.

68. *Id.* art. III, § 26.

69. *See* Kilmer v. Mun, 17 S.W.3d 545, 548 (Mo. 2000) (quoting David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1201 (1992)). Indeed, in 1946, Missouri's Supreme Court relied on its remedy clause to protect segregated housing by holding that racially restrictive covenants were enforceable, in part to avoid denying court access for enforcement of contractual obligations. Kraemer v. Shelley, 198 S.W.2d 679, 683 (Mo. 1946) (en banc), *rev'd on other grounds sub nom*., 334 U.S. 1 (1948).

70. Practices, of course, have not always mapped onto these aspirations. *See* Resnik, *Asking About Gender in Courts, supra* note 62, at 952–54.

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

employees, household members, and criminal defendants. As courts became more accessible to such claimants, the stakes of openness have changed. Remedies obtained in courts underscored for some the importance of openness and sparked efforts by others, unhappy at having to disgorge information and to provide remedies, to try to limit both the ability to bring claims to open courts and the opportunity to learn about others' allegations.

B. Sunshine in Government and in its Courts

Open-court practices in the United States reflect a more general view of public rights to observe government. Commitments to protect public access come from both federal and state constitutions. The U.S. Constitution provides that Congress "keep a journal of its Proceedings" and publish it periodically, subject to its "Judgment" on a need for "Secrecy."[72] Congress is also obliged to make and publish a "regular Statement and Account" of its use of public monies.[73] Statutes such as the Freedom of Information Act of 1966 demonstrate popular support to put such obligations (albeit with caveats and exceptions) into place.[74]

While the U.S. Constitution does not have the language common to many state constitutions mandating that "all courts shall be open," the Sixth Amendment provides an express guarantee to criminal defendants of a "speedy and public trial" before a jury drawn from the vicinage.[75] The scope of the provision is brought into question when the public is excluded from criminal proceedings. The case law has recognized both defendants' rights *to have* an audience[76] and the public's First Amendment rights *to be* an audience.[77] Rights of

72. U.S. CONST. art. 1, § 5. Section 7 required recording the names of persons voting "Yeas and Nays." *Id*. § 7.

73. *Id*. art. I, § 9, cl. 7. Implementation comes from the Congressional Record and the Government Printing Office. Court enforcement has, however, been made difficult by rulings concluding that individuals lack standing to seek enforcement. *See, e.g.*, United States v. Richardson, 418 U.S. 166, 167–68, 170 (1974). *Richardson* found that the Court's doctrine on standing prevented reaching the merits of a challenge to the CIA's withholding of information on its expenditures. *Id*.

74. *See* Freedom of Information Act of 1966, Pub. L. No. 89-487, 80 Stat. 250 (codified as amended at 5 U.S.C. § 552 (2012)).

75. U.S. CONST. amend. VI.

76. *See, e.g.*, Weaver v. Massachusetts, 137 S. Ct. 1899, 1905 (2017); Presley v. Georgia, 558 U.S. 209, 210–11, 216 (2010).

77. *See* Press-Enter. Co. v. Superior Court (*Press Enterprise I*), 464 U.S. 501, 503–05 (1984); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 559–63, 580 (1980) (plurality opinion); *see also* Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 409 (1987). The Sixth Amendment right of the defendant is sometimes either

assembly and to petition for redress are sometimes also cited as bases for the public's entitlement to open courts.[78]

As noted, state constitutional provisions often have texts directing openness. Florida offers an exemplar of the depth of commitments to "sunshine laws." Its Constitution of 1839 had a familiar rendition of the "open courts/rights-to-remedies" text,[79] which was updated in 1968 to be gender neutral.[80] A new provision, added in 2002, protected public access to proceedings in other branches of government by giving "[e]very person" rights to "inspect and copy any public record," including materials from the legislative, executive, and judicial branches.[81] That amendment reflects an important substantive point: that an insistence on openness comes from political and social movements; a referendum produced the amendment to the Florida Constitution.[82]

itself the basis of access by third parties or related to a First Amendment right or "freedom" of the public to "listen." *Richmond Newspapers*, 448 U.S. at 576.

78. For example, prisoners have rights of access to bring claims, and in the discussion of such cases, the Court has on occasion referenced petitioning rights. The central decision of *Bounds v. Smith*, 430 U.S. 817, 828 (1977), was limited in *Lewis v. Casey*, 518 U.S. 343, 351 (1996). In finding that states have "affirmative obligations to assure all prisoners meaningful access to the courts," the *Bounds* Court emphasized the role that law libraries and other legal assistance play in helping prisoners prepare for their defense. *Bounds*, 430 U.S. at 824–26. But several years later, the Court in *Lewis* held that "*Bounds* did not create an abstract, free standing right to a law library or legal assistance." *Lewis*, 518 U.S. at 351. Rights of assembly are discussed in *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967).

79. FLA. CONST. of 1839, art. I, § 9 ("That 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.").

80. FLA. CONST. of 1968, art. I, § 21 ("The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.").

81. FLA. CONST. art. I, § 24(a) ("Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state. . . . This section specifically includes the legislative, executive, and judicial branches of government.").

82. Florida had a 1905 public access law applicable to "formal" municipal meetings. Act of May 24, 1905, ch. 5463, 1905 Fla. Sess. Laws 157, 157 (repealed 1974) ("All meetings of any City or Town Council or Board of Aldermen of any City or Town in the State of Florida, shall be held open to the public of any such City or Town, and all Records and Books of any such City or Town shall be at all times open to the inspection of any citizens thereof."). A more general statute protected public access in 1967. Act of July 1, 1967, ch. 67-356, 1967 Fla. Sess. Laws 1147, 1147–48 (codified as amended at FLA. STAT. ANN. § 286.011 (West, Westlaw through the 2017 First Reg. Sess. and Special "A" Sess.)). After a 1978 Constitution Revision Commission had proposed a constitutional provision, which was not enacted, the Florida Supreme Court held that the public records law did not apply to the legislature. *See* Locke v. Hawkes, 595 So. 2d 32, 37 (Fla. 1992).

The 2002 amendment, focused on branches of government other than the judiciary, interacts with Florida's Sunshine in Litigation Act, prohibiting courts from entering an order whose "purpose or effect" is to conceal "a public hazard or any information concerning a public hazard."[83] Also prohibited are court orders and judgments cutting off "any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard."[84] At least twenty other states have statutes or court rules constraining in various ways the ability to make unavailable court documents and outcomes.[85] Some of these obligations came in response to suppression of information in cases alleging abuse of children by members of the clergy or about harms caused by faulty products such as exploding lighters, just as #MeToo is prompting efforts to curb nondisclosure agreements ("NDAs") involving sexual misconduct.[86]

Popular support for making the change followed, resulting in open access at state and local levels. *See* William A. Buzzett & Deborah K. Kearney, *Commentary to 1992 Addition*, art. I, § 24 (1992 Comm. Substitute for House Joint Resolutions 1727, 863 & 2035). As they explain, the Florida Supreme Court's decision

> meant that records of legislators, as well as those of the governor and cabinet officers, at least with respect to the exercise of their constitutional powers, were not subject to the law. The decision caused a stir among the public and particularly the press. Efforts were quickly begun for constitutional change, which concluded with the successful passage of this amendment.

Id; *see also* Sandra F. Chance & Christina Locke, *The Government-in-the Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida's Position as a Leader in Open Government*, 35 FLA. ST. L. REV. 245, 247–57 (2008).

83. FLA. STAT. ANN. § 69.081(7) (West, Westlaw through the 2017 First Reg. Sess. and Special "A" Sess.). In 1999, Florida also required that its Department of Public Health publish on the Internet payment of malpractice claims in excess of a specified amount. *Id*. § 627.912(6)(a) (Westlaw).

84. *Id*. § 69.081(3) (Westlaw).

85. Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 564 (2006); *see also* Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated through Litigation*, 81 CHI.-KENT L. REV. 375, 380 (2006). A list of state open records laws can be found at, *Open Government Guide*, REPORTERS COMM. FOR THE FREEDOM OF THE PRESS (2011), https://www.rcfp.org/open-government-guide [https://perma.cc/Y7WP-FP6S]. *See also* State Public Record Laws, FOIADVOCATES (2018), http://www.foiadvocates.com/records.html [https://perma.cc/M9EX-67G3].

86. New York case law describes the "broad presumption that the public is entitled to access to judicial proceedings and court records." Mosallem v. Berenson, 905 N.Y.S. 2d 575, 578 (N.Y. App. Div. 2010); *see also* N.Y. COMP. CODES R. & REGS. tit. 22, § 216.1(a) (2017). Some states have provisions focused on disclosure of settlements as well. *See, e.g.*, CONN. GEN. STAT. ANN. § 19a-17a (West, Westlaw through 2017 Jan. Reg. Sess.

These state practices are the tip of what at the outset I termed the *doctrinal openness* of courts, supported by an array of constitutional provisions and statutes. Open court directives in state constitutions are but one piece of the scaffolding that supports a shared sense that courts are intrinsically open. Adding to the edifice of openness are rights to jury trials in civil and criminal cases, coupled with criminal defendants' rights to confrontation, cross-examination, and, as mentioned, a "speedy and public trial," as well as English common law traditions.

Atop this mélange of constitutional and common law comes a host of statutes and regulations directing both federal and state judiciaries to publish a wealth of data about themselves. Public records name every judge appointed in the federal and state systems. Statistics on cases come from systems begun in the nineteenth century. In 1871, the Attorney General of the United States began providing compilations on caseloads.[87] That task was taken over in 1939 by the Administrative Office of the United States ("AO"), which works with federal district and appellate courts to file reports annually on the "business" of the federal courts.[88]

and 2017 June Special Sess.) (requiring that, "[u]pon entry of any medical malpractice award or upon entering a settlement of a malpractice claim" against those licensed under other provisions, the entity making payment or the party is to notify the Department of Public Health of "the terms of the award or settlement" as well as to provide a copy along with the complaint and answer); N.J. STAT. ANN. §§ 45:9-22.21 to 9-22.25 (West, Westlaw through 2017) (originally enacted in June of 2003 and requiring that all "medical malpractice court judgments and all medical malpractice arbitration awards" in which a complaining party had received an award within the five most recent years be made available to the public in profiles of physicians and podiatrists licensed to practice in the state of New Jersey); *see also* Med. Soc'y of N.J. v. Mottola, 320 F. Supp. 2d 254 (D. N.J. 2004) (holding New Jersey Health Care Consumer Information Act valid under federal Health Care Quality Improvement Act and U.S. Constitution).

Federal legislation has been proposed but not enacted that would limit the issuance of protective orders for materials provided through discovery and require judges not to enforce provisions in settlements mandating nondisclosure (aside from funds paid) of terms "relevant to the protection of public health or safety." *See* Sunshine in Litigation Act of 2017, H.R. 1053, 115th Cong. § 2(c)(1) (2017).

87. *See* PETER G. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 91–95 (1973); David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 97 (1981).

88. *See* 28 U.S.C. §§ 601, 604, 610 (2012). The Director of the AO files reports annually. *See, e.g.*, *Judicial Business 2016*, ADMIN. OFFICE OF U.S. COURTS, http://www.uscourts.gov/statistics-reports/judicial-business-2016 [https://perma.cc/NBU6-P9WC]. For the history of the development of this administrative apparatus, see Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 937–38 (2000).

This documentation is not only predicated on ideologies promoting open courts; the documentation is also 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 needs for support. The federal judiciary continues to be successful in maintaining its budget allocations even as other segments of the government have suffered cuts. For fiscal year 2017, the federal judiciary requested (and received) some seven billion dollars in discretionary appropriations, a 3.2% increase above fiscal year 2016 funding.[89]

With the advent of PACER (Public Access to Court Electronic Records), computer docketing puts federal court filings into a public database permitting readers to view pleadings and to track the submissions and dispositions in particular cases.[90] As computer-facilitated access replaces labor-intensive searches through file drawers, problems familiar to computer users emerge about how to protect public information while recognizing the privacy interests of individuals.[91] For example, certain forms of personal information, such as Social Security numbers, are redacted. Concern about litigants' vulnerability is also the basis for federal appellate rules limiting remote electronic access by the public (but not the government) to documents in immigration cases.[92]

89. ADMIN. OFFICE OF U.S. COURTS, THE JUDICIARY FY 2018 CONGRESSIONAL BUDGET SUMMARY REVISED i (2017), http://www.uscourts.gov/sites/default/files/fy_2018_congressional_budget_summary_0.pdf [https://perma.cc/AC2Q-P2RB] [hereinafter FY 2018 JUDICIARY BUDGET]; *Judiciary Transmits Fiscal Year 2017 Budget Request to Congress*, ADMIN. OFFICE OF U.S. COURTS (Feb. 12, 2016), http://www.uscourts.gov/news/2016/02/12/judiciary-transmits-fiscal-year-2017-budget-request-congress [https://perma.cc/76B2-YJPB]. For fiscal year 2018, the courts requested $7.19 billion, a 3.8% increase over the previous year. FY 2018 JUDICIARY BUDGET, *supra*, at i.

90. *See* PACER, https://www.pacer.gov [http://perma.cc/94AA-3GCV].

91. *See* David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385, 1387; Karen Eltis, *The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context*, 56 MCGILL L.J. 289, 295–300 (2011); Nancy S. Marder, *From "Practical Obscurity" to Web Disclosure: A New Understanding of Public Information*, 59 SYRACUSE L. REV. 441, 443–50 (2009); *see also Access to Records and Information in CRT Disputes: Policy 001-20151215*, B.C. CIVIL RESOLUTION TRIBUNAL 1–5, 12–17 (2015) [hereinafter British Columbia CRT, *Access to Records*], https://civilresolutionbc.ca/wp-content/uploads/2017/02/Access-to-Info-in-CRT-Case-Records.pdf [https://perma.cc/P542-ZNW8].

92. *See* FED. R. CIV. P. 5.2(a)–(c); FED. R. APP. P. 25(a)(5); Conference on Privacy and Internet Access to Court Files, *Panel Two: Should There be Remote Access to Court Filings in Immigration Cases?*, 79 FORDHAM L. REV. 25, 25 (2010).

Obligations to report judicial statistics exist in the states,[93] albeit often supported by fewer resources than in the federal system. The Court Statistics Act in Illinois is illustrative, as it requires officials to provide "information, statistical data, and reports bearing on the state of the dockets and business transacted by the courts and other matters pertinent to the efficient operation of the judicial system."[94] Implementation can be complex because Illinois, like some other states, does not have a "unified" system. Each county has degrees of autonomy that make data collection challenging, which is also reflected in efforts by the Illinois Task Force on Court Assessments to identify the welter of fees that each county can impose.[95] In short, through constitutional doctrine, rulemaking, litigant filings, task forces, obligations to account for funds, and the need to obtain more, courts are "a huge information system—an entity that receives, processes, stores, creates, monitors, and disseminates large quantities of documents and information."[96]

C. Functional Privatization in Courts, Arbitration, and Online

The shape of this "huge information system" requires further interrogation, as do ideas about its dissemination and its relationship to knowledge and to justice. Here the plot thickens, as I turn from *doctrinal openness* to what happens at a *functional* level, where there is less to see than one would expect.

Four sets of practices (as they are currently formatted) close off public purview. One is the reformatting of rules of court to shift from

93. *See* ROBERT C. LAFOUNTAIN, RICHARD Y. SCHAUFFLER, SHAUNA M. STRICKLAND & KATHRYN A. HOLT, NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 1–2 (2012), http://www.courtstatistics.org/OtherPages/~/media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx [http://perma.cc/NXV9-BYSX]; NAT'L CTR. FOR STATE COURTS, STATE COURT GUIDE TO STATISTICAL REPORTING 1 (2017) http://www.courtstatistics.org/~/media/Microsites/Files/CSP/State%20Court%20Guide%20to%20Statistical%20Reporting%20v%202point1point2.ashx [https://perma.cc/FF23-VWGR]; *Reporting Excellence Awards, 2016*, NAT'L CTR. FOR STATE CTS. (2016), http://www.courtstatistics.org/Other-Pages/Awards.aspx [https://perma.cc/56F7-G4T9].

94. 705 ILL. COMP. STAT. ANN. 125/1 (West, Westlaw through Pub. Acts effective Jan. 8, 2018). The Administrative Office of Illinois Courts ("AOIC")—like its counterparts across the country—issues annual reports containing caseload statistics, disposition information, and more. *See, e.g.*, ADMIN. OFFICE OF ILL. COURTS, ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY 101 (2015), http://www.illinoiscourts.gov/SupremeCourt/AnnualReport/2015/2015_Statistical_Summary.pdf [http://perma.cc/RWF3-8B9J].

95. ILLINOIS COURT ASSESSMENTS 2016, *supra* note 19, at 1–2.

96. RICHARD SUSSKIND, THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES 201 (2008).

adjudication toward management and settlement. Another is the devolution of court authority to agencies that often do not provide ready access to their adjudicatory processes. A third is online dispute resolution, which relies on computer exchanges among disputants and sometimes third parties to resolve conflict. A fourth (that may also use web-based technologies) is the outsourcing to arbitrators or other private providers, who in turn impose mandates (generally enforced by courts) to keep arbitration processes bilateral and confidential.

I do not here debate whether mediation, early neutral evaluation, ODR, arbitration, and other forms of resolution are "good" on the variety of metrics (speed, accuracy, economy, informality, generativity, etc.) that have been discussed.[97] My focus is on the impact of the shifts to these processes on access to knowledge about justice-seeking. My questions are about the ease of knowing their rules, watching their processes, and learning their outcomes under the frameworks shaped through thousands of alternative civil procedural rules.

1. Court-Based Alternative Dispute Resolution

Various forms of ADR are based in courts and organized by national and state statutes, and by local rules that suggest or require the use of mediation, arbitration, and other settlement-focused techniques. Those rules rarely reference the public. To the extent third parties are mentioned, the context is usually an admonition that confidentiality is required of participants in court-based ADR processes.

An example comes from the federal courts. As is familiar, in 1983, and then again in 1993, the Federal Rules of Civil Procedure were revised to promote conflict management and settlement in lieu of adjudication.[98] These changes represent a movement away from the 1938 court-based litigation model (with its due process predicates) to what I have suggested should be called "Contract

97. *See, e.g.*, Deborah Thompson Eisenberg, *What We Know (and Need to Know) about Court-Annexed Dispute Resolution*, 67 S.C. L. REV. 245, 245–47, 262–65 (2016).

98. Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 612–14 (2003) [hereinafter Resnik, *Procedure as Contract*]; *see also* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–80 (1982).

Procedure,"[99] in which judges strive to end cases through agreements.[100]

Central to this shift have been amendments to Rule 16, governing pretrial procedures in civil cases in federal court. In contrast to criminal rules in which court-based activities such as "pleas, sentencing, case conferences, and adjournments" are generally held in courtrooms,[101] the civil rules do not specify that pretrial meetings be open to the public or on the record.[102] As I noted at the outset, some judges do their pretrial work on the bench and on the record. Others do so in chambers, in part based on the view that privacy facilitates agreements and that concessions are more readily made if they cannot be used later at trial or in other proceedings.[103]

Other changes to the Federal Rules also move information away from public access. Discovery materials are no longer routinely filed in courts unless appended to motions; pre-discovery confidentiality agreements have become routine.[104] Settlements conditioned on non-disclosure of terms are commonplace, as reflected both in the NDA acronym for them and by recent accounts of sexual harassment claims that had been settled by requiring silence.[105] Even when

99. Resnik, *Procedure as Contract*, *supra* note 98, at 598.

100. Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 OHIO ST. L.J. 73, 88–104 (2017).

101. Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2175 (2014); *see also* El Vocero de P.R. v. Puerto Rico, 508 U.S. 147, 147–50 (1993); Press-Enter. Co. v. Superior Court (*Press Enterprise II*), 478 U.S. 1, 8–13 (1986); Press Enterprise I, 464 U.S. 501, 505–10 (1984).

Simonson argued that the U.S. Constitution obliges judiciaries to keep all non-trial criminal adjudication open and that, given the decline of jury trials, this right is under-enforced. Simonson, *supra*, at 2177–79, 2206–21. Her examples included the routine closing of arraignments and misdemeanor courtrooms in certain localities and ad hoc exclusions, sometimes based on limited space for observers. *Id*. at 2191–93. Further, she argued that an "audience of locals" was particularly important in that defendants are disproportionately from minority communities and under-represented among the professional participants in courtrooms. *Id*. at 2202–05.

102. Conferencing by telephone is contemplated as an option for scheduling conferences. *See* FED. R. CIV. P. 16 advisory committee's note to 2015 amendment.

103. *See, e.g.*, Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 323–27 (1994).

104. *See* Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 WASH. & LEE L. REV. 2181, 2189–92 (2014). Benham surveyed the use of "return-or-destroy" provisions required as a predicate either to discovery or to settlement, and the relaxed standard for granting protective orders of disclosures made. *Id.*

105. *See* Daniel Hemel, *How Nondisclosure Agreements Protect Sexual Predators*, VOX (Oct. 13, 2017), https://www.vox.com/the-big-idea/2017/10/9/16447118/confidentiality-agreement-weinstein-sexual-harassment-nda [https://perma.cc/55H3-JKT4].

settlements are presented in courts, facets may remain undisclosed.[106]

2. Online Dispute Resolution

ODR is a form of ADR using web-based technologies that can turn computers into venues for dispute resolution.[107] Expanding use of e-commerce and of computer-based government services prompted the turn to ODR,[108] offered sometimes through ad hoc arrangements and increasingly institutionalized. Promotion of this format comes from private entities aiming to expand their markets. Some court-based systems, such as British Columbia, with its new Civil Resolution Tribunal, discussed below, are also advocates of ODR. That court's adoption of ODR illustrates how the categorization of ODR as an alternative *to* courts will become less useful as courts use ODR as a form *of* adjudication.

The advantages proffered are speed, assistance for unrepresented disputants,[109] ease of communication and of information sharing,[110] the potential to generate more cooperative behavior, and methods for parties to come to resolutions. For example, one technique to identify mutually-agreed upon settlement points is through computer-based "blind-bidding systems."[111] Accomplishing these goals varies with the technological sophistication of a particular system.[112] Enthusiasm for doing so runs high, as reflected in a "vision" statement from senior members of the U.K. judiciary committed to enlisting technology to transform civil justice into a unified, paper-free system.[113]

106. *See, e.g.*, SEC v. Citigroup Global Mkts, Inc., 752 F.3d 285 (2d Cir. 2014).

107. *See* Resnik, *Diffusing Disputes*, *supra* note 1, at 2847–48 n.212.

108. For an overview of the various forms of ODR, *see generally* Ayelet Sela, *The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends, and Future Directions*, 21 LEWIS & CLARK L. REV. 635 (2017) [hereinafter Sela, *The Effect of Online Technologies*].

109. *See* Maximilian A. Bulinski & J.J. Prescott, *Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency*, 21 MICH. J. RACE & L. 205, 221 (2016); Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J. L. & PUB. POL'Y 331, 341 (2016).

110. *See* J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993, 2020–26 (2017).

111. *See* Sela, *supra* note 108, at 665–67.

112. *Id*. at 649–67.

113. MINISTRY OF JUSTICE, TRANSFORMING OUR JUSTICE SYSTEM 5 (2016), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf [https://perma.cc/HS29-HPWP]; *see also* Joe Tomlinson, *A Primer on the Digitisation of Administrative Tribunals*, UNIV. OF SHEFFIELD 14–17 (Sept. 12, 2017),

In the United States, ODR is coming to the fore through corporate-based efforts. In what is called a "B2C" or "business-to-consumer" contract, some companies require using ODR. Providers, such as Modria, argue that costs and delays render court-based consumer redress "broken," and that ODR is the useful replacement.[114] Proponents seek to assuage concerns about repeat-player advantages by pointing to the need for businesses to have good reputations that, in turn, require them to be consumer friendly by offering remedies for faulty products or services.[115] Rarely discussed is the absence of competition in some markets, making "shopping" for alternative providers elusive.

Information about third-party involvement in or access to ODR in the United States is sparse. A few online providers have built in "jury-like" mechanisms, whereby disputants can submit conflicts and panels of similarly situated individuals (such as other customers) can provide feedback or resolutions through polling and aggregating opinions.[116] While companies such as eBay are reported to resolve some sixty million disputes a year, in part through software that requires no "human intervention," the underlying data are not available for public inspection.[117] The "corporation as courthouse" in the U.S. system has no mandates to open its doors or its files to third parties.[118]

While the United States provides an example of largely unregulated ODR, the European Union ("EU") and the court system in British Columbia offer models of government-sponsored and

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

114. *See* AMY J. SCHMITZ & COLIN RULE, THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION (2017); *see also* Amy J. Schmitz, *Remedy Realities in Business-to-Consumer Contracting*, 58 ARIZ. L. REV. 213, 262 (2016); *Expanding Access to Justice with Online Dispute Resolution*, TYLER TECH., https://www.tylertech.com/solutions-products/modria [https://perma.cc/WJ4W-XQ45].

115. *See, e.g.*, Schmitz, *supra* note 114, at 236–37.

116. Sela, *The Effect of Online Technologies*, *supra* note 108, at 659–61, 674–75.

117. COLIN RULE, MODRIA, ONLINE DISPUTE RESOLUTION: EXPANDING ACCESS TO JUSTICE 5 (2015), https://www.americanbar.org/content/dam/aba/images/office_president/colin_rule_programs_to_bridge_the_gap_slides.pdf [https://perma.cc/S2JN-AZNB]. In Part IV, I provide some data, based on state mandates for providers to provide information on consumer arbitrations. As I detail, those statutes do not require making files publicly accessible, nor do they address ODR.

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

government-monitored ODR. The EU's interest in facilitating cross-border trades has prompted it to focus on cross-border remedies, especially for relatively small claims.[119] Rule-makers in British Columbia likewise describe the need to lower the costs of small claims.[120] An important distinction for those familiar with ADR in the United States is that the EU's Directives make such procedures supplemental. Member States may require the use of ADR, but such procedures may not be exclusive or preclusive of court-based redress.[121] While seen as an "efficient way of obtaining redress in mass harm situations," the European Commission commends that such procedures should "always be available alongside, or as a voluntary element of, judicial collective redress."[122]

In 2013, EU regulations called for a web-based "platform" for ODR on which disputants could submit complaints. [123] The relevant directive also required registered ADR providers to be "independent, impartial, transparent, effective, fast and fair."[124] The regulations called for public databases (protective of personal data) to enable

119. *See* Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, 2013 O.J. (L 165) 63, 63 ("Ensuring access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes which arise from sales or service contracts should benefit consumers and therefore boost their confidence in the market. That access should apply to online as well as to offline transactions, and is particularly important when consumers shop across borders.").

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

121. Member States may make "participation in ADR procedures mandatory, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system." EC ADR Consumer Disputes Directive 2013/11, *supra* note 119, at 70. Under the law of the Court of Justice of the European Union (CJEU), national bodies interpret this obligation. *See, e.g.*, Case C-75/16, Menini v. Banco Popolare Società Cooperativa, 2017 E.C.L.I. 132, ¶¶ 48, 57, 69–71 (Feb. 16, 2017).

122. Commission Recommendation 2013/396/EU, on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violation of Rights Granted Under Union Law, 2013 O.J. (L 201) 60, 61. Whether ODR in Europe will remain a voluntary option is also a question; some critics argue that consumers are hurt by the ability of providers to require more expensive forms of process to obtain remedies. *See* Maxime Hanriot, *Online Dispute Resolution (ODR) as a Solution to Cross Border Consumer Disputes: The Enforcement of Outcomes*, 2 MCGILL J. DISP. RES. 1, 4 (2016).

123. Regulation (EU) 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, 2013 O.J. (L 165) 1, 2 [hereinafter EU Regulation Online Dispute Resolution Consumer Disputes 524/2013].

124. *Id*. at 4.

monitoring of ODR's use and functioning through compiling consumer complaints and scoreboards that evaluated access and use of the online system.[125] In 2016, the European Commission launched a new "online dispute resolution platform," to be made available in any of the EU's twenty-three official languages.[126] Businesses selling goods or services online are required to tell consumers about the availability of the system, which is part of a larger "E-justice" project.[127] The goal is to make ODR more accessible through "national platform points" offering cross-border online remedies.[128]

Policing of ODR comes not only through regulations, but also from courts. In 2010, in *Alassini v. Italian Telecom*,[129] the Court of Justice for the European Union ("CJEU") concluded that the company's online ADR program was not an impermissible and disproportionate burden on rights to a fair hearing, protected by European treaties. [130] The CJEU's caveats were that courts in Member States had to be able to assess ADR programs' burdensomeness; settlement outcomes could not be binding; the ADR efforts could not impose a "substantial delay" in bringing legal proceedings; time-bars would need to be tolled; forms of judicial "interim measures" would remain available; and settlement procedures could not be available only electronically.[131] Yet even as

125. *Id.* at 2–3. *See generally Alternative and Online Dispute Resolution (ADR/ODR)*, EUROPEAN COMM'N, http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm [https://perma.cc/6WS2-JLSS]. As of 2008, researchers reported that systems in place for consumer ADR in Europe responded to about half a million claims annually, and many of the processes were free of charge. *See* CHRISTOPHER HODGES, IRIS BENÖHR & NAOMI CREUTZFELDT-BANDA, CONSUMER ADR IN EUROPE 18–20, 368, 380 (2012); *see also* Maude Piers, *Europe's Role in Alternative Dispute Resolution: Off to a Good Start?*, 2 J. DISP. RESOL. 279, 279 (2014).

126. EUROPEAN COMM'N, *supra* note 125; *Online Dispute Resolution*, EUROPEAN COMM'N (2016), https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home2.show&lng=EN [https://perma.cc/3L5S-BMTH]; *see also* Commission Regulation 524/2013, of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes, 2013 O.J. (L 165) 1, 11.. Denmark has been described as at the forefront of implementation. *See* Sylvia Cécile Cavaleri, *Digitalizing Dispute Resolution Processes: The Example of Denmark*, *in* VI YEARBOOK OF INTERNATIONAL ARBITRATION AND ADR (Marianne Roth & Michael Geistlinger eds., forthcoming 2018).

127. *See* EUROPEAN COMM'N, *supra* note 125.

128. *See id*.; VĚRA JOUROVÁ, EUROPEAN COMM'N, SETTLING CONSUMER DISPUTES ONLINE 1–3 (2016), http://ec.europa.eu/consumers/solving_consumer_disputes/docs/adr-odr.factsheet_web.pdf [https://perma.cc/9EVC-XZRT].

129. Case C-317/08, Alassini v. Telecom Italia SpA 2010 E.C.R. I-2213.

130. *Id*. at I-2557-8.

131. *Id*. at I-2252-56; *see also* Case C-75/16, Menini v. Banco Popolare Società Cooperativa, 2017 E.C.L.I. 457 ¶ 80.

the EU system insists on public access to information and oversight uncommon in the United States, it has not built in opportunities for third parties to watch or to read the ODR interactions as they take place.

The challenges of creating open ODR systems are addressed by procedures promulgated by British Columbia,[132] which describe the efforts to balance public access and personal privacy in light of the risks that online information could be manipulated and appropriated.[133] As noted, the work in British Columbia also exemplifies the ways in which ODR is shifting from being an ADR process to becoming the court process itself.

The new "Tribunal Decision Process" is part of British Columbia's Civil Resolution Tribunal ("CRT"), which is to "replace a model" of in-person open dispute resolution of property disputes ("generally open to the public") with an ODR process reliant on written submissions, as long as parties do not opt out of that process.[134] The exchanges also aim to encourage negotiation, that, as the policy governing "Access to Records and Information in CRT Disputes" discusses,[135] would (if not online) often takes place in private settings. The policy does not organize access to materials from those exchanges. The policy concluded that it would not seek to make those exchanges public nor was it "not practical to provide the pubic with the opportunity to observe the tribunal Decision Process as it occurs."[136] Instead, the policy created a structure for the public to learn about the decisions and achieve "transparency . . . by posting CRT final decisions on a publicly accessible website"[137] Further, the policy permits members public (upon payment of a fee) then to see the "evidence submitted."[138]

132. *See generally* British Columbia CRT, *Access to Records*, *supra* note 91.
133. *Id*. at 3.
134. *Id.*
135. *Id*. at 1.
136. *Id*.
137. *Id*. at 2.
138. *Id*. at 2. To summarize, the negotiation and mediation phases are distinct from the Tribunal Decision Process, which is the phase where information may be provided publicly. *See Information Access & Privacy Policy*, CIVIL RESOLUTION TRIBUNAL, https://civilresolutionbc.ca/resources/information-access-privacy-policy/#will-the-crt-share-my-information-with-the-public [https://perma.cc/3UYP-CRKZ].

3. Arbitration and Confidentiality Mandates

Turn, then, from resolutions through negotiation in or out of court to arbitration, in which a third party renders a decision. As the term "court-annexed arbitration" reflects, statutes or court-based rules in some jurisdictions send cases to court-appointed arbitrators, who are generally lawyers. If unsatisfied, litigants may sometimes return to court; the disincentive in some jurisdictions is that if a better outcome does not result, fees or costs may be imposed.

Learning about the public dimensions of court-annexed arbitrations requires searching for relevant statutes, looking at local court rules, and calling court staff. For example, in the federal courts, authorization for court-annexed arbitration came in the 1988 Judicial Improvements and Access to Justice Act[139] when Congress permitted ten federal district courts to mandate it for a limited set of cases involving monetary damages under $100,000.[140] The statute also provided for trial *de novo*, with assessment of fees for arbitration if the outcome at trial was less favorable than had been achieved in arbitration.[141]

The 1988 provisions neither addressed the role of the public at such proceedings nor spoke in general about confidentiality. The statute stated that awards were not to be "made known" to judges assigned to the cases, so as to insulate them from being affected by that information if litigation resumed.[142] Further, the materials adduced during arbitration and the awards made were not to be admitted as evidence if a trial took place subsequent to the arbitration.[143]

139. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 101, 102 Stat. 4642, 4644 (1988) (codified as amended at 28 U.S.C. §§ 651–658 (2012)) (creating committee to "examine problems and issues currently facing the courts of the United States" and to "develop a long-range plan for the future of the Federal judiciary").

140. *Id*. § 652, 102 Stat. at 4659. Note that the 1998 revision does not include the limitation precluding cases that include novel issues. In the 1998 Amendment, as well as the original 1988 statute, if the court's jurisdiction rested on 28 U.S.C. § 1343, which is available for cases filed under 42 U.S.C. § 1983, arbitration is not permitted. *See* Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, § 654, 112 Stat. 2993, 2995–96 (codified as amended at 28 U.S.C. § 654(a) (2012)).

141. In the 1988 provisions, Congress had provided that if a party did less well in the de novo trial, fee-shifting was permissible. *See* Judicial Improvements and Access to Justice Act, § 655(a), 102 Stat. at 4661.

142. *Id*. § 654(b), 102 Stat. at 4661 ("Sealing of Arbitration Award").

143. *Id*. § 655(c), 102 Stat. at 4661 ("Limitation on Admission of Evidence"). This constraint adds arbitration proceedings to the limits imposed by federal evidentiary rules that have, since 1975, precluded admission of information obtained in a mediation or

A decade later, the Alternative Dispute Resolution Act of 1998 required that all federal district courts "authorize, by local rule . . . , the use of alternative dispute resolution processes in all civil actions," including the "use of arbitration."[144] Congress specified court authority to appoint additional personnel ("neutrals and arbitrators"),[145] and called for the Federal Judicial Center ("FJC") and the AO to "assist the district courts in the establishment and improvement" of programs.[146] That statute also described arbitrators as "performing quasi-judicial functions" and, therefore, both subject to the rules of disqualification applicable to federal judges and protected by doctrines of immunity from suit developed for judges.[147]

As for third-party access, Congress imposed a general admonition that district courts protect the "confidentiality of the alternative dispute resolution processes" through prohibitions on "disclosure of confidential dispute resolution communications."[148] The statute does not address whether arbitration proceedings constitute "confidential dispute resolution communications."[149] In practice, few of the ninety-four federal district courts use court-annexed arbitration,[150] and as of 2011, the national tally counted fewer than 3000 cases in

settlement conference for the purpose of proving or disproving "the validity or amount of a disputed claim." FED. R. EVID. 408(a).

144. Alternative Dispute Resolution Act of 1998, § 651(b), 112 Stat. at 2993–94. The Act explained that its provisions were not to affect existing programs under the 1988 statute. *Id*. § 654(d), 112 Stat. at 2996. Those provisions altered somewhat the category of cases eligible for arbitration. *See* 28 U.S.C. §654(a) (2012) (authorizing referrals of "any civil action (including any adversary proceeding in bankruptcy) pending before it when the parties consent, except" actions based on "an alleged violation of a right secured by the Constitution of the United States," or when jurisdiction is based "in whole or in part on section 1343 of this title," or when the relief sought in monetary damages exceeds $150,000).

145. Alternative Dispute Resolution Act of 1998, § 651(a), 112 Stat. at 2993.

146. *Id*. § 651(f), 112 Stat. at 2994.

147. *Id*. § 655(c), 112 Stat. at 2996.

148. *Id*. § 652(d), 112 Stat. at 2995 ("Confidentiality Provisions"). Congress called on districts to adopt local rules implementing confidentiality and, in the interim, provided this provision. *Id*.

149. Very little case law cites to the statute. One decision in 2007 that did is *Stepp v. NCR Corp.*, 494 F. Supp. 2d 826, 836–37 (S.D. Ohio 2007). There, an employee had lost a job and alleged age discrimination, and the employer sought confidential compulsory arbitration outside of the courts. *Id*. at 828. The district court rejected the claim that closure failed to vindicate his statutory rights by citing not only the case law on the Federal Arbitration Act, but also 28 U.S.C. § 652(d) (1948), which the court read as providing "confidentiality in court mandated arbitration." *Id*. at 837 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991)).

150. *See* Resnik, *The Contingency of Openness in Courts*, *supra* note 1, at 1657–68.

such programs.[151] Three districts referred more than a hundred cases annually, and others referred none.[152]

What about public access? Because local rules generally do not address this question, district-by-district inquiries were required. As of 2014, in the eight districts that had some court-annexed arbitration, five treated such proceedings as private; three, including two districts reporting a few hundred court-annexed arbitrations, permitted the public to attend.[153] In short, doctrines and structures of openness can be found in some federal court-annexed arbitration programs.[154]

The same can be said for state-based court-annexed arbitration. Illinois provides an example, as it has a relatively large volume of cases involved in its program. In 2011, Illinois courts sent more than 41,000 cases to a "mandatory, non-binding, non-court procedure designed to resolve civil disputes by utilizing a neutral third party."[155] When creating the program, the state's legislature required evaluations of its "effectiveness" to be reported annually.[156] According to staff at the state's clerk's office, the arbitrations are held in

151. According to a survey by FJC researcher Donna J. Stienstra, 2799 cases had been referred to arbitration in her review of forty-nine federal district courts in one year, ending June 30, 2011; the District of New Jersey recorded 1668 court-annexed arbitrations, and the Eastern District of Pennsylvania listed 826 court-annexed arbitrations. *See* DONNA STIENSTRA, FED. JUDICIAL CTR., ADR IN THE FEDERAL DISTRICT COURTS: AN INITIAL REPORT 15, app. 17, 23–24 (2011), https://www.fjc.gov/sites/default/files/2012/ADR2011.pdf [http://perma.cc/NS2J-WRSF].

152. The districts with more frequent use were the District of New Jersey, Eastern District of New York, and the Eastern District of Pennsylvania; in others where formal programs remained, almost none took place. *See* Resnik, *The Contingency of Openness in Courts*, *supra* note 1, at 1661–62, n.133.

153. *Id.* at 1662, n.134.

154. Those proceedings were in the Eastern District of Pennsylvania. *See id.* at 1662, n.133.

155. ADMIN. OFFICE OF THE ILL. COURTS, COURT-ANNEXED MANDATORY ARBITRATION 1 (2011), http://www.state.il.us/court/Administrative/ManArb/2011/ManArbRpt11.pdf [http://perma.cc/9FDM-BK9H]. Illinois's mandatory arbitration is akin to abbreviated trials. As of 2011, 41,302 cases were referred to arbitration, about three-quarters were settled or dismissed prior to arbitration, and about 600 of those that did arbitrate proceeded from arbitration to trial. *See id*. at 5.

156. 735 ILL. COMP. STAT. ANN. 5/2-1008A (West 2011), *repealed by* Act of August 24, 2012, Pub. Act No. 97-1099, § 10, 2012 Ill. Laws 5652. Separate reporting is no longer required; data on the number of arbitrations have become part of the annual reports. *See* ADMIN. OFFICE OF THE ILL. COURTS, ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY 101 (2015), http://www.illinoiscourts.gov/SupremeCourt/AnnualReport/2015/2015_Statistical_Summary.pdf [http://perma.cc/RWF3-8B9J]; Telephone Interview with Staff, Admin. Office of Ill. Courts (Nov. 24, 2014).

courthouses or other buildings, and the proceedings are open to the public.[157] Outcomes become part of a court-created database.[158]

These open practices are not idiosyncratic innovations. Public access to arbitrations is part of a long tradition, reflected in documents on English arbitrations dating from pre-Roman Britannia through the Elizabethan Age, that gave third-party arbitrators authority to resolve disputes and included public access to many proceedings.[159] So too did arbitrations in the eighteenth and nineteenth centuries in the United States. Historians have identified examples of arbitrations conducted like trials, albeit without juries, and many proceedings included spectators.[160] Moreover, twentieth-century labor arbitrations, embedded in collective bargaining agreements and committed to social justice ends, were not only publicly enabled, but also produced contractual agreements that were accessible to the public.[161]

Thus, although today's purveyors of arbitration aim to make confidentiality its hallmark, arbitration has a history that includes some publicly accessible proceedings. But contemporary legal rules and practices have generated *structures of privatization* that aim to make arbitration appear to be "naturally" closed as if, whether involving commercial differences between two corporations or between

157. *See arbitrator's Bench Book*, DU PAGE CTY., ILL., EIGHTEENTH JUD. CIR. 14 (3d rev. 2011), http://www.dupageco.org/Courts/Docs/34145 [http://perma.cc/Q4ZM-9KNU]. In October of 2017, I reconfirmed with staff at the Administrative Office of the Illinois Courts that arbitrations are open to the public. Telephone Interview with Staff, Admin. Office of Ill. Courts (Oct. 2017).

158. Posted reports from 2004 to 2011 can be found on the Illinois courts' websites. *See Court-Annexed Mandatory Arbitration Annual Reports*, ILL. COURTS., http://www.state.il.us/court /Administrative/ManArb/default.asp [http://perma.cc/L984-J7VJ]. The numbers reported in the 2015 calendar year report were that 26,880 cases were referred or pending and that 4527 arbitration hearings were held, with 326 cases thereafter proceeding to trial. ADMIN. OFFICE OF THE ILL. COURTS, ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY 101 (2015), http://www.illinoiscourts.gov/SupremeCourt/AnnualReport/2015/ 2015_Statistical_Summary.pdf [http://perma.cc/RWF3-8B9J].

159. *See generally* DEREK ROEBUCK, EARLY ENGLISH ARBITRATION (2008); DEREK ROEBUCK, THE GOLDEN AGE OF ARBITRATION: DISPUTE RESOLUTION UNDER ELIZABETH I (2015).

160. Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 468 (1984); AMALIA KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF THE AMERICAN ADVERSARIAL LEGAL REGIME, 1800-1877, at 191–92 (2017); James Oldham & Su Jin Kim, *Arbitration in America: The Early History*, 31 L. & HIST. REV. 241, 246–51 (2013).

161. *See* Amalia D. Kessler, The Public Roots of Private Ordering: An Institutional Account of the Origins of Modern American Arbitration 9–10 (Aug. 2017) (unpublished manuscript) (on file with author).

consumers and manufacturers, privacy is requisite. Yet, when Congress in 1925 enacted what has come to be called the Federal Arbitration Act ("FAA"),[162] it provided windows into the decisions rendered by locating enforcement proceedings in public courts. While motions seeking to vacate arbitrations are a small fraction of federal court case filings, the statutory structure does not shield them from public scrutiny.[163] Rather, if seeking to vacate, confirm, or modify awards, parties must file information on the arbitrations.[164] Thus, the FAA itself "appears to presume that arbitration materials could become public."[165]

Likewise, the 2000 Uniform Arbitration Act does not propose that state statutes include confidentiality mandates. Rather, a comment on judicial enforcement of arbitral awards reminds users that "[b]ecause of the involvement of important legal rights, a court should review more carefully claims of confidentiality, trade secrets, privilege, or other matters protected from disclosure."[166]

The contemporary aura of privacy that shrouds arbitration comes in part from the FAA's history: its purpose was to enable businesses to avoid courts.[167] The idea was that bespoke contracts could specify the terms, including requiring confidentiality. The FAA's major proponents—the American Arbitration Association ("AAA," founded in

162. *See* Federal Arbitration Act, Pub. L. No. 68-401, § 4, 43 Stat. 883, 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2012)); Resnik, *The Contingency of Openness in Courts*, *supra* note 1, at 1675–76.

163. One analysis of motions filed from 2011 to 2014 identified 294 motions to vacate. *See* Diana Li, Vacatur of Arbitral Awards: An Empirical Study of Access to Federal Court Review 18 (May 25, 2017) (unpublished manuscript) (on file with author).

164. *See* 9 U.S.C. § 13 (2012); *see also* PDV Sweeny, Inc. v. ConocoPhillips Co., No. 14-cv-5183, 2014 WL 4979316, at *2 (S.D.N.Y. Oct. 6, 2014) (concluding that arbitral award actions are "judicial documents" that are presumptively open); Martis v. Dish Network, No. 1:13-cv-1106, 2013 WL 6002208, at *1 (W.D. Mich. Nov. 12, 2013) (same).

165. Richard Frankel, *State Court Authority Regarding Forced Arbitration After* Concepcion, *in* POUND CIVIL JUSTICE INST., FORCED ARBITRATIONS AND THE FATE OF THE 7TH AMENDMENT: THE CORE OF AMERICA'S LEGAL SYSTEM AT STAKE? 55, 70 (2014), http://www.poundinstitute.org/sites/default/files/docs/2014PoundReport2.24.15.pdf [http://perma.cc/MFQ9-VQKW].

166. UNIF. ARBITRATION ACT § 18 cmt. 1 (2000). As of 2017, the revised uniform law has been adopted by nineteen jurisdictions and introduced in four more jurisdictions. *See Arbitration Act (2000)*, UNIF. LAW COMM'N, http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20(2000) [http://perma.cc/X6DW-5HXH].

167. *See Joint Hearings Before the Subcomms. of the Comms. on the Judiciary on S. 1005 and H.R. 646*, 68th Cong., 11 (1924) (statement of Charles L. Bernheimer, Chairman, Committee on Arbitration, Chamber of Commerce of the State of New York); H.R. REP. NO. 68-96, at 1–2 (1924).

1925) and the New York Chamber of Commerce—argued the virtues of privacy for commercial actors.[168]

Since 1925, the AAA has been a dominant provider of services and has helped to shape the presumption of confidentiality. The AAA's lists of arbitrators are not in a public directory.[169] Further, in its ethics code, the AAA commits the organization and arbitrators working at its behest to keep information that they obtain private.[170] Watching the process is not, under current rules, an option, but, in recent years, the AAA has published (through LexisNexis and Westlaw) redacted versions of some decisions, which are termed "awards."[171] Other major domestic arbitration providers advertise

168. *See* FRANCES KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS 10, 26–27 (1948).

169. *See The AAA National Roster of Arbitrators and Mediators*, AM. ARBITRATION ASS'N, https://www.adr.org/aaa-panel [http://perma.cc/5A8C-68ZX]. Public access to information about AAA arbitrators is available only when seeking to select arbitrators. *See AAA Arbitrator Select*, AM. ARBITRATION ASS'N, https://www.adr.org/sites/default/files/document_repository/AAA_Arbitrator_Select_2pg.pdf [http://perma.cc/FL9H-33US] (explaining how, after a party "completes a detailed filing form . . . [t]he AAA provides a list of arbitrators whose credentials best match the criteria specified" by a party on a detailed filing form). A party choosing the "list only" service fills out a two-page form in which the party can indicate the dollar amounts of the claim and counterclaim if any; the nature of the dispute; the "reason for choosing AAA arbitrator select"; and the "desired qualifications for arbitrator(s)." *Request for Arbitrator Select: List Only*, AM. ARBITRATION ASS'N, https://www.adr.org/sites/default/files/Request%20for%20Arbitrator%20Select%20List%20only.pdf [http://perma.cc/E293-3A64].

The AAA then provides lists of sets of arbitrators and their fees (ranging from $750, $1,500 to $2,000). *AAA Arbitrator Select*, *supra*. Searching and selection comes with a service charge of $500 for each arbitrator appointed. *Id.* In addition, state laws seeking information on arbitration providers offer another route to information, as do some federal regulations. *See infra* notes 229-249 and accompanying text. Those entities in compliance provide spreadsheets on which the names of arbitrators can be found. *See, e.g.*, *Consumer Arbitration Statistics*, AM. ARBITRATION ASS'N (2015), https://www.adr.org/sites/default/files/document_repository/ConsumerReportQ3_2017.xlsx [https://perma.cc/RK3L-D46V].

170. Arbitrators working under the AAA adhere to its code of ethics. For example, the Commercial Disputes Ethics Code provides: the "arbitrator should keep confidential all matters relating to the arbitration proceedings and decision." *The Code of Ethics for Arbitrators in Commercial Disputes*, AM. ARBITRATION ASS'N 7 (Mar. 1, 2004), https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf [https://perma.cc/24B4-LVNX]; *see also AAA Statement of Ethical Principles*, AM. ARBITRATION ASS'N, https://www.adr.org/StatementofEthicalPrinciples [https://perma.cc/SE3Y-RUX2?type=pdf].

171. *See Consumer Due Process Protocol: Statement of Principles of the National Consumer Disputes Advisory Committee*, AM. ARBITRATION ASS'N 27–28 (Apr. 17, 1998), https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20(1).pdf [https://perma.cc/T2AQ -NYNE] ("Unlike court proceedings, however, the general public has not right to attend arbitration proceedings; if the parties agree, moreover, attendance at hearings may be severely restricted."). For publication,

confidentiality as a signature of their processes. Their hearings are generally closed, and their rules permit arbitrators to bar third parties from attending hearings.[172]

But a distinction needs to be drawn between what information arbitrators and institutional providers can (or should) disclose and what parties can say about what happened to them. In the context of arbitrations imposed on consumers and employees by the providers of goods, services, and jobs,[173] some repeat players have unilaterally sought to insist on secrecy.[174]

Before turning to the legality of such rules, the question to be asked is why they exist. The model arbitration for the FAA was a business-to-business transaction, in which the argument for confidentiality rested on ideas that the participants were both repeat players and that public conflicts would make future dealings more difficult or costly. But when a repeat player is in conflict with a one-shot actor (for example, when a wireless service provider is challenged on billing by a customer), the only privacy interest is a provider's desire not to have other similarly-situated consumers know of the harms alleged, the positions taken, or the remedies accorded.

That one-sidedness prompted some courts to reject enforcement of confidentiality clauses and, at times, of the arbitration mandates in

see, for example, Lexis Advance (typing "AAA Employment Arbitration Awards and AAA Labor Arbitration Awards" to access those collections); *see also Consumer Arbitration Rules*, AM. ARB. ASS'N, Rule 4-43(c) (Sept. 1, 2014), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425& [https://perma.cc/3LZB-UGDP] ("The AAA may choose to publish an award rendered under these Rules; however, the names of the parties and witnesses will be removed from awards that are published, unless a party agrees in writing to have its name included in the award.").

172. *JAMS Comprehensive Arbitration Rules & Procedures*, JUDICIAL ARBITRATION & MGMT. SERVS. (July 1, 2014), http://www.jamsadr.com/rules-comprehensive-arbitration/#Rule%2026 [http://perma.cc/45KY-C2PZ] (limiting public access to proceedings before the Judicial Arbitration and Management Services); *Rules of Conditionally Binding Arbitration*, BETTER BUS. BUREAU, https://www.bbb.org/bbb-dispute-handling-and-resolution/dispute-resolution-rules-and-brochures/rules-of-conditionally-binding-arbitration/ [http://perma.cc/S386-Z69L] ("It is our policy that records of the dispute resolution process are private and confidential.").

173. *See* Resnik, *Diffusing Disputes*, *supra* note 1, at 2872–73; Erin O'Hara O'Connor, *Protecting Consumer Data Privacy with Arbitration*, 96 N.C. L. REV. (forthcoming 2018); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. (forthcoming 2018).

174. *See* Resnik, *Diffusing Disputes*, *supra* note 1, at 2895. The use of such clauses is also the subject of Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 Y.B. ARB. & MEDIATION 28 (2015).

which they were embedded.[175] But more recent case law, while acknowledging that repeat players gain asymmetrical knowledge, condones such practices, sometimes by noting (without any data) that the advantages derived are not so significant as to bar their use.

An example of a secrecy provision comes from a clause imposed in 2002 (and since withdrawn) by AT&T instructing that: "Neither you nor [the company] may disclose the existence, content or results of any arbitration or award, except as may be required by law or to confirm and enforce an award."[176] In 2003, the Ninth Circuit held that text unconscionable because, while "facially neutral, confidentiality provisions usually favor companies over individuals," AT&T could ensure that "none of its potential opponents have access to precedent" that AT&T had.[177] In contrast, other circuits did not find such provisions objectionable.[178] Some of those decisions posited

175. Examples of rulings that arbitration clauses remain enforceable even with confidentiality requirements and that question of the enforceability of confidentiality itself goes at least initially to arbitrators include *Borgarding v. JPMorgan Chase Bank*, No. CV 16-2485 (RAOx), 2016 WL 8904413, at *9 (C.D. Cal. Oct. 31, 2016) (citing Kilgore v. KeyBank, 718 F.3d 1052, 1059 n.9 (9th Cir. 2013) (en banc)) and Velazquez v. Sears, Roebuck & Co., No. 13CV680-WQH-DHB, 2013 WL 4525581, at *5–6 (S.D. Cal. Aug. 26, 2013) (citing *Kilgore v. KeyBank*, 718 F.3d 1052, 1059 n.9 (9th Cir. 2013) (en banc)).

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

177. *Id*. at 1151–52. The Ninth Circuit in *Pokorny v. Quixtar, Inc*., 601 F.3d 987 (9th Cir. 2010), found unenforceable ADR provisions, including those requiring confidentiality, where they created one-sided advantages; "while handicapping the Plaintiffs' ability to investigate their claims and engage in meaningful discovery, the confidentiality provision does nothing to prevent [the defendant] from using its continuous involvement in the [dispute resolution] process to accumulate a 'wealth of knowledge' on how to arbitrate future claims." 601 F.3d at 1002 (quoting *Ting*, 319 F.3d at 1152); *see also* Narayan v. Ritz-Carlton Dev. Co., 400 P.3d 544, 555 (Haw. 2017); Schnuerle v. Insight Commc'ns Co., 376 S.W.3d 561, 578–79 (Ky. 2012); McKee v. AT&T, 191 P.3d 845, 858–59 (Wash. 2008); Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 764–65 (Wash. 2004). Ninth Circuit case law was modified by the ruling in *Kilgore v. KeyBank*, 718 F.3d 1052 (9th Cir. 2013) (en banc). The decision concluded that the existence of a confidentiality clause in itself was not a sufficient basis for avoiding the obligation to arbitrate. *Id*. at 1058. The ruling generally shifted decision-making power on the validity of confidentiality clauses from courts to arbitrators. *Id*. at 1059 n.9. The ability of states to use doctrines of unconscionable contracts to limit confidentiality remains, but is constrained by Supreme Court case law closely examining the basis for denying enforcement of arbitration obligations to determine whether the state courts have failed to follow its edicts on the scope of the FAA. *See* Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1426 (2017); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013).

178. *See* Guyden v. Aetna Inc., 544 F.3d 376, 384–85 (2d Cir. 2008); Iberia Credit Bureau Inc. v. Cingular Wireless, 379 F.3d 159, 175–76 (5th Cir. 2004); Parilla v. IAP Worldwide Serv., VI, Inc., 368 F.3d 269, 279–81 (3d Cir. 2004); *see also* African Methodist Episcopal Church, Inc. v. Smith, 217 So. 3d 816, 825–26 (Ala. 2016). A court concluded that a for-profit educational service could seek an injunction against former students to

that arbitration was itself ordinarily private. As one court wrote, "confidentiality clauses are so common in the arbitration context" that court-imposed limits on confidentiality would undermine the "character of arbitration itself."[179]

In 2017, the Ninth Circuit returned to the question, prompted in part by shifts in California law, and the Circuit tempered its prior constraints. Under the law as currently explained by a lower court, "the risk of repeat-player advantage does not render unenforceable an arbitration agreement containing a confidentiality clause."[180] Required, however, is that confidentiality provisions include an "exception" that permitted parties (at least in theory) to negotiate about confidentiality.[181]

How common are confidentiality clauses in arbitration mandates? A 2015 study by the Consumer Financial Protection Bureau ("CFPB") examined samples of arbitration provisions in credit-card documents issued from 2010 to 2012. The CFPB found that some credit card markets (such as student loans) imposed confidentiality more frequently than did wireless service providers, which, during the time of the study, did not have such clauses.[182]

Yet many people (lawyers included) have come to assume that they cannot disclose outcomes because they think arbitrations are confidential. Institutional providers such as the AAA do not discourage such impressions. Rather, the "AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves."[183]

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prevent them from disclosing the outcomes of arbitration. ITT Educ. Servs., Inc. v. Arce, 533 F.3d 342, 348–49 (5th Cir. 2008).

179. *Guyden*, 544 F.3d at 385 (quoting *Iberia Credit Bureau*, 379 F.3d at 175).

180. Herrera v. CarMax Auto Superstores Cal., LLC, No. CV–14–776–MWF (VBKx), 2014 WL 3398363, at *10 (C.D. Cal. July 2, 2014) (citing Sanchez v. CarMax Auto Superstores California, LLC, 168 Cal. Rptr. 3d 473, 481–82 (Cal. Ct. App. 2014)).

181. *See* Poublon v. C.H. Robinson Co., 846 F.3d 1251, 1266 (9th. Cir. 2017) (citing Sanchez v. CarMax Auto Superstores California, LLC, 168 Cal. Rptr. 3d 473, 481–82 (Cal. Ct. App. 2014)). A district court thereafter drew a distinction between clauses that had such exceptions and those that did not; the court held that a confidentiality clause by a national insurance plan that did not include options for its opponents was unenforceable. Fox v. Vision Serv. Plan, No. 2:16-cv-2456, 2017 WL 735735, at *8 (E.D. Calif. Feb. 24, 2017). As the judge explained, the insurer could "discipline doctors across the country" but with the confidentiality provision, doctors would have no "access to any information" about the treatment of other doctors using the same dispute resolution process. *Id*. In contrast, the repeat player participated in all disputes and therefore had "access to information and precedents set in other hearing." *Id*.

182. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 15, § 2, at 52.

183. *AAA Ethical Principles*, *supra* note 172.

I have focused on the lower courts and not on doctrine from the U.S. Supreme Court because it has not directly addressed asymmetrical confidentiality mandates. But in the context of discussing bans on class actions in arbitration,[184] justices have mentioned confidentiality as a desired attribute of arbitration that could be undermined if class actions were permitted. The topic emerged after the Court noted the potential for class arbitrations and the AAA had promulgated rules to govern such proceedings. Those rules commented that "the presumption of privacy and confidentiality" did not apply.[185] In 2010, Justice Alito quoted that provision as illustrative of the "fundamental changes" that class arbitrations would impose on the proceedings.[186] Likewise, Justice Scalia noted in 2011 in his majority decision in *AT&T Mobility LLC v. Concepcion*[187] that confidentiality "becomes more difficult" with class action arbitrations.[188]

IV. REPEAT PLAYERS, COSTS, AND THE IMPACT OF BANNING COLLECTIVE ACTION

Taking steps to identify oneself as harmed and locating the source are requisite to seeking redress; "naming, blaming, and claiming" are difficult for individuals to do.[189] Joining others makes it easier to proceed. Class and other forms of collective actions provide infusions of knowledge and resources, typically by way of lawyers.[190] The legitimacy of the resolution of such representative actions hinges on the formation of at least a nominal relationship among representatives, courts, and absentees. Since 1966, in federal class

184. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011). The permissibility of bans on class actions in employment is pending before the Court in the 2017-2018 term. The question is whether the rights to collective actions under the National Labor Relations Act are buffers against bans on class actions. *See* Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1155–56 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); Murphy Oil USA, Inc. v. NLRB, 808 F.3d. 1013, 1019–20 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017); *see also* Convergys Corp. v. NLRB, 866 F.3d 635, 637–39 (5th Cir. 2017).

185. AM. ARBITRATION ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS 9(a) (2003), http://apps.americanbar.org/labor/lel-annualcle/08/materials/data/papers/018.pdf [https://perma.cc/EE25-VXX8].

186. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686 (2010).

187. 563 U.S. 333 (2011).

188. *Id*. at 348.

189. Austin Sarat, *Exploring the Hidden Domains of Civil Justice: "Naming, Blaming, and Claiming" in Popular Culture*, 50 DEPAUL L. REV. 425, 426–27 (2000).

190. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 685–87, 714–17 (1940).

actions where damages are sought, the Federal Rules of Civil Procedure have insisted that notice be provided at certification of the pendency of the claim.[191] Although people often do not respond to such notices,[192] that mechanism forces the fact of a claim into public view.[193]

This form of publicity is on the wane because of class action bans in courts and in arbitration. The argument advanced in favor of the preclusion of group-based claims is that individual arbitration provides an "effective" alternative.[194] As the lawyer for the Chamber of Commerce, which opposed efforts in 2016 by the CFPB to limit class action bans, put it: arbitration "empowers individuals, freeing them from reliance on lawyers" and makes "dispute resolution easy to access and claims easy to prosecute."[195] But, as my opening discussion forecasts and as I detail below, the evidence available points in the opposite direction: individual consumers do not use arbitration.

A. The Rarity of Single-File Consumer Claims

To learn about evidence of "empowerment" through consumer arbitration practices, the CFPB surveyed a three-year period in six financial services markets involving tens of millions of customers.[196] That research demonstrated that individuals infrequently bring claims

191. *See* Resnik, *"Vital" State Interests*, *supra* note 11, at 1790.

192. *See, e.g.*, Nicholas M. Pace & William B. Rubenstein, *How Transparent Are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data* 7 (RAND Inst. for Civil Justice, Working Paper No. WR-599-ICJ, 2008), http://www.billrubenstein.com/Downloads/RAND%20Working%20Paper.pdf [https://perma.cc/JX9W-EYQ9].

193. Rules for class arbitrations have been modeled after court class action rules, and therefore, as Justice Scalia correctly observed in *AT&T v. Concepcion*, class actions—in court or arbitration—make confidentiality "more difficult." 563 U.S. at 348.

194. In the 1980s, as the U.S. Supreme Court expanded its interpretation of the reach of the FAA, the Court launched the argument that arbitration was an "effective" means of vindicating federal statutory rights in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). That decision was when the Court first applied the FAA to preclude litigation of a federal statutory right. *Id*. at 637–38. For discussion of the "adequacy" test's application, evolution, and its limits, see Resnik, *Diffusing Disputes*, *supra* note 1, at 2884–90.

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

196. *See* CFPB 2015 ARBITRATION STUDY, *supra* note 15, at §1.4.1, 9, §1.4.3, 11.

in arbitration; the CFPB located about 400 filings brought by consumers in each of the three years studied.[197]

Another source of data comes from a few states that statutorily require consumer-ADR providers to publish information on use.[198] California's statute, enacted in 2002 and amended in 2014, calls for providers of arbitrations to make available information in "a computer-searchable format" on the web.[199] The information required to be publicized under this law includes "each consumer arbitration" (including the name of non-consumer parties who are corporations or other business entities); the "type of dispute" (by wage brackets for employees); whether an attorney represented the consumer; the time

197. The six markets were "credit card; checking account/debit cards; payday loans; prepaid cards; private student loans; and auto loans." *Id*. at § 1.4.3, 11.

198. Lexis and Westlaw also allow subscribers to search the texts of arbitral awards provided by the AAA with some redactions. *See, e.g.*, *Search of Arbitral Awards Database*, LEXIS ADVANCE, https://advance.lexis.com (type "AAA Employment Arbitration Awards" or "AAA Labor Arbitration Awards" into search bar to access those collections).

199. Act of Sept. 30, 2002, ch. 1158, sec. 1, § 1281.96(a), 2002 Cal. Stat. 7502, 7502 (codified as amended at CAL. CIV. PROC. CODE § 1281.96(a) (West, Westlaw through 2017 Reg. Sess.)); Act of Sept. 30, 2014, ch. 870, sec. 1, § 1281.96(a), 2014 Cal. Stat. 5671, 5671 (codified as amended at CAL. CIV. PROC. CODE § 1281.96(a), (b) (West, Westlaw through 2017 Reg. Sess.)) (originally enacted in 2002, effective 2003, and amended in 2014). Given that I gathered information initially for AAA filings in 2009-2013 and that its reporting was governed by the mandates of California's 2003 statute, the quoted provisions in the text are from the 2003 version of the statute.

The 2014 statute made a few modifications. California required that "[t]he information required by this section shall be made available in a format that allows the public to search and sort the information using readily available software." Act of Sept. 30, 2014, ch. 870, sec. 1, § 1281.96(b), 2014 Cal. Stat. at 5672 (codified as amended at Cal. CIV. PROC. CODE § 1281.96(b) (Westlaw)). Furthermore, the 2014 statute mandated that data are to be "directly accessible from a conspicuously displayed link." *Id.* The statute—in 2003 and in 2014—also requires that paper copies be provided upon request, exempts companies doing fewer than fifty yearly consumer arbitrations from web-based quarterly reporting, and protects companies from liability for providing the information. *See* Cal. CIV. PROC. CODE § 1281.96(a), (c)(2), (e); Act of Sept. 30, 2014, ch. 1158, sec. 1, §1281.96(a), (c)(2), (3), 2014 Cal. Stat. at 5671–5672 (codified at Cal. CIV. PROC. CODE § 1281.96 (Westlaw)); Act of Sept. 30, 2002, ch. 1158, sec. 1, § 1281.96(b)(1)–(2), (d) 2002 Cal. Stat. 7502–03 (codified as amended at Cal. CIV. PROC. CODE § 1281.96 (Westlaw)). The 2014 amendment added additional disclosure requirements, including whether "arbitration was demanded pursuant to a pre-dispute arbitration clause and, if so, whether the pre-dispute arbitration clause designated the administering arbitration company." Act of Sept. 30, 2014, ch. 870, sec. 1, § 1281.96(a)(1), 2014 Cal. Stat. at 5671 (codified at Cal. CIV. PROC. CODE § 1281.96(a)(1) (Westlaw)).

Maryland, Maine, and the District of Columbia enacted similar provisions after California's 2002 enactments. *See* D.C. CODE ANN. § 16-4430 (West, Westlaw through Dec. 12, 2017); ME. REV. STAT. ANN. tit. 10, § 1394 (West, Westlaw through 2017 First Reg. Sess.); MD. CODE ANN., COM. LAW § 14-3903 (West, Westlaw through 2017 Reg. Sess.).

from when a demand to arbitrate was made until disposition; the mode of disposition ("withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing"); the prevailing party; the amount sought; the amount awarded and other relief provided; and the arbitrator's name, fee, and the fee's allocation among the parties. [200]

Not all providers comply with California's mandate. According to a 2013 study, *Reporting Consumer Arbitration Data in California*, eleven of the twenty-six entities identified as arbitration providers filed some—but not all—of the required information.[201] A 2017 follow-up reported that thirty-two entities offered consumer arbitration services, eleven (about one-third) posted some data, and three met all the formal requirements of California's law[202] One of those providers largely in compliance was the American Arbitration Association, which puts "Consumer Arbitration Statistics" on its webpage and states that the data are "updated on a quarterly basis, as required by law."[203] The AAA is also the designated dispute resolution provider for AT&T.[204] Because I wanted to learn about how much consumers used single-file arbitration, I focused on AT&T, which had succeeded in the Supreme Court when arguing that its ban on collective actions was enforceable under the FAA. Working with adept and thoughtful research assistants, we culled the data that AAA posted on its website to learn about claims brought against or by AT&T.

200. CAL. CIV. PROC. CODE § 1281.96(a) (Westlaw).

201. DAVID J. JUNG, JAMIE HOROWITZ, JOSE HERRERA & LEE ROSENBERG, PUB. LAW RESEARCH INST., REPORTING CONSUMER ARBITRATION DATA IN CALIFORNIA: AN ANALYSIS OF COMPLIANCE WITH CALIFORNIA CODE OF CIVIL PROCEDURE §1281.96, at 9–12, 52–53 (2013), http://gov.uchastings.edu/docs/arbitration-report/2014-arbitration-update [http://perma.cc/9M5X-8LH2]. The remaining fifteen companies did not publish any disclosure report on their websites. *Id*. at 10.

202. PUB. LAW RESEARCH INST., U.C. HASTINGS COLL. OF THE LAW, ARBITRATION REPORTING IN CALIFORNIA: COMPLIANCE WITH CCP §1281.96, at 4 (2017), http://carsfoundation.org/pdf/arbitration_UC-Hastings-report_final.pdf [https://perma.cc/W8CB-TAVY]. Those three were ADR Services, Arts Arbitration and Mediation Services (AAMS), and JAMS. *Id.* at 6.

203. *AAA Consumer Arbitration Statistics*, AM. ARBITRATION ASS'N (2017) https://www.adr.org/consumerarbitrationstatistics [https://perma.cc/AFV9-W2SQ]. The 2017 Hastings Report described the AAA as a "good," in that it complied with much of the substance of the California requirements in 2017, but that study did not list the AAA as one of the top three compliant providers because the AAA's website did not use some of the statutory language, which makes web-based searches more difficult. *See* PUB. LAW RESEARCH INST., *supra* note 200, at 24.

204. *See Resolve a Dispute with AT&T via Arbitration*, AT&T, https://www.att.com/esupport/article.html#!/wireless/KM1045585 [https://perma.cc/2PXP-XE8R].

Before detailing the results, caveats are in order. A first limitation is the absence of access to the underlying materials, which are held privately. As the AAA explains, it does not independently verify what arbitrators report to it.[205] A second problem is that coding errors can occur at both individual and aggregate levels. For example, when researching consumer arbitration between 2015 and 2016, we identified sixty-two cases in the set that were described as seeking the same amount ($607,525.40) and in which each consumer was listed as having received the same award ($585.71). AAA research staff responded to our inquiries, identified a computer coding error affecting these cases as well as other cases, and posted corrected data. But no red flags told other researchers that the data had been corrected.[206] While a vivid example of a potential error may be found through culling thousands of entries and then seeking clarification, the general public has no systematic method of checking the accuracy of the data posted by AAA.

Of course, researchers on court-based information know well that such data are neither pristine nor comprehensive. For example, lawyers in the federal system fill out civil cover sheets that require the selection of a single cause of action for each case filed.[207] Yet those of us who write complaints regularly plead more than one legal basis on which to proceed. Further, searching the electronic database to learn about rulings at different phases of cases is challenging.[208] Moreover, in the federal system, access to the electronic system is costly unless individuals or organizations fit the categories for lower charges or exemptions. Filings related to administrative adjudication raise yet other problems, as no comprehensive database hosts the

205. *See* AM. ARBITRATION ASS'N, *supra* note 204 ("Any 'prevailing party' information contained with this website/document, has been provided solely by the arbitrator(s) to an arbitration. The AAA has not reviewed, investigated, or evaluated the accuracy or completeness of the arbitrator's/arbitrators' determination of the 'prevailing party' and makes no representations regarding the accuracy or completeness of this information."). The AAA has upon occasion opened its own files to researchers.

206. Email from Ryan Boyle, Vice President, Statistics & In-House Research, AM. ARBITRATION ASS'N, to Judith Resnik (Sept. 25, 2017) [hereinafter 2017 Email from Ryan Boyle] (on file with author).

207. *Civil Cover Sheet, JS 44*, U.S. COURTS (2017), http://www.uscourts.gov/sites/default/files/js_044_1.pdf [https://perma.cc/Y9MJ-ZW9E].

208. *See* ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 145–48 (2017); Deborah R. Hensler, *Happy 50th Anniversary, Rule 23! Shouldn't We Know You Better After All this Time?*, 165 U. PA. L. REV. 1599, 1620–21 (2017); Miguel de Figueiredo, Alexandra D. Lahav & Peter Siegelman, *Do Judges Respond to Incentives? The Effects of the Six Month List* 15–16, (July 20, 2017) (unpublished draft), https://ssrn.com/abstract=2989777 [https://perma.cc/9QY4-UD9Y].

materials.[209] Nonetheless, because court records are presumptively public, third-parties have the possibility of looking at the underlying materials.

The arbitration statistics reported here have, therefore, to be read with an appreciation for the potential for errors and incompleteness. Our work with these materials entailed two data pulls, one focused on July of 2009 to June of 2014 and a second, on information about the period between July of 2014 and June of 2017. Using the same methodology, we looked at thousands of AAA-posted inputs on individual consumer claims, some of which related to the same case; we excluded claims related to real estate and construction.[210] Between July of 2009 and June of 2014, we identified a total of 134 claims against AT&T, or an average of 27 per year brought by consumers.[211] During that same time period, AT&T had between 85 and 120 million customers. By 2016, AT&T's customer base had grown to some 147 million.[212] The 2014-2017 review identified 316 claims against AT&T (or 105 per year) closed in the three years ending June of 2017.[213]

209. DANIEL J. SHEFFNER, ADMIN. CONFERENCE OF THE U.S., ADMINISTRATIVE MATERIALS ON AGENCY WEBSITES, DRAFT REPORT 3–4 (2017), https://www.acus.gov/sites/default/files/documents/Adjudication%20Materials%20on%20Agency%20Websites%20%28March%206%2C%202017%29.pdf [https://perma.cc/FW88-VART].

210. Resnik, *Diffusing Disputes, supra* note 1*,* at 2899. For the 2009 through 2014 period, we looked at the list of 17,368 individual claims (sometimes related to the same case). By, as noted, excluding real estate and construction, we identified 7303 (or forty-two percent) as in the consumer category. Of the 5224 claims "terminated by an award," about half included a dollar figure. For the 2014 to 2017 timeframe, and deleting the overlap in 2012-2014, we looked at the list of 13,648 individual claims (again sometimes related to the same case). Again excluding real estate and construction, we identified 6477 (or forty-seven percent) as in the consumer category.

Of the 2545 claims "terminated by an award," about forty-five percent included a dollar figure. A bit more than half of those awards (twenty-four percent) went to consumers, and twenty-one percent to companies.

211. *Id*. at 2812.

212. *See* AT&T INC., 2016 ANNUAL REPORT 10 (2017), https://investors.att.com/~/media/Files/A/ATT-IR/financial-reports/annual-reports/2016/att-ar2016-completeannualreport.pdf [https://perma.cc/5F24-SYSJ].

213. These data come from two AAA datasets, the first covering complaints closed between July 2009 and June 2014 and the second covering complaints closed between July 2012 and June 2017. We then looked to cases to which AT&T (and any of the variations in its name and corporate form) was a party. Overlapping time periods were deleted from the second dataset. The caveat is that there were minor differences when information overlapped on claims in 2012-2014, and in those instances, we used the earlier posted data. Both datasets are on file with the author [hereinafter *AAA Data, July 2009-June 2017*].

A few details illustrate the kinds of information available and the limits of the coded information. In the 316 cases in which AT&T was involved between 2014-2017, thirty-nine were described as ending in decisions, called "awards," 251 settled, and twenty-six fell under the categories of "administrative," "dismissed," or "withdrawn."[214] Within the thirty-nine "awarded" cases, twenty-two involved instances when AT&T "prevailed." Of those cases, in three, consumers were to pay the company in amounts ranging from $566 to $2103. In the other seventeen cases that ended in awards, the AAA compilation listed "zero" as funds that would be ordered paid; in nine instances, the compilation listed no party prevailing. In one case, no party was listed as prevailing, but the consumer was described as receiving a positive award.[215] Counting this case along with the other seven claims in which consumers were listed as prevailing, these eight consumer awards ranged from $2.23 to $1449, with a median of $525.36.[216]

A summary comes by way of bringing the two data sets together in Figure 1, Consumer Arbitration Filings with the American Arbitration Association. As that Figure shows, during the course of eight years,

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The July 2009-June 2017 data, as posted by the AAA and including additional quarters posted thereafter, can also be found at the Yale Law School Consumer Arbitration Data Archive, Consumer Arbitrations with The American Arbitration Association 2009 to Present, Open Science Framework, https://osf.io/qmtsu/. This website has been constructed to enable ongoing preservation of AAA data in light of the AAA practice of taking down a quarter of data every time a new quarter is posted given that the California statute requires that only five years of data be made public.

The data from 2009-2014 did not include a set of 1148 claims against AT&T filed between 2011 and 2012 by one law firm, of which 1093 were filed on one day. Another fifty-three were filed during the preceding fifteen months and two were filed in the subsequent month. After discussions with lawyers at that firm, it became clear that its filings did not fit the model of individual, single-file cases that both AT&T and the U.S. Supreme Court had extolled. Resnik, *Diffusing Disputes, supra* note 1, at 2901 n.480.

The numbers that we identified comport with information reported by AT&T to Senators Al Franken, Richard Blumenthal, Ron Wyden, Patrick Leahy, and Edward J. Markey in 2017. Letter from Timothy P. McKone, Exec. Vice President Fed. Relations, AT&T Servs., Inc., to Sen. Al Franken, Sen. Richard Blumenthal, Sen. Ron Wyden, Sen. Patrick Leahy, Sen. Edward J. Markey, U.S. Senate, (June 30, 2017), https://www.franken.senate.gov/files/letter/170630ATTResponseLetter.pdf [https://perma.cc/87JT-J48V] [hereinafter AT&T letter to U.S. Senators] ("412 arbitrations have been commenced since the beginning of 2015; most were settled before hearing, just as the vast majority of court cases are resolved before trial.").

214. *AAA Data, July 2009-June 2017*, *supra* note 213. The focus was on cases closed between July 2014 and June 2017.

215. *Id.* These details provide examples of the "noise" in the statistical compilations posted on the AAA website.

216. *Id.*

an average of fewer than sixty people a year sought relief for claims against AT&T by using the individual arbitration system mandated.

Figure 1

Consumer Arbitration Filings with the American Arbitration Association

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

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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

Figure 1 also includes information garnered by the CFPB, which relied on AAA-posted data, as we did. The CFPB's findings confirm that a focus on AT&T did not produce an idiosyncratic result. Millions upon millions of people have credit cards of varying kinds, and about 104 per year seek redress through single-file arbitration. In short,

almost no one turns to the self-proclaimed "effective" method of redress that companies have imposed.

Under some arbitration mandates, including AT&T's, individuals could also use small claims courts,[217] but again only single-file.[218] As I recounted in *Diffusing Disputes*, we sought to gather some information on filings in small claims courts from 2010 to 2014. To do so, we selected two jurisdictions, California and Illinois; in both, several counties provided free online information about small claims court filings.[219] In California, where accessible databases came from twenty-five of its fifty-eight counties (just under a third of the state's population), we identified sixty-six cases in fifteen counties in which AT&T was listed as a defendant and three in which it was a plaintiff.[220] During the same five-year period, we located 140 cases in fourteen counties in Illinois that involved AT&T in breach of contract or fraud cases.[221]

More recently, we tried a different approach by looking for filings involving AT&T from July of 2009 through June of 2017 in the five largest counties in the United States—Los Angeles and San Diego

217. The relevant documents during the 2009-2014 period are discussed in *Diffusing Disputes*, *supra* note 1, at 2903, n.486. During the 2014-2017 period, AT&T also permitted use of small claims court. *See Service Agreement*, AT&T (2017), https://www.att.com/equipment/legal/service-agreement.jsp?q_termsKey=postpaidServiceAgreement&q_termsName=Service+Agreement [https://perma.cc/LB6B-2CXA]; *Wireless Customer Agreement*, AT&T § 2.1 (2015), https://www.att.com/legal/terms.wirelessCustomerAgreement.html [https://perma.cc/9XA6-E956]; *see also File a Complaint*, AT&T (2017), https://www.att.com/esupport/article.html#!/wireless/KM1041856 [https://perma.cc/3ZQB-6EMW].

218. The CFPB also sought to understand the role played by small claims courts. The CFPB looked at filings in 2012 and found that 870 consumers filed against credit issuers in small claims court in a set of jurisdictions totaling about 85 million people; the CFPB identified credit card issuers turning to courts repeatedly—eighty percent of 41,000 claims—for debt collection. CFPB 2015 ARBITRATION STUDY, *supra* note 15, § 1, at 15–16, § 7, at 11–12. The CFPB encountered the challenges we had in that a central database for small claims courts does not exist, and access to data varies by jurisdictions. *Id*. § 7, at 5. Therefore, the CFPB only used information from states with databases that purported to provide statewide data, permit searches by party name, and allow for sorting by date. *Id.* § 7, at 5–6. The CFPB supplemented its statewide data with data from the thirty most populous counties in the United States. *Id*. § 7, at 6.

219. Resnik, *Diffusing Disputes*, *supra* note 1, at 2903.

220. These counties were: Santa Clara, Ventura, Santa Cruz, Fresno, Stanislaus, Placer, Kern, El Dorado, Contra Costa, San Joaquin, San Francisco, San Mateo, Monterey, Marin, and Mendocino. Memorandum from Diana Li, Jonas Wang, John Giammatteo, Marianna Mao, Ben Woodring & Chris Milione on Small Claims Court Filings: A Preliminary Analysis, to Judith Resnik 3, 6 (Mar. 16, 2015) (on file with author).

221. Those counties were Cook, Lake, St. Clair, Vermilion, Clinton, LaSalle, DuPage, Madison, Bard, Champaign, Winnebago, Macon, McHenry, and Jackson. *Id*. at 7–8.

counties, California; Maricopa County, Arizona; Cook County, Illinois; and Harris County, Texas. In 2016, 27.5 million residents, or about 8.5% of the U.S. population, lived in these five counties.[222] Between July 2009 and June 2017, by using the tools for online searches provided by the counties, we identified 273 small claims cases filed against AT&T and ten filed by AT&T.[223]

222. These figures are calculated using the sum of the five counties' populations in 2016, divided by the 2016 U.S. census population. U.S. CENSUS BUREAU, COUNTY POPULATION TOTALS DATASETS: 2010–2016, (2017), https://www.census.gov/data/datasets/2016/demo/popest/counties-total.html [https://perma.cc/6Y2Z-MLGU]; *Quick Facts*, U.S. CENSUS BUREAU (2017), https://www.census.gov/quickfacts/fact/table/US/PST045216 [https://perma.cc/EM5F-ML22].

223. The caveats are that we relied on using various versions of AT&T's commonly known corporate entities, put them into the text box provided, and sifted through the results, and that the methods to do searches in counties were not identical. For example, in Cook County, Maricopa County, and San Diego County, we were able to search for the broad term "ATT," and search the results. The search functions in these counties do not accept the ampersand symbol. In Los Angeles County, using "AT&T" as a "party" alone was too general for the system, and in Harris County, business name searches were required to have at least eight characters. In these two counties, we therefore further specified AT&T's corporate entities by using "AT&T Corp.," "AT&T Inc.," "AT&T Mobility," "AT&T Communications," and "AT&T Wireless." We did not, for example, search for all of the terms associated with the Bell Telephone Company. By doing what is known as a follow-up sensitivity check after we had completed the searches, we know that AT&T's predecessor companies, "Illinois Bell" or "Southwest Bell," may also have been parties to cases. Thus, because of the search variables and because AT&T has over time used different names, it is possible, and we think likely, that our research resulted in an undercount of small claims cases.

The databases in counties varied in another respect. It was not always clear what cases were "small claims" cases, and moreover, what value claims qualify as "small claims" also varies by state and over time. To avoid more sources of an undercount, we were over-inclusive. Thus, while Los Angeles County, Harris County, and San Diego County explicitly identified cases as small claims, in Cook County we included all cases involving contract disputes, consumer fraud disputes, or pro se litigants; in Maricopa County, we included all civil claims.

Thereafter, we summed our results for each county during the relevant time period. In Cook County, we identified at least 20 cases in which AT&T was the defendant and at least 9 in which AT&T was the plaintiff. In Harris County, we identified seven cases in which AT&T was the defendant, one in which it was the plaintiff, and one in which they were the counter-plaintiff. In Los Angeles County, we identified at least 177 cases in which AT&T was the defendant and no cases in which it was the plaintiff. In Maricopa County, we located AT&T as the defendant 17 times and not a plaintiff in any case. In San Diego County, we found that AT&T was the defendant in at least 52 cases and not a plaintiff in any.

For more details, see Memorandum from Greg Conyers on AT&T Small Claims Data in the Five Largest Counties in United States, to Judith Resnik (Jan. 22, 2017) (on file with author). The underlying data are posted on the web sites of each of the counties. "Party Name Search," The Superior Court of California, County of Los Angeles, https://www.lacourt.org/paonlineservices/civilindex/cipublicmain.aspx; "Electronic Full Case Docket Search," Clerk of the Circuit Court, Cook County, Illinois,

This preliminary foray into trying to compare the use of small claims court and arbitration suggests that, like arbitration, small claims court filings are a rarity. A few individuals have pursued relief in small claims courts against AT&T. As for claims brought by the company, they are exceedingly unusual. The company has little incentive to pursue small claimants in either arbitration or small-claims court. In the sample we reviewed, AT&T can be found filing in small claims court but not in its own, mandated arbitration system.[224]

Analysts of dispute resolution know well that filings are not the best or the only metric of underlying disputes. Claims may not be pursued for a host of reasons, as "lumping it" (doing nothing) is a common response. Moreover, remedies may be available because companies respond to complaints. Low filing rates could therefore reflect inertia, that no legal claims are available, or that an opponent is conciliatory when challenged.[225] But as I detailed in *Diffusing Disputes*,[226] the federal and state governments pursued all the major wireless service providers for overcharging customers in violation of federal law and for failing to respond to customer requests for reimbursements.[227] These government filings against the wireless companies illustrate the importance of collective action (in these instances, governments as plaintiffs) to seeking redress.

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http://www.cookcountyclerkofcourt.org/?section=CASEINFOPage&CASEINFOPage=2400; "Search For Your Case," Justice of the Peace Courts, Harris County, Texas, https://jpwebsite.harriscountytx.gov/FindMyCase/search.jsp; Justice Court Case History," Maricopa County Justice Courts, http://justicecourts.maricopa.gov/FindACase/casehistory.aspx; "Party Name Search," Superior Court of California, County of San Diego, http://courtindex.sdcourt.ca.gov/CISPublic/namesearch.

224. As noted, we found ten claims initiated by AT&T in small claims courts. *See supra* text accompanying note 221. We found no claims initiated by AT&T against consumers during the 2009-2014 period in the AAA arbitration data, but AT&T did file a counterclaim in one of the consumer-initiated claims. Resnik, *Diffusing Disputes*, *supra* note 1, at 2902. According to the AAA data, AT&T did not initiate any claims in arbitration in the subsequent three years. *See supra* text accompanying note 211.

225. That is the view espoused by AT&T, as indicated by its letter to several U.S. Senators. AT&T Letter to U.S. Senators, *supra* note 211, at 6. That letter argued that "[m]any thousands of customers have used AT&T's dispute resolution process to obtain prompt, fair resolutions for their claims. The number of reported arbitration decisions is small because only a relatively small number of cases are not settled, and actually proceed to the arbitration process—and even fewer proceed to a final hearing, because they are settled after the arbitration process as invoked." *Id*.

226. *See* Resnik, *Diffusing Disputes*, *supra* note 1, at 2908–2910.

227. *See id.* at 2909; *see also* Stipulated Order for Permanent Injunction and Monetary Judgment at 2–3, FTC v. AT&T Mobility, LLC, No. 1:14-CV-3227-HLM (N.D. Ga. Oct. 8, 2014).

That pursuit undermines an analysis that the miniscule number of consumer-initiated claims came from a lack of legal bases for bringing claims. Rather, the better explanation of what Cynthia Estland called "missing claims" in the employment context[228] comes from the practical difficulties of reading bills, ferreting out overcharges, understanding and using the procedures, and paying upfront costs. Moreover, the sums sought to be recouped in individual cases are small compared to the energy required to seek relief. The arbitration regimes imposed by repeat players on less well-resourced litigants not only privatize process through diffusing claims to diverse providers but also erase legal claims. Instead of a pathway to justice, these obligatory programs have become barriers to publicity and to obtaining relief.

B. Assessing Fees and Providing Waivers

Arbitration and courts both charge users for services. Below, I sketch some of the ways in which the dollars and cents of dispute resolution—in both arbitration and courts—also limit access and are another method by which public knowledge about disputes is being lost.

In some jurisdictions, information about the costs of court-annexed arbitration is available to the public. In some programs, parties have to pay separately (and sometimes privately) for arbitrators; in others, the expenses of support for ADR programs are borne by the court, whose personnel may also staff the programs.[229] In terms of the amounts, some courts regulate the charges of auxiliary ADR providers. For example, in the federal system, the lawyers serving as court-annexed arbitrators have fees capped at $150 to $250 per arbitration,[230] and those sums are generally paid by the

228. Estlund, *supra* note 171, at 15–21.

229. *See* ILLINOIS COURT ASSESSMENTS 2016, *supra* note 19, at 10; Telephone Interview with Ill. Admin. Office Staff (Oct. 24, 2017).

230. The Judicial Conference of the United States authorizes each district to set its own rules on paying ADR neutrals. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 53 (1999) http://www.uscourts.gov/sites/default/files/1999-09_1.pdf [https://perma.cc/DE9F-JP88]. In the federal courts using court-annexed arbitration, several have written rules calling on the "court" or the AO to compensate arbitrators. For example, the District of New Jersey provides: "An arbitrator shall be compensated $250 for service in each case assigned for arbitration. . . . [F]ees shall be paid by or pursuant to an order of the Director of the Administrative Office of the United States Courts." D. N.J. CIV. R. 201.1(c). Similarly, the Eastern District of New York provides: "An arbitrator shall be compensated $250 for services in each case. . . . [F]ees shall be paid by or pursuant to the order of the Court

court. Special assessments are another route to funding. Illinois charges each civil litigant eight to ten dollars on top of other fees to cover the costs of its court-annexed arbitrators and the program's administration.[231]

Learning about the costs of privately-based arbitration is difficult. Two sets of fees exist, those charged by the arbitrators and those imposed by the entity that administers the arbitration, which can include (as AAA does) fees for obtaining access to lists of arbitrators.

Depending on the arbitration market, fees paid to arbitrators can range from a few hundred dollars to tens of thousands of dollars daily. For example, the AAA's Consumer Arbitration Rules provide that arbitrators dealing with "a case with an in-person or telephonic hearing" are to receive $1,500 per day; the rate for document-only arbitrations is $750 per case.[232] Information about the charges imposed by other providers comes from case law, such as a decision finding unenforceable an obligation to arbitrate that was imposed on mobile home owners renting land in California.[233] The court described JAMS, another major provider, as charging a fee of "$5,000 to $10,000 fee for each day of arbitration;" half of the sums were—under provisions in the rental documents that the court found unenforceable, half of the sums were to have been paid in advance by the mobile home owners.[234] In contrast, if one makes it into court, judges are "free" in the sense that their salaries are paid by the governments that employ them.

As for administration fees, in 2013, the AAA instituted a consumer filing fee of $200, confirmed again in 2016; business parties

subject to the limits set by the Judicial Conference of the United States." E.D.N.Y. CIV. R. 83.7(b). The rule for the Eastern District of Pennsylvania is: "The arbitrators shall be compensated $150.00 each for services in each case assigned for arbitration. . . . [F]ees shall be paid by or pursuant to the order of the director of the Administrative Office of the United States Courts." E.D. PA. CIV. R. 53.2(2). The limited fees paid may have an effect on the place in which arbitrations are held; convening the proceeding in a lawyer's office is likely time-saving for the arbitrator, even as it makes public access to the proceeding functionally implausible. *See* Memorandum from Jason Bertoldi on Compensating ADR Neutrals in the Federal Courts, to author 5 (Mar. 3, 2015) (on file with author).

231. 735 ILL. COMP. STAT. ANN. 5/2-1009A (West, Westlaw through P.A. 100-576 of the 2018 Reg. Sess.).

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

233. Penilla v. Westmont Corp., 207 Cal. Rptr. 3d 473, 488 (Cal. Ct. App. 2016).

234. *Id*. at 480, 485.

are charged $1,700.[235] The AAA states that, as a condition of its services, consumers and employees are not to be charged the fees for arbitrators; the AAA had capped that requirement at $75,000 and thereafter removed the cap.[236] Filing fees may, at the option of the provider or under the documents mandating use of alternative processes, sometimes be recouped at the conclusion of the proceeding through fee-shifting.[237]

Limits on private-sector ADR charges can come from self-imposed constraints. For example, the AAA's Consumer Due Process Protocol calls for costs to be "reasonable."[238] Limits can also come through lawyers and providers enhancing access through pro bono

235. *AAA Consumer Arbitration Rules*, *supra* note 232, at 33; *see also American Arbitration Association (AAA) Consumer Dispute Documents Pre-September* 2014, AM. ARBITRATION ASS'N, https://archive.org/stream/ConsumerRelatedDisputesSupplementary PROCEDURES/Consumer-Related%20Disputes%20Supplementary%20 PROCEDURES_djvu.txt [https://perma.cc/93WJ-F5B7]. If the claim is withdrawn within thirty days of filing, the business party received a refund of half its filing fee, *Consumer Arbitration Fact Sheet*, AM. ARBITRATION ASS'N, http://info.adr.org/consumer-arbitration/ [https://perma.cc/AMC6-UZTZ].

236. Conversation with AAA Vice President Ryan Boyle, Jan. 26, 2018. The rules provide that the "business shall pay the arbitrator's compensation unless the consumer, post dispute, voluntarily elects to pay a portion of the arbitrator's compensation."*Consumer-Related Disputes: Supplementary* Procedures, AM. ARBITRATION ASS'N 10 (rules effective September 15, 2005, fees effective March 1, 2013), at 12 https://www.adr.org/sites/default/files/Consumer-Related%20Disputes%20 Supplementary%20Procedures%20Sep%2015%2C%202005.pdf [https://perma.cc/7JGE-WA6C].

237. The AAA Commercial Arbitration Rules provide that the "filing fee must be paid before a matter is considered properly filed. If the court order directs that a specific party is responsible for the filing fee, it is the responsibility of the filing party either to make such payment to the AAA and seek reimbursement as directed in the court order or to make other such arrangements so that the filing fee is submitted to the AAA with the Demand." *Commercial Arbitration Rules and Mediation Procedures*, AM. ARBITRATION ASS'N 34 (rules amended and effective October 2016, cost of arbitration effective July 1, 2016), https://www.adr.org/sites/default/files/Commercial%20Rules.pdf [https://perma.cc/6QQK-RWU2] [hereinafter *AAA Commercial Arbitration Rules*]. Moreover, the Consumer Arbitration Rules discuss "nonrefundable" filing fees. *AAA Consumer Arbitration Rules*, *supra* note 232, at 33–34. Whether one side of the dispute reimburses the other depends on the documents governing the specific arbitration, as referenced in the Consumer Rules, which state that in "cases before a single arbitrator, a nonrefundable filing fee capped in the amount of $200 is payable in full by the consumer when a case is filed, unless the parties' agreement provides that the consumer pay less." *Id*. at 34.

238. *Consumer Due Process Protocol Statement of Principles*, AM. ARBITRATION ASS'N 2 (Apr. 17, 1998), https://www.adr.org/sites/default/files/document_repository/Consumer %20Due%20Process%20Protocol%20(1).pdf [https://perma.cc/6UMS-X9N8].

programs[239] and by way of regulation either through statutes or judicial decisions finding arbitration obligations unenforceable because of the fees imposed.[240]

One route to capping arbitration expenses could have come from interpreting the FAA as licensing the enforcement of obligations to arbitrate only if the process was accessible, measured in part in terms of fees. But in 2000, in the 5-4 decision of *Green Tree Financial Corp. v. Randolph*,[241] the U.S. Supreme Court placed the burden on the opponent of arbitration to demonstrate its excessive costs.[242] In 2013, the Court (again 5-4) reiterated that approach in *American Express v. Italian Colors*,[243] involving a family-owned restaurant alleging that American Express had violated federal antitrust laws. The Court ruled that even though the expenses that Italian Colors would have to incur to pursue its claim were likely to be more than the sums it sought to recoup, that economic disparity did not constitute a basis for the federal courts to decline to enforce a ban on class actions.[244]

These two U.S. Supreme Court decisions on accessibility involved efforts by individuals to enforce their federal statutory rights. In the 2011 *AT&T* case, a consumer sought recoupment of about thirty dollars based on a claim of deceptive advertising under California law; the filing fee to pursue arbitration was many times that amount. Nonetheless, the Supreme Court held that the FAA preempted California's protection of consumers that would have permitted less well-resourced claimants to bring collective actions. [245]

State law may, nonetheless, have some means of insisting on affordability in individual cases, either by applying the *Green Tree* test or through finding fee obligations to be unconscionable. California, for example, requires that if employees allege violations of state statutory rights and if employers require arbitration, an employer is required to pay "all costs unique to arbitration."[246] In addition, California requires

239. *See, e.g.*, Jerome B. Simandle, *Enhancing Access to ADR for Unrepresented Litigants: Federal Court Programs Provide Models for Helping* Pro Se *Parties—and the Justice System*, 22 DISP. RESOL. MAG., Spring 2016, at 6, 8–10.

240. *See, e.g.*, CAL. CIV. PROC. CODE § 1284.3(b)(1) (West, Westlaw through 2017 Reg. Sess.).

241. 31 U.S. 79 (2000).

242. *Id*. at 91–92.

243. 133 S. Ct. 2304 (2013).

244. *Id*. at 2310–11; *see* Brian Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 172–73 (2015).

245. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351–52 (2011).

246. *See* Armendariz v. Foundation Health Psychcare Servs., Inc., 6 P.3d 669, 689 (Cal. 2000); Hovanesyan v. Glendale Internal Med. & Cardiology Med. Grp., No. B277855,

that consumer arbitration providers waive their administrative charges for "indigent consumers," defined as those with incomes of "less than 300 percent of the federal poverty guidelines."[247] This provision does not apply to arbitrators' own fees, but to costs imposed by the entities that administer arbitration. California instructs providers to give consumers notice of this option and to create forms for sworn declarations that a particular consumer qualifies; providers are not to ask for additional information.[248]

In compliance, the AAA provides a "Waiver of Fees Notice for Use by California Consumers Only" on its website.[249] Another document (not available on the web) applies to the rest of the country and has the title "Affidavit in Support of Reduction or Deferral of Filing and Administrative Fees."[250] The latter form requires consumers outside of California to make detailed disclosures of assets, income, and liabilities and does not indicate the availability of full fee waivers.[251] AAA staff report that waivers have been provided when requests are made, but that the AAA does not track the numbers or kinds of waivers, deductions, or deferrals given.[252] Thus, robust and publicly accessible analogues to court-based *in forma pauperis* proceedings are not available in arbitration.

2017 WL 2391688, at *7–9 (Cal. Ct App. June 2, 2017). The court in *Hovanesyan* analyzed a rule by JAMS that put the right to recovery "at risk" if a plaintiff did not pay its share of arbitration costs. *Id.* at *8–9; *see also* Penilla v. Westmont Corp., 207 Cal. Rptr. 3d 473, 487 (Cal. Ct. App. 2016). Ambitions to do more to support individuals come from model state consumer and employee laws, proposed by consumer advocates. *See* MODEL STATE CONSUMER & EMP. JUSTICE ENF'T ACT tit. IV § 2(e) (DAVID SELIGMAN, NAT'L CONSUMER LAW CTR. 2015).

247. CAL. CIV. PROC. CODE § 1284.3(b)(1) (West, Westlaw through 2017 Reg. Sess.); *see also* Sanchez v. Valencia Holding Co., 353 P.3d 741, 755 (Cal. 2015) ("In enacting Code of Civil Procedure section 1284.3, the Legislature concluded that an ability-to-pay approach is appropriate in the context of consumer arbitration agreements.").

248. CAL. CIV. PROC. CODE § 1284.3(b)(3).

249. *Waiver of Fees Notice for Use by California Consumers Only*, AM. ARBITRATION ASS'N, https://www.adr.org/sites/default/files/AAA%20Affidavit%20for%20Waiver%20of%20Fees%20Notice%20California%20Consumers.pdf [https://perma.cc/7WQU-SKWE].

250. Affidavit in Support of Reduction or Deferral of Filing and Administrative Fees, AM. ARBITRATION ASS'N (on file with author).

251. *Id*.

252. The information came from an exchange of emails and telephone interviews with Ryan Boyle, AAA's Vice President for Statistics and In-House Research. *See* 2017 Email from Ryan Boyle, *supra* note 206; Email from Ryan Boyle, Vice President, Statistics and In-House Research, AM. ARBITRATION ASS'N, to Judith Resnik (Oct. 25, 2017) (on file with author); Telephone Interviews with Ryan Boyle, Vice President for Statistics and In-House Research, Am. Arbitration Ass'n (Feb. 2015, Apr. 2015, Aug., 2017, Sept., 2017, Jan. 25, 2018).

Turning then to courts, the obligation to waive fees generally stems from statutes, pegged to poverty.[253] As I discussed in Part II, in the early 1970s, constitutional law came into play. The U.S. Supreme Court mandated fee waivers for the class of plaintiffs seeking divorces in Connecticut, which lacked a statute providing for such an exemption.[254] As I also noted, the U.S. tests for eligibility are narrow, while courts in Canada and the U.K have required fee waivers through showings of economic hardship expressly limited to indigency.[255]

No national database of which I am aware tracks the numbers of individuals who seek to file without prepayment of court fees or who ask for waivers at subsequent proceedings. One recent study, about how low-income litigants "plead poverty" in the federal courts, found that the test for waiving filing fees varies by jurisdiction and, within the federal system, by district court and sometimes by district judge.[256]

A possible proxy for information on fee waivers comes from research on litigants who are self-represented and sometimes labeled "pro se." My opening discussion noted that about a quarter of the civil filings in the federal courts are brought by individuals lacking lawyers,[257] that rates of appeals without lawyers run in excess of fifty percent,[258] and that 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.[259] Most often, that party was the defendant.[260]

In addition to filing fees, courts impose many other charges. Illinois's 2016 Task Force identified "a tremendous growth in the

253. *See, e.g.*, C.S. v. W.O., 178 Cal. Rptr. 3d 338, 343–44 (Cal. Ct. App. 2014). A trial court had held that because a recipient of public benefits had received a $1000 gift to pay for an expedited transcript on an appeal in a child custody dispute, she was not eligible to have a fee waiver. *Id*. at 340. The appellate court reversed, citing both the constitutional mandates of due process and equal protection and the California statute providing fee waivers if persons received public benefits, and that, once granted, the waivers continued in all stages of the proceedings. *Id*. at 342–44.

254. *See* Boddie v. Connecticut, 401 U.S. 371, 380–82 (1970); *supra* text accompanying notes 48–52.

255. *See* R *(on application of* UNISON*)* v. Lord Chancellor [2017] UKSC 51, [117] (Lord Reed) (appeal taken from Eng.).; *see also supra* notes 57–61 and accompanying text.

256. *See* Andrew Hammond, Pleading Poverty in Federal Court 3 (Feb. 2018) (unpublished manuscript) (on file with author).

257. *See* 2016 U.S. DISTRICT COURTS PRO SE FILINGS, *supra* note 5; 2005–2010 U.S. DISTRICT COURT PRO SE FILINGS, *supra* note 5. The federal district court database details unrepresented litigants (termed "pro se filings") back to 2005.

258. *See* U.S. APPELLATE COURT PRO SE FILINGS, *supra* note 6.

259. LANDSCAPE CIVIL LITIGATION STATE COURTS 2015, *supra* note 7, at 31–32.

260. *Id.* at iv. In 1992, attorneys had represented both parties in ninety-five percent of the cases; in 2012 to 2013, in twenty-four percent of the cases. *See id.* at 31.

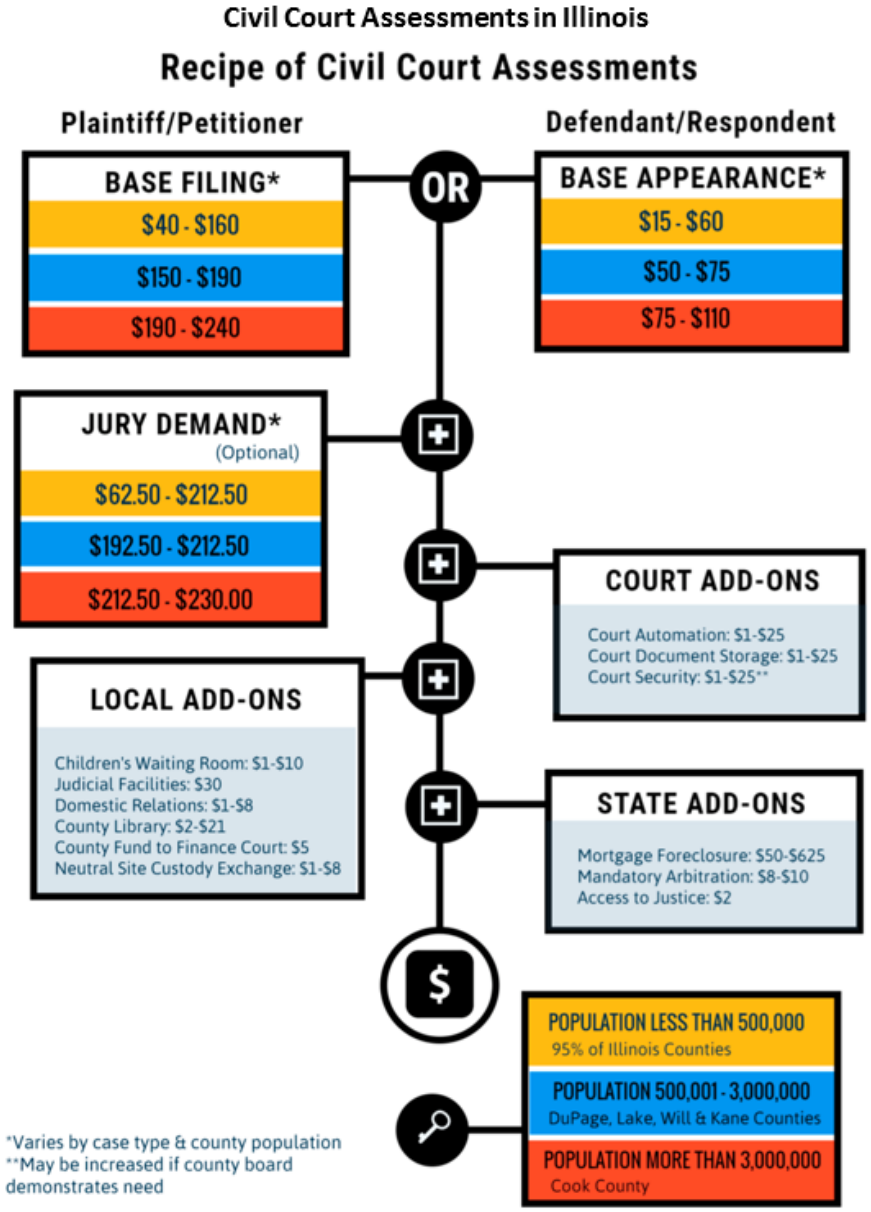
assessments imposed on the parties to court proceedings." Both civil plaintiffs and defendants are "required to pay hundreds of dollars" to pursue or to defend claims.[261] In that state, the fees vary by county,[262] which can include local add-ons to support facilities, such as children's waiting rooms and libraries..[263] An overview comes from Figure 2, Civil Court Assessments in Illinois, which is reproduced from the Task Force Report, and sets forth the ingredients of what it called a "recipe" of fees stemming from different sources. Notable is the imposition of the fee charged to civil defendants; unless qualifying for fee waivers, defendants have to pay between $15 and $110 to answer claims brought against them.

261. ILLINOIS COURT ASSESSMENTS 2016, *supra* note 19, at 1.

262. *Id*. at 10.

263. For example, the filing fee in one county was $267. *See* MCLEAN CTY. CIRCUIT CLERK, MCLEAN CTY. LAW & JUSTICE CTR., CIVIL FEE FILING SCHEDULE 3 (Jan. 22, 2017), http://www.mcleancountyil.gov/DocumentCenter/Home/View/2751 [https://perma.cc/N6HK-HDUG]. This schedule lists what look like additional fees for arbitration; for example of claims seeking $10,000 to $15,000, it appears that an additional fee of $182 is imposed. *Id*. In McHenry County, arbitration filing fees range from $167 to $252. MCHENRY CTY. CLERK OF THE CIRCUIT COURT, FEE SCHEDULE 1 (Jan. 22, 2017), https://www.co.mchenry.il.us/home/showdocument?id=71476 [https://perma.cc/P6C8-CAKH]. Additionally, Illinois charges a party who declines the non-binding outcome of court-annexed arbitration a "rejection fee" of $200 for awards less than $30,000, and $500 for awards greater than $30,000, unless the party is indigent. ILL. SUP. CT. R. 93.

Figure 2[264]



264. ILLINOIS COURT ASSESSMENTS 2016, *supra* note 19, at 10.

"Hundreds of dollars" in fees is apt not only for Illinois, but also for many other states. San Diego County charges $435 for child support filings if a child support agency does not intervene and $700 for the adoption of a stepchild.[265] Moreover, although some states provide that waivers must be accorded for all stages of proceedings, litigants may need to renew applications to obtain waivers.[266] Like Illinois, California imposes charges on defendants to respond to claims. The amounts for both plaintiffs and defendants vary with the value of the claim and for some cases, such as those seeking protective orders, no fees are charged. In small claims court (involving $10,000 or less), filing fees for plaintiffs range from thirty to seventy-five dollars.[267] Figure 3 provides a sampling of some of the fees charged as of 2017 in five major states, California, Florida, Illinois, New York, and Washington, which had in total almost 100 million residents, or about thirty percent of the U.S. population in 2016.[268]

265. *Family Law Fees*, SUPERIOR COURT OF CAL., CTY. OF SAN DIEGO, http://www.sdcourt.ca.gov/portal/page?_pageid=55,1524419&_dad=portal&_schema=PORTAL [https://perma.cc/5PNG-XFFQ]. In Los Angeles County, it costs $435 to file for child support if a child support agency does not intervene and $424 for the child interview portion of child custody evaluation. SUPERIOR COURT OF CAL., CTY. OF LOS ANGELES, CIVIL FEE SCHEDULE 4, (July 1, 2016), http://www.lacourt.org/forms/pdf/fees/fee-schedule-2016_rev.pdf [https://perma.cc/5GBM-ACWH].

266. An example comes from *Chunkang Kim v. De Maria*, 160 Cal. Rptr. 3d 849 (Cal. App. Dep't Super. Ct. 2013). There, the court concluded that, given that a defendant received public benefits, he was "entitled to have all fees waived including jury fees and expenses." *Id*. at 852 (citing CAL. GOV'T CODE § 68632 (West 2017)).

267. *See Statewide Civil Fee Schedule*, SUPER. CT. CAL. 5–6 (Jan. 1, 2017), http://www.fresno.courts.ca.gov/fees_schedule/documents/Statewide%20Civil%20Fee%20Schedule%20January%202017.pdf [https://perma.cc/PB4L-NU3K]. The amount for filing the "first paper" in cases involving more than $25,000 is $435, and in claims involving $10,000-$25,000, the amount is $370. *Id*. at 1.

268. *See U.S. and World Population Clock*, U.S. CENSUS BUREAU https://www.census.gov/popclock/ [https://perma.cc/2ZZH-HYGU].

Figure 3

A Sampler of Fees in Civil Litigation, 2017

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

*Uniform across the state **County-by-county variation

My focus is on how cost barriers suppress information in civil litigation, but mention needs to be made of fees imposed on criminal defendants.[269] Illustrative are "registration fees" for indigent defendants entitled to legal counsel. Los Angeles County charged fifty dollars to defendants being assigned a "free" lawyer and, in 2016, had garnered about $300,000 from those fees. In the summer of 2017, the

269. *See generally* ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016). *See also* MARIE CLAIRE TRAN-LEUNG, SHRIVER CTR., DEBT ARISING FROM ILLINOIS' CRIMINAL JUSTICE SYSTEM: MAKING SENSE OF THE AD HOC ACCUMULATION OF FINANCIAL OBLIGATIONS 1 (2009), http://povertylaw.org/files/docs/debt-report.pdf [https://perma.cc/YPN9-P32C] ("When a person enters the criminal justice system, a complicated, ad hoc system of financial obligations awaits.").

county was persuaded to remove the fee.[270] "Services"—such as drug courts, probation, and ankle bracelet monitoring—are also the bases for yet more assessments, and failure to pay can result in threats of imprisonment. Fines impose yet other costs, illustrated by litigation against Virginia's practice of automatically suspending driver's licenses when tickets were not paid.[271]

Many lawsuits (sometimes brought as class actions) challenge the cascading wave of fees, fines, assessments, and surcharges. The result is that courts have become venues for conflicts about their own costs. Both state and federal judges are returning to the questions raised in 1971 in *Boddie v. Connecticut* about how commitments to "open courts," due process, equal protection, and prohibitions on excessive fines affect fees charged by courts. For example, a 2013 ruling by the Supreme Court of Washington held that its constitution required that a "surcharge" added to deal with budget shortfalls had to be waived once a person was found to qualify for a filing fee waiver.[272] Challenges based on unconstitutional conflicts of interest have also been raised because some of the fees generated are returned to the entities imposing them.[273] One federal district court concluded that due process obligations of impartiality were violated because the judges deciding on fee waivers benefitted from the fees recouped.[274]

270. *See* DEVON PORTER, AM. CIVIL LIBERTIES UNION OF S. CAL., PAYING FOR JUSTICE: THE HUMAN COST OF PUBLIC DEFENDER FEES 2 (2017), https://www.aclusocal.org/sites/default/files/pdfees-report.pdf [https://perma.cc/4AG6-3MTA]; Nina Agrawal, *L.A. County Ends Public Defender 'Registration Fee'*, L.A. TIMES (June 6, 2017), http://beta.latimes.com/local/lanow/la-me-ln-registration-fee-20170606-story.html [https://perma.cc/C2FG-DB5Y].

271. *See* Stinnie v. Holcomb, No. 3:16-cv-00044, 2017 WL 963234, at *3–4 (W.D. Va. Mar. 13, 2017), *appeal docketed*, No. 17-1740 (4th Cir.). Members of the plaintiff class in *Stinnie* had their driver's licenses revoked after being "convicted of some traffic violation or crime, thus incurring court costs, fees, and fines they could not afford to pay." *Id*. at *4. According to the district court, "hundreds of thousands of Virginians allegedly have had their licenses suspended for failure to pay court costs and fines." *Id*. at *3.

272. Jafar v. Webb, 303 P.3d 1042, 1043 (Wash. 2013).

273. *See, e.g.*, Cain v. City of New Orleans, No. 15-4479, 2017 WL 6372836, at *21–22 (E.D. La. Dec. 13, 2017); Kevin McGill, *'Mayor's Court' Taken to Federal Court in Louisiana*, U.S. NEWS (Dec. 6, 2017), https://www.usnews.com/news/best-states/louisiana/articles/2017-12-06/mayors-court-taken-to-federal-court-in-louisiana [permalink].

274. *Cain*, 2017 WL 6372836, at *26. The court discussed *Tumey v. Ohio*, 273 U.S. 510 (1927), in which money raised by fines levied "was divided between the state, the village general fund, and two other village funds." *Cain*, 2017 WL 6372836, at *22. As in that famous Prohibition-era case, the district court in *Cain* concluded that the judges'

I have discussed the financial obligations produced by the court system, but the costs of courts have to be understood in broader terms, including the economic impact of the lack of access and of the time to reach decisions. The issue of disposition time was the focus of a recent study, prompted by the major cutbacks in the budget of the California judiciary. Researchers sought to measure the direct and indirect losses in the wake of the decrease in funding[275] and put the loss of some 150,000 jobs and $30 billion in what it termed "economic output."[276] Looking at time-to-disposition in federal courts and in arbitration, the report praised arbitration for producing faster dispositions.[277] What the Report did not, however, explore is how the vastly larger number of civil cases—217,288—filed in federal district courts in 2015, as compared to 1,375 cases in the AAA caseload, affected the analysis. Nor did the report factor in the "missing cases" that could have been pursued individually or as collective actions in court.

Figures 2 and 3 provide glimpses of the dollars assessed in courts. The published schedules of fees have become the bases for lawsuits and for court-authorized task forces seeking to make changes. Given the Supreme Court's enforcement of privately-imposed class action bars, no pending cases of which I am aware contest the structure and the costs of arbitration processes. Closed processes not only limit access to claiming and suppress information on the cases filed, but also cut off debates on and challenges to the costs of the processes by which disputes are resolved.

C. Losing Adjudication

Remarkably few cases actually involve much litigation. The National Center on State Court's research on state court dispositions evaluated almost a million cases dealt with between 2012 and

"direct pecuniary interest in the outcome" created financial motives to convict. *Id*. at *22, 25 (quoting *Tumey*, 273 U.S. at 535).

275. ROY WEINSTEIN, CULLEN EDES, JOE HALE & NELS PEARSALL, MICRONOMICS, EFFICIENCY AND ECONOMIC BENEFITS OF DISPUTE RESOLUTION THROUGH ARBITRATION COMPARED WITH U.S. DISTRICT COURT PROCEEDINGS 2 (2017), http://go.adr.org/rs/294-SFS-516/images/Economic%20Impact%20of%20Delay%20Micronomics%20Final%20Report%20%282017-03-07%29.pdf [https://perma.cc/ZL77-2JYQ].

276. *Id*.

277. *Id*. at 2–3. The numbers of cases for arbitration came from the AAA and involved 7416 cases. *Id*. at 22 n.47. Of the cases that went to award, 637 (8.6%) were consumer cases. *Id.*; *see also* Table 1.

2013.[278] Most of the civil cases involved debt collection, in which most debtor-defendants were not represented, and almost all of the decisions took place without adjudication (defined to include court-annexed arbitration) on the merits.[279] 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.

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 NCSC found that about half of the claims analyzed were tort cases;[280] the NCSC's 2012-2013 data put tort cases down to seven percent.[281] In about three-quarters of the more recent judgments analyzed, the sums were under $5,200, and the study reported that overall, four percent of the filings were disposed of by trials. [282]

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 trial are also diminishing, as recorded in research on "bench presence," counting the hours that federal judges spend in open court, whether on trial or not. The study reported a "steady year-

278. LANDSCAPE CIVIL LITIGATION STATE COURTS 2015, *supra* note 7, at iii.

279. *Id*. at iii, 20, 31. The data on other forms of dispositions are what social scientists call "noisy," in that about a quarter have an "unspecified" judgment and the grounds for neither the thirty-five percent dismissed nor the ten percent settled were specified in court documents. *Id*. at 20.

280. The 1992 data were drawn from case outcomes in the seventy-five "most populous counties" in the country. *Id.* at 7. Of about 762,000 tort, contract, and property dispositions, approximately 378,000 were tort cases. *See* CAROL J. DEFRANCES, JOHN A. GOERDT, PATRICK A. LANGAN & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: TORT CASES IN LARGE COUNTIES 6 (1995), https://www.bjs.gov/content/pub/pdf/TCILC.PDF [https://perma.cc/D9T3-MUYA]; *see also* CAROL J. DEFRANCES, STEVEN K. SMITH, PATRICK A. LANGAN, BRIAN J. OSTROM, DAVID B. ROTTMAN & JOHN A. GOERDTY, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 1 (1995), https://www.bjs.gov/content/pub/pdf/cjcavilc.pdf [https://perma.cc/U336-2XGU].

281. LANDSCAPE CIVIL LITIGATION STATE COURT 2015, *supra* note 7, at iv.

282. *Id.* Adjudication was defined for these purposes as trials by a judge or jury, summary judgment, and binding arbitration. In the 1992 survey, 62% of the cases were disposed of through settlements, and 3% were disposed of by judge or jury trial. *Id*. at 7. Thus, in the 2012-2013 data, of the almost one million cases, 32,124 trials took place, of which 1109 (3%) were jury trials, and 31,015 (97%) were bench trials. *Id*. at 25. Jury awards exceeded $500,000 in 17 (3%) of the cases, and 75% of the jury awards in tort cases were below $152,000. *Id*. at 28. The 2012-2013 study also noted that, as contrasted with 1992, both parties were represented in 24% of the bench trials. *Id.* at 28.

over-year decline in total courtroom hours" from 2008 to 2012 that continued into 2013.[283] 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."[284]

What about decision-making in mandated arbitration? In Section IV.A, I provided a snapshot of claims resolved during eight years that involved one company and were administered by the AAA. But recall that, as of 2017, of more than thirty institutions running consumer arbitrations in California, about one-third file the data as the state statute directs. Moreover, the statute calls for five years of data, and each time the AAA puts up a new three-month interval, it has developed a practice of taking down earlier intervals of data. Therefore, unless researchers independently stockpile data and until many other providers comply, no comprehensive account is available about the patterns of arbitration's use over time.

V. THE "LOGICS" AND THE "EXPERIENCES" OF COURTS AND OF ARBITRATION

Judges' experiences with growing numbers of poor people in court are part of what prompts states to convene A2J task forces to find new routes for the funding of litigants and courts.[285] In some instances, state judiciaries have succeeded in obtaining new streams of funding to provide legal services for cases involving housing and families. New York, for example, under the leadership of former Chief Judge Jonathan Lippman, set aside $100 million for civil legal services in 2017.[286] Illinois's Task Force aims to alter its filing fee system.[287] Connecticut's Task Force has proposed a statutory right to civil counsel for domestic violence, child custody, and eviction cases,

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

284. *Id.* at 566.

285. *See* CIVIL JUSTICE IMPROVEMENTS COMM., CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL: RECOMMENDATIONS TO THE CONFERENCE OF CHIEF JUSTICES 4–6 (2016), http://www.ncsc.org/~/media/microsites/files/civil-justice/ncsc-cji-report-web.ashx [https://perma.cc/3JJL-S2D4].

286. JONATHAN LIPPMAN, LAWRENCE K. MARKS, RONALD P. YOUNKINS, BARRY R. CLARKE & MAUREEN H. MCALARY, N.Y. STATE UNIFIED COURT SYS., FISCAL YEAR 2016-2017 BUDGET (2017), https://www.nycourts.gov/admin/financialops/BGT16-17/2016-17-UCS-Budget.pdf [https://perma.cc/X38Y-D43M].

287. *See* ILLINOIS COURT ASSESSMENTS 2016, *supra* note 19, at 38–39, app. A (Proposed Court Clerk Assessment Act, 705 ILCS 105/27.1); *see also* 705 ILL. COMP. STAT. ANN. 105/27.1a (West, Westlaw through Pub. Acts effective Jan. 1, 2018).

as well as fee-shifting in foreclosure and debt collection cases.[288] If the political will is available, some of the problems can be mitigated. Indeed, given that courts' budgets are typically a small percentage (two to three percent) of state and federal expenditures, public insistence on funding could do more.

Other restructuring can come from regulations of ADR/ODR and arbitration as well as from the development of constitutional doctrine, which could be put to work to retrieve public access to dispute resolution. I have already noted constitutional challenges to fines, fees, surcharges, bail, and the structure of financial obligations stemming from courts. Here, I focus both on regulations and on the mandates for public access to court proceedings, which are predicated on a mix of common, statutory, and constitutional law.

One method for interrupting privatization can be regulatory, as illustrated by British Columbia[289] and, in the United States, by the CFPB's efforts in 2016 and 2017. In addition to proposing that pre-dispute class action waivers not go into effect in the financial products and services markets over which it had jurisdiction, the CFPB also sought to require reporting on arbitration—through databasing on a website, with redactions if needed for individuals' privacy.[290] That rule, which shared some of the features of California and other states' mandates on reporting, required information on the initial claim requested, the documents mandating arbitration, and communications between individual arbitrators and the administrator (such as the AAA) related to problems if the service provider had not paid required fees.[291] But such efforts were stymied in October of 2017 when Congress (with the Vice President voting in the Senate)

288. WILLIAM H. CLENDENEN, JR. & TIMOTHY FISHER, CONN. GEN. ASSEMBLY, JUDICIARY COMM., REPORT OF THE TASK FORCE TO IMPROVE ACCESS TO LEGAL COUNSEL IN CIVIL MATTERS (2016), http://www.rc.com/upload/O-Hanlan-Final-Report-of-CT-Leg-Task-Force-12_2016.pdf [https://perma.cc/3YS9-ZMBF].

289. *See supra* notes 132-138.

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

291. *See id.* The proposal is analyzed in Nancy A. Welsh, Dispute Resolution Neutrals' Ethical Obligation to Support Reasonable Transparency (Nov. 14, 2017) (unpublished manuscript) (on file with author). As she details, the proposal garnered "strong support" from the American Bar Association's Section of Dispute Resolution. *Id.* at 7–9; *see also* Section of Dispute Resolution of the American Bar Association, Comment Letter on the Bureau of Consumer Financial Protection Proposed Rule on Arbitration Agreements (July 29, 2016) [hereinafter ABA Dispute Resolution Section 2016 Comments], https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/bars/dr-cfpb-comments_7-29-16.authcheckdam.pdf [https://perma.cc/KD79-V5FT].

passed a resolution providing that the CFPB's proposed "rule shall have no force or effect."[292]

Other U.S. regulatory systems do impose obligations for arbitration providers to make some information public. The Financial Industry Regulatory Authority ("FINRA") requires public disclosure of awards,[293] as does the Internet Corporation for Assigned Names and Numbers ("ICANN"), a non-profit that created a dispute resolution system for disagreements about domain names; ICANN publishes arbitrators' decisions.[294] Moreover, as the analysis of the AAA filings reflects, state statutes can also force information about arbitration into the open.

Another question is what work constitutional mandates could play in making public the processes of and the decisions in dispute resolution. As I sketch below, the current case law offers *doctrinal access*; interpretations of the First, Sixth, and Fourteenth Amendments, coupled with Article III's creation of an independent judiciary, make impermissible the closing off of trials and related court proceedings. What the doctrine does not (yet) do is to take into account changing procedures in and out of court and insist on *functional openness*. Hence, a few details about the limits and possibilities of the current law are in order.

The U.S. Supreme Court has held that criminal trials and related activities, including voir dire and pre-trial suppression hearings, are to be open, absent case-specific reasons that permit narrowly tailored closings of a particular proceeding.[295] The Court's strong stance bent some in 2017 when it declined to find that a routine practice in Massachusetts of closing courtrooms during voir dire constituted a structural error requiring enforcement by vacating a conviction.[296]

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

293. *See Rule 12904(h): Awards*, FINRA MANUAL, http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=4192 [https://perma.cc/LUG5-DMF8]; Welsh, *supra* note 287, at 13.

294. *See* Rule 16(b) of Rules for Uniform Domain Name Dispute Resolution Policy, https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en [https://perma.cc/D27B-FDK7]; Welsh, *supra* note 187, at 14.

295. *See* Presley v. Georgia, 558 U.S. 209, 209 (2010); Waller v. Georgia, 467 U.S. 39, 40, 45 (1984); *see also* Simonson, *supra* note 101, at 2195–96 (analyzing the uneven application of these rulings in the lower courts).

296. *See* Weaver v. Massachusetts, 137 S. Ct. 1899, 1910 (2017) ("[W]hile the public-trial right is important for fundamental reasons, in some cases an unlawful closure might

The Court has not directly addressed the public's right to observe civil litigation, but lower courts have read the precedents, coupled with common law, to require access to civil litigation analogous to that accorded in criminal litigation. The Court's approach, predicated on the First Amendment, relies on historical experiences of courts as public venues and the values of the resulting public exchanges. The normative argument reflects (albeit not always with citations) Bentham's concerns about education, oversight, and accountability.[297]

Judges describe the analysis as considering the "experience" of practices over time to ascertain whether a "tradition of accessibility" has existed for a kind of proceeding. Judges then assess the "logic," which entails the claimed benefits of openness or closure through evaluating whether "access plays a significant positive role in the functioning of the particular process in question."[298] The doctrine does not provide clear direction about the vantage point (litigants, courts, the public, or social welfare more generally) from which to make that assessment. Should the perspective be that of litigants or judges eager for closure, or of third parties such as those participating in #MeToo and complaining about how insistence on secrecy stymied their claims?

take place and yet the trial still will be fundamentally fair from the defendant's standpoint."). Thus, the standard of review varied depending on whether the claim was raised "on direct review or raised instead in a claim alleging ineffective assistance of counsel." *Id*. at 1912. The Supreme Judicial Court of Massachusetts noted that Weaver's attorney did not object to court room closure because he "did not understand that the public had a right to be present during the jury empanelment phase of the trial proceedings." Commonwealth v. Weaver, 54 N.E.3d 495, 520 (Mass. 2016). As Justice Breyer, joined by Justice Kagan, explained in his *Weaver* dissent, the Court had recognized that "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance." *Weaver*, 137 S. Ct. at 1917 (Breyer, J., dissenting) (quoting *Waller*, 467 U.S. at 49). As a result, "a requirement that prejudice be shown 'would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury.'" *Id.* (Breyer, J., dissenting) (quoting *Waller*, 467 U.S. at 49 n.9) (square brackets in the original)).

297. *See, e.g*., Press-Enterprise I, 464 U.S. 501, 507–08 (1986); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571–72 (1980) (plurality opinion); *see also* BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, *supra* note 31.

298. *See* Press Enterprise II, 478 U.S. 1, 8–9 (1986). This test was developed from Justice Brennan's concurring opinion in *Richmond Newspapers*, joined by Justice Marshall, *Richmond Newspapers*, 448 U.S. at 584–89, and has been applied in civil cases, see, for example, *Del. Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 514 (3d Cir. 2013); *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth*., 684 F.3d 286, 297–99 (2d Cir. 2012); and *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984).

Despite the fuzziness, courts using this test have found constitutional access rights to civil trials and to related court-based proceedings. As in criminal cases, openness can be tempered under U.S. law, as it was for Bentham.[299] If a proceeding does qualify as open, the next decision is whether special considerations justify a narrowly tailored closure.

A related line of cases focuses specifically on public access to documents filed in court.[300] The case law, mixing common law traditions and constitutional values, requires access to "judicial documents" that are "relevant to the performance of the judicial function and useful in the judicial process."[301] Judges describe a "strong presumption in favor of openness" if records are filed in

299. Bentham's enthusiasm for openness did not render him insensitive to the burdens of public processes and the need for privacy. His justifications for privacy included protecting participants from "annoyance," avoiding unnecessary harm to individuals through "disclosure of facts prejudicial to their honour" or about their "pecuniary circumstances," and preserving both "public decency" and state secrets. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, *supra* note 31, at 360. Specifically, exceptions permitted expelling those who disturbed a proceeding and closing proceedings for the preservation of "peace and good order," to "protect the judge, the parties, and all other persons present, against annoyance," 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," to avoid "unnecessary disclosure of . . . pecuniary circumstances," "to preserve public decency from violation" and to protect "secrets of state." *Id*. Bentham's list of circumstances for closure, like his arguments for openness, parallel those made in contemporary courts. For example, the European Convention on Human Rights provides that:

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

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

300. *See, e.g.*, Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 93–96 (2d Cir. 2004).

301. *See* United States v. Amodeo, 44 F.3d 141, 145–46 (2d Cir. 1995).

court,[302] with the burden of closure falling to the party seeking to do so,[303] again coupled with admonitions to tailor narrowly any sealing.[304]

If this body of law can help to make non-trial-based ADR and ODR open to third parties, more analyses are needed about what constitutes "judicial documents" and whether the concept of "judicial documents" applies when "judges" are ADR providers, such as court-annexed arbitrations. Aspects of these questions have been explored. For example, judges have debated whether materials attached to motions or reports from post-settlement monitors or by government agencies fall within the mandated accessibility.[305] In litigation related to the September 11, 2001 terrorist attacks, the question was whether a settlement involving property claims against airline insurers would be made publicly available.[306] The *New York Times* succeeded in having a court grant its request to unseal the aggregate amounts of the settlement and the allocation of funds from contributing insurers but not information on amounts paid to settling defendants.[307] Another case involved reports by a court-appointed monitor in a case relating to conditions at a county jail; the Second Circuit held those materials had to be publicly accessible.[308] And in 2017, the D.C. Circuit rejected the redaction of materials that had been sealed below but which were relevant to a pending appeal.[309]

302. Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1179 (6th Cir. 1983); *see also* Hartford Courant Co., 380 F.3d at 92, 96.

303. *In re* Cendant Corp., 260 F.3d 183, 194 (3d Cir. 2001). The burden is a heavy one: "Only the most compelling reasons can justify non-disclosure of judicial records." *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 476 (6th Cir. 1983).

304. *See* Baxter Int'l, Inc. v. Abbott Labs., 297 F.3d 544, 548 (7th Cir. 2002); *see also* Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305–06 (6th Cir. 2016); JetAway Aviation, LLC v. Bd. of Cty. Comm'rs, 754 F.3d 824, 826–27 (10th Cir. 2014).

305. *See, e.g.*, United States v. Erie Cty., 763 F.3d 235, 239–41 (2d Cir. 2014); SEC v. Am. Int'l Grp., 712 F.3d 1, 3–5 (D.C. Cir. 2013); IDT Corp. v. eBay, 709 F.3d 1220, 1223–25 (8th Cir. 2013).

306. *See In re* Sept. 11 Lit., 723 F. Supp. 2d 526, 529–30 (S.D.N.Y. 2010).

307. *Id*. at 533.

308. *Erie County*, 763 F.3d at 241.

309. Metlife, Inc. v. Fin. Stability Oversight Council, 865 F.3d 661, 667–69 (D.C. Cir. 2017). The company had challenged the decision by the Financial Stability Oversight Council that had designated it under the Dodd–Frank Act to be a "nonbank financial company," which subjected it to more supervision by Federal Reserve System's Board of Governors. *Id*. at 663. A group called "Better Markets" sought to intervene to unseal the briefs and appendices related to summary judgment. *Id*. at 664. The trial court permitted intervention but rejected the motion to unseal; the appellate court held that the materials were "judicial records" and that the Dodd–Frank Act did not limit the common law right of public access. *Id*. at 664–69. The circuit court distinguished its decision in *SEC v. American International Group*, which had concluded that "an independent consultant's reports were not judicial records." *Id*. at 667–68. The circuit court in that case held that,

What the cases do not yet address are other activities that have become part of the "judicial function," including managing and settling cases. Could regulations require or lawsuits force access to materials related to settlement efforts or require that the interactions among disputants and judges be held in open court and on the record? Return to the two doctrinal prongs of "experience" and "logic." As noted, a few jurists report doing their Rule 16 conferences on the bench, yet no rules oblige doing so. As for the "logic," the issue would be whether openness plays a "significant positive role." If court-annexed arbitration, for example, is open, then experiences of it can be used to confirm the vitality of public access. But if confidentiality becomes the norm, one could rely on that experience as the basis for overruling challenges to closed procedures.[310] The Court's test thus invites troubling circularity, as practices in place turn what "is" into what ought to be.

Another issue is who counts as a "judge." Court-based arbitrators are, under federal statutes, accorded judge-like immunity and constrained by judicial rules of disqualification.[311] Yet while shielded from liability, they are not currently obliged to do their work in public or to report their decisions to the public. Were the work of court-based arbitrators to come within the "judicial function/judicial process" rubric, then materials provided in ADR could be made available and routinely data based, with caveats akin to the rules in British Columbia, would be to impose limits, such as to protect disclosures until after the decisions become final or new trials are held, or for personal privacy and other specified reasons for limiting access.

A more ambitious doctrinal innovation would be to understand that, given that mandates to participate in arbitration come from non-negotiable obligations that courts have enforced through the FAA,[312] the resulting "private" arbitrations are artifacts of public law, subject to regulation. Instead of arguing that mandated arbitration constitutes an unconstitutional delegation of federal judges' Article III powers,[313] one could condition constitutionality on having the attributes of

although prepared because of a consent decree, the materials were not therefore given to the district court. 712 F.3d at 3–5. In *Metlife*, in contrast, the court concluded that the relevant materials were before the district court and that redaction was not proper, even if some of the materials had been sealed below. *Metlife*, 865 F.3d at 675–76.

310. Illustrative of that approach is the dissent in *Del. Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 523–26 (3d Cir. 2013) (Roth, J., dissenting).

311. 28 U.S.C. § 655(b)–(c) (2012).

312. *See* Resnik, *Diffusing Disputes*, *supra* note 1, at 2860–63, 2870 –74.

313. *See* PETER B. RUTLEDGE, ARBITRATION AND THE CONSTITUTION 15–53 (2013).

adjudication—openness, due process norms of impartiality and evenhandedness, and equal protection—travel with the delegation.

Support for this equation of arbitration and adjudication comes from a debate in Nebraska about the constitutionality of arbitration itself. In 1889 and again in 1991, the Nebraska Supreme Court read the state constitution as prohibiting mandated arbitration because the closed processes were inconsistent with its "open courts"/"rights-to-remedies" clauses.[314] In response to the 1991 decision, lobbyists for arbitration succeeded in getting an amendment to the state's constitution to license closed arbitrations as an exception to the open-courts clause.[315] But another argument remains—that because arbitration has become a licit substitute for court, it ought to be required, inter alia, to offer third parties opportunities to watch how it works.

To summarize, if courts are to be sustained as open venues and if court-like activities are to become open, more than the current formulations are needed.[316] Doing so will require weaning the doctrine from its focus on "experiences," which are increasingly of private activities, and insisting on expanded analyses of the "logic" supporting public processes. Moreover, the doctrine could rest on a mix of due process, equal protection, Article III, and First Amendment values to require both public access to, and collective actions in, courts and arbitration.

The doctrinal presumption of open courts would apply to the surrogates *for* courts, as would the mandate to tailor narrow limits on third-party access. Parties and the decision-makers would have the burden of justifying why to shut the doors in particular cases, such as by relying on arguments familiar in courts and predicated on commercial interests in trade secrets or on personal safety and privacy. The result would be that, in contrast to current secrecy practices, most consumer and many employment arbitrations would have to be open. The enforceability of both the obligation to arbitrate and of the results could be conditioned on the provision of public access rights.

314. *See* State v. Neb. Ass'n of Pub. Emps., 477 N.W.2d 577, 581–82 (Neb. 1991); German-Am. Ins. Co. v. Etherton, 41 N.W. 406, 406 (Neb. 1889).

315. Details of the political campaign for the amendment are provided in Resnik, *Constitutional Entitlements*, *supra* note 65, at 983–85.

316. *See* Resnik, *Public Dimension*, *supra* note 77, at 408–20, 423–27.

VI. THE INTERESTS AT STAKE

Doctrine is not free-floating. Law is nested in political and social movements. The pressures to close off courts reflect efforts by contemporary political leaders, promising to diminish the provision of government services more generally. The conflicts over secrecy and openness in courts is part of a larger backlash against what I have elsewhere termed "statization"—the expansion during the twentieth century of government activities that aimed, in some measure, to be redistributive and egalitarian.[317] My efforts here, to reconstitute predicates for open courts, goes against these deregulatory privatization efforts.

To succeed entails a politics supportive of openness. Norms of egalitarian redistribution can be one route. In the current climate so accepting of inequalities, another entails clarifying that the problems posed by closed courts and diffuse dispute resolution are not identified as detrimental to low-income litigants alone. How can repeat players be persuaded to see their interests furthered by openness? Evidence that some repeat players see the value of openness and its relationship to legitimacy comes from inside the market of dispute resolution providers. Examples include recent changes in investor-state dispute resolution under the United Nations Commission on International Trade Law ("UNCITRAL"), which created "Transparency Rules" in 2013 for a subset of arbitrations and that requires (when the rules apply) disclosure of a wide range of information submitted to and issued by tribunals.[318]

In the United States, a parallel call came both from the CFPB and, in the summer of 2016 from the ABA's Dispute Resolution Section, which applauded the CFPB rule that would have mandated more disclosure in financial services arbitrations. That Section, comprised of lawyers committed to ADR, argued that transparency

317. *See* Judith Resnik, *Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century*, 11 INT'L J. CONST. L. 162, 168–73 (2013); Judith Resnik, *Courts and Social and Economic Rights/Courts as Social and Economic Rights*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS, (Katharine G. Young ed., forthcoming 2018) (manuscript at 2–4) [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2983853]; *see also* Martha T. McCluskey, *Constitutional Economic Justice: Structural Power for "We the People*,*"* 35 YALE L & POL'Y REV. 271, 283–92 (2016).

318. *See* G.A. Res. 68/109, at 1–2 (Dec. 16, 2013); Lise Johnson, *The Mauritius Convention on Transparency: Comments on the Treaty and its Role in Increasing Transparency in Investor-State Arbitration* 1–4 (Columbia Ctr. on Sustainable Inv. Policy Paper, 2014), http://ccsi.columbia.edu/files/2013/12/10.-Johnson-Mauritius-Convention-on-Transparency-Convention.pdf [https://perma.cc/DC7E-LEHY].

was particularly important to help "protect the integrity of arbitration and, by extension, the integrity of the strong federal policy in favor of arbitration" upon which the U.S. Supreme Court has insisted.[319] The rule almost went into effect; Congress split in 2017, with half of the Senate supporting the CFPB regulations mandating openness in arbitration as well as limits on class action bans. Yet another example is the 2017 pending legislation to exempt sexual harassment claims from arbitration; that proposal reflects the impact of the #MeToo movement, whose participants, pressing for public disclosures, span the economic and political spectrum.

This set of recent shifts builds on a long tradition of pro-court efforts by repeat players. Indeed, collective, court-based action has been deployed in service of a diverse set of claimants. For a period of time during the second half of the twentieth century, public and private sector actors understood their interests to be enhanced by opening up courts, including through class actions and multi-district litigation, facilitating the pursuit and the closure of claims.[320]

The pioneering constitutional authorization to do so came at the behest of banks, seeking to obtain declarations that they had properly discharged their fiduciary obligations to beneficiaries of pooled trusts.[321] In 1950, in *Mullane v. Central Hanover Company*,[322] the U.S. Supreme Court ruled N.Y. law could constitutionally authorize such collective accountings and reach beneficiaries nationwide.[323] Doing so required new approaches to the Due Process Clause, governing the authority of courts to impose binding resolutions. While class actions have since come to be identified with civil rights, consumers, and employee plaintiffs, interest in collectivity was then sought to enable what the U.S. Supreme Court called the "vital state interest" of marketing pooled trusts that would not subject banks to extensive challenges for alleged imprudent management.[324] The Court's 1950 caveat was that beneficiaries—across the country—had to be told of the pendency of the accounting.

319. *See* ABA Dispute Resolution Section 2016 Comments, *supra* note 287, at 8; Welsh, supra note 287, at 7–9.

320. For some of this history, see Resnik, *"Vital" State Interests*, *supra* note 11, at 1768–83 and Judith Resnik, *From "Cases" to "Litigation*," 54 L. & CONTEMP. PROBS. 5, 21–22 (1991).

321. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 307–09 (1950).

322. 339 U.S. 306 (1950).

323. *See id*. at 318–20.

324. *Id*. at 313.

That process became the model for the 1966 revisions to the federal class action rule. And even then, some commentators worried that enabling collectivity would benefit corporate interests more than individuals.[325] Yet, as it has turned out, class actions became icons of empowering groups when individuals did not have the "strength" to pursue their claims alone.[326] Mandating notice forced knowledge about aggregate claims into the public sphere and produced the debates ongoing today about their fairness and utilities. Although individuals rarely respond to required notices, notice requirements put the fact of claiming into the mailboxes of millions and onto the public screen.

The development of the constitutional law of fee waivers is likewise predicated on the government's own need to legitimate court action. Just as that concern was a part of the calculus for the Court in *Mullane*, so too are "vital state interests" reflected in cases requiring that, as a matter of due process, governments subsidize lawyers for criminal defendants and help certain kinds of civil litigants[327] to provide some semblance of what the English call "equality of arms" among disputants. The current wave of constitutional cases, challenging the practice of using courts to generate revenues in ways that discriminate along race and class lines, again brings the question of the legitimacy of courts to the fore.

All of us—rich and poor, plaintiff or defendant—need court systems. Given resource limits and the nature of contemporary harms, collective actions in courts and finding ways to make the various forms of ADR public are important facets of legitimacy. To bring openness back to courts as well as into their alternatives requires a broad political base. Repeat players (including the federal government) will need to understand that reviving public courts is in service of their interests in having thriving economies in which obligations can be fairly enforced.[328] Politics made the law that

325. *See* Brian T. Fitzpatrick, *The Ironic History of Rule 23*, 96 N.C. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020306.

326. *See* Kaplan, *supra* note 11, at 497–98; Resnik, *Reorienting the Process Due, supra* note 11, at 1043–45.

327. *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 119–24 (1996); Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963). For the history of that development, see Resnik, *supra* note 52, at 91–93.

328. *See* Resnik, *Reorienting the Process Due, supra* note 10, at 1065–67; *see also* Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?* 15-22 (Vanderbilt Univ. Law

opened up courts, and politics will either undo or recommit to dispute resolution in public.

School, Working Paper No. 17-40, 2017); BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS (forthcoming 2018).