

April 2006

Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk

Judith Resnik

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

Recommended Citation

Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 Chi.-Kent L. Rev. 521 (2006).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol81/iss2/9>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

UNCOVERING, DISCLOSING, AND DISCOVERING
HOW THE PUBLIC DIMENSIONS OF
COURT-BASED PROCESSES ARE AT RISK

JUDITH RESNIK*

In this essay—considering “privacy” and “secrecy” in courts—I first offer a brief history of the public performance, through adjudication, of the power of rulers, who relied on open rituals of judgment and punishment to make and maintain law and order. Second, I turn to consider why, during the twentieth century, the federal courts became an unusually good source of information about legal, political, and social conflict. Third, I map how, despite new information technologies, knowledge about conflicts and their resolution is being limited by the devolution of court authority to agencies, by the outsourcing of decisions to private providers, and by the internalization in courts of rules that promote private management and settlement of conflicts in lieu of adjudication. Fourth, I argue that deployment of new procedures of dispute resolution requires new answers to questions about what processes should be presumptively public and that, given their political implications, these answers should not be left to judges, as rulemakers or doctrine-producers alone. Fifth, I explain why new regulations are needed to protect the public dimensions of courts and to create public dimensions for their alternatives. Public processes generate not only knowledge about the uses of power but also a commitment to fair treatment by government, to accountability in government, and to norm development, all of which should not be controlled exclusively by the parties to a dispute nor by those empowered to resolve it.

I. SECRECY AND SUNSHINE IN CONTEXT	522
II. THE PUBLIC DISPLAY OF STATE POWER	526
III. INVESTING IN THE FEDERAL COURTS: PRODUCTION AND DISCLOSURE	537

* Arthur Liman Professor of Law, Yale Law School. © Judith Resnik, all rights reserved. This essay is based on material presented during the program, Secrecy in Litigation, held by the Section on Civil Procedure of the American Association of Law Schools at the annual meeting of 2005. My thanks to the co-panelists, to Nancy Marder for enabling this symposium and reading an earlier draft, to Denny Curtis for his insights, to Camilla Tubbs of the Yale Law Library, and to past and present students who have provided wonderful intellectual companionship and who include Andrew Goldstein, Paige Herwig, Alison Mackenzie, Kate Andrias, Cori Vannoy, Melissa Jacoby, Johanna Kalb, Marin Levy, Phu Nguyen, Jennifer Peresie, Natalie Ram, Bertrall Ross, and Emily Teplin. Thanks also to the Chicago-Kent Law Review for careful, thorough, and patient editorial work.

IV. DIVESTING: DELEGATION, OUTSOURCING, AND INTERNALIZATION	542
A. Agency Adjudication	542
B. Enforcing Contracts to Resolve Disputes Outside of Courts	549
C. Pressing for Conciliation Inside Courts	551
V. CHOOSING RULES	560
VI. INSTRUCTIONS FROM HISTORY AND FOR POSTERITY	565

I. SECRECY AND SUNSHINE IN CONTEXT

How much information related to litigation and relevant to court-based decisionmaking is, and should be, available to the public? What materials are appropriately private and what information is wrongly hidden from public purview? Should these questions be couched in the language of *privacy*, a value much respected though complex to parse,¹ or as part of a troubling trend towards *secrecy* in courts?² What kind of discussions would emerge, were the problem framed as one of *enhancing access* through the information highway of the Internet and television so as to improve the dissemination of knowledge produced through and about the courts?³

Such questions, coupled with concerns about actual practices⁴ and proposed federal legislation mandating “sunshine in litigation,”⁵ prompted re-

1. See, e.g., ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988); Ruth Gavison, *Privacy and the Limits of Law*, 89 *YALE L.J.* 421 (1980).

2. See, e.g., Joseph F. Anderson, Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 *S.C. L. REV.* 711 (2004). This issue was recently addressed in a conference, entitled “Classified: Secret Evidence and the Courts in the Age of National Security,” that was held at the Benjamin N. Cardozo School of Law, in December of 2005. Its brochure described its goal as considering the “transformation . . . occurring in Article III courts, immigration proceedings, military courts and status review tribunals: the expanded use of secret evidence.” (Brochure of Conference, held Dec. 5 and 6, 2005 on file with the Law Review).

3. See, e.g., Cary Coglianese, Stuart Shapiro, & Steven J. Balla, *Unifying Rulemaking Information: Recommendations for the New Federal Docket Management System*, 57 *ADMIN. L. REV.* 621 (2005) (describing efforts to make information on federal regulation more readily available through the internet and the response by a group of more than fifty scholars concerned about information storage as well as methods for searching and downloading the data).

4. See, e.g., SEDONA CONFERENCE WORKING GROUP ON PROTECTIVE ORDERS, CONFIDENTIALITY & PUB. ACCESS, *THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY, AND PUBLIC ACCESS TO CIVIL CASES* (Ronald J. Hedges & Kenneth J. Withers eds., rev. Apr. 2005 Public Comment Drft.), available at http://www.thesedonaconference.org/content/miscfiles/publications_html (seeking to describe the contemporary contexts and prescribe best practices).

5. See *Sunshine in Litigation Act of 2005*, S. 1348, 109th Cong. (2005). The bill would require that courts not enter orders under the Federal Rules of Civil Procedure “restricting the disclosure of information obtained through discovery, an order approving a settlement agreement that would restrict

searchers at the Federal Judicial Center to inquire into the practice of sealing court-based settlements.⁶ From their review of a sample of docket sheets from different federal districts, researchers reported in 2004 that few litigants in their data set requested that settlements filed in court be sealed.⁷ One might infer from the relative rarity of docket sheets noting sealing that information about how cases are processed and about their outcomes is generally accessible. An alternative explanation, detailed in this essay, is that privatization of court-based decisionmaking is underway but that sealing court files is not the predominant mode used to accomplish what some *describe* as appropriate measures of “confidentiality” and “privacy” and what others *decry* as inappropriate “secrecy.”

Sealing settlements is one of many vehicles to limit access to knowledge about disputes. Below, I explore the multiple means of privatizing conflict resolution. Further, I explain why the hard questions about who should have access (and how) to what kinds of information related to which forms of conflict resolution ought not be analyzed by considering only court-based rules, doctrine, and data. I argue that privatizing court processes does put at risk the public dimensions of adjudication and that, given the variety of normative

the disclosure of such information, or an order restricting access to court records in a civil case” without finding that such orders would not “restrict” disclosure of information “relevant to the protection of public health or safety,” or that the public interest in disclosure is outweighed by “a specific and substantial interest” in maintaining confidentiality, and further that the protective order is “no broader than necessary to protect the privacy interest.” *Id.* (proposed 28 U.S.C. § 1660(a)). The bill also provides that any orders entered during the pendency of a litigation not continue in effect after the entry of a final judgment without a court making separate findings in which the proponents of restricting access have the burden of proof. Further, the bill would prohibit parties from seeking others to stipulate to nondisclosure as a condition of discovery. This proposal follows earlier ones, as comparable bills have been introduced since the 1990s. *See, e.g.*, S. 817, 108th Cong. (2003); S. 957, 106th Cong. (1999); S. 374, 104th Cong. (1995); and S. 1404, 103d Cong. (1993). For discussion of the Sunshine in the Courtroom Act of 2005, addressing televised courtroom proceedings, see *infra* note 44.

6. *See* ROBERT TIMOTHY REAGAN, SHANNON R. WHEATMAN, MARIE LEARY, NATACHA BLAIN, STEVEN S. GENSLER, GEORGE CORT, & DEAN MILETICH, SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT (Fed. Judicial Ctr., 2004) [hereinafter FJC SEALED SETTLEMENT STUDY].

7. From a sample of fifty-two of the ninety-four federal district courts, the researchers culled more than 280,000 docket filings and found court-sealed settlement agreements in a small number—1,270 cases, or one out of every 227 cases, constituting under one-half of one percent of the filings reviewed. *Id.* at 3; *see also id.* at app. c (providing summaries of the cases). Sealing occurred in a range of kinds of cases (including personal injury, employment, civil rights, and contract cases) with higher rates of confidentiality in certain kinds of cases, such as those filed under the Fair Labor Standards Act. *Id.* at 3 (noting that Fair Labor Standards Act cases had a rate of sealing almost six times the overall average). The researchers concluded that in at least two-fifths of the cases identified, sealing occurred when cases had features making them of “special public interest.” *Id.* at 7. That such cases are ones in which sealing occurs can also be seen from a non-random consideration of published caselaw. In 2003, for example, the Ninth Circuit reviewed a blanket protective order making secret a good deal of discovery related to alleged fraud by an insurance company. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003). The court held that a “presumption of access” attached to discovery materials submitted in conjunction with dispositive motions and remanded the case to the trial court to revisit its ban on access. *Id.* at 1136. *See also Stalnaker v. Novar Corp.*, 293 F. Supp. 2d 1260 (M.D. Ala. 2003) (approving a settlement in a Fair Labor Standards Act lawsuit but ordering that it be unsealed).

commitments embodied in the practice of open courts, the resulting losses are significant.

This essay is part of a larger project, aimed at understanding the relationship between adjudication (a practice that long predates the development of liberal constitutional democracies) and democratic commitments to widen the circle of claimants eligible to enforce rights against each other and against the state.⁸ My argument here proceeds in five steps. First, I offer a brief history of the public performance, through adjudication, of the power of rulers who relied on open rituals about judgment and punishment to make and to maintain law and order.

By reviewing the traditions of adjudication in the Renaissance and thereafter, I show how adjudicatory practices influenced political theory about good government. Through adjudication and other activities, a range of norms for state behavior developed. For example, when displaying the power of the state to impose judgment, courts gathered, used, and disseminated information. Judgments were supposed to be linked to and constrained by evidence. Moreover, to establish legitimacy, rulers (both oligarchical and aristocratic) instructed judges not to favor disputants because of personal relationships. Over time and in part through the practice of public display, concepts about accountability and transparency in government decisionmaking, fair treatment between disputants, and respect for ordinary persons moved from the realm of the customary into that of right.

Second, I turn from this multi-century overview to the United States, and provide an account of aspects of the political economy of the American justice system that made the federal courts an unusually good source of information about legal, political, and social conflicts. Given the centrality, recent changes in federal practices are of particular saliency. Third, I map how, despite the information explosion enabled by new technologies, knowledge about conflicts and their resolutions is being limited. While courts were once information producers and information outlets, that function is diminishing through (a) the *devolution* of court authority to agencies, (b) the *outsourcing* of decisions to private dispute resolution providers, and (c) the *internalization* by courts of rules and practices that promote conflict management and settlement (alternative dispute resolution or ADR) in lieu of adjudication.

These changes represent a movement away from a litigation model exemplified by the 1938 Federal Rules of Civil Procedure (with their due process predicates) to what should be called "Contract Procedure," in which

8. See Judith Resnik & Dennis E. Curtis, *Representing Justice: From Renaissance Iconography to Twenty-First Century Courthouses*, Henry La Barre Jayne Lecture at the American Philosophical Society (Nov. 12, 2005) (on file with the author).

judges strive to produce settlements.⁹ This privatization makes it more difficult to grasp the nature, content, and consequences of conflicts in which public norms are invoked.

Both the Due Process Model of the 1930s and the Contract Procedure Model of the twenty-first century rely on crafting new forms of process—ranging from discovery to pretrial meetings of lawyers and judges to judicial settlement conferences and other forms of alternative dispute resolution. Questions thus emerge about whether these new forms of process ought to include public dimensions. For some, responding entails determining whether the pretrial phase of litigation, with discovery and settlement as its focus, is to be analogized to trials and thus ought to inherit their presumption of openness. For others, the claim is that pre-trial activities are more akin to what once took place in lawyers' offices and, hence, ought presumptively to be private. For me, the quest for analogies is limited by a recognition that many of the twentieth century's innovations are, in fact, new—requiring distinct answers that are informed by historic, doctrinal, or political principles but which cannot be decided by reasoning from prior premises alone.

Thus, and fourth, I urge recognition that the deployment of new procedures requires new answers to questions about what aspects of these processes should be presumptively public. Moreover, I argue that questions about the public dimensions of adjudication cannot be focused on courts alone. For hundreds of thousands of claimants, administrative agencies are, functionally, courts. And in light of the turn to other “alternatives,” those processes must also be under scrutiny.

Fifth, such resolution ought not to rest solely with judges, either as rule-makers or as producers of doctrine. Nor should that power be given to litigants left unfettered to negotiate any terms that they please. Rather, the issues of whether to enable or inhibit the closing down of public access to, and participation in, adjudication as well as its alternatives require analyses of the claimed utilities of public and of private resolutions and of theories of political power and legal rights. Both popular and legislative input is needed to consider how, in the context of changing technologies, conflicts and the paths toward their resolution can be brought to and remain in the public sphere.¹⁰ To assist that discussion, I detail some of the interventions possible. New regulations are needed not only to respond to changing technologies but also to rules and practices that have already reduced the information filed in court.

9. I describe the changes in greater depth in Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005).

10. See, e.g., BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* (2004); Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813 (2000); Nancy L. Rosenblum, *Primus Inter Pares: Political Parties and Civil Society*, 75 CHI.-KENT L. REV. 493 (2000).

The familiarity of courts' public dimensions may lead some to assume the stability of those attributes. I do not. My concern about the need to protect the public dimensions of adjudication and to create ways to vest public aspects into court-alternatives does not stem from an assumption that courts are either the best or the only resource for understanding the nature of injuries, the kinds of conflicts around us, the development of legal norms, and the roles and obligations of governments. But courts, well practiced in contributing to social ordering through public enactment of the state's power, are one source worth preserving.

II. THE PUBLIC DISPLAY OF STATE POWER

Adjudication, a useful practice for ruling powers of various sorts, pre-dates the rise of democratic political regimes. To maintain order and to enforce obligations, legal regimes do "violence,"¹¹ in that both civil and criminal judgments involve the relocation of rights to property or to personal liberty. Public displays of such violence—including the pageantry that once surrounded executions (as Michel Foucault famously analyzed¹²)—demonstrate and thereby help to make and to legitimate the state's force.

Punishments have since moved largely offstage—from the scaffold and stocks of town squares to the prisons. Yet the public processes of trials, harkening back to Greek traditions and before,¹³ have continued until recently to be predicates to criminal punishment and to civil adjudication.¹⁴ The activities of judges—under monarchies and in pre-democratic republics as well as in democracies—have influenced contemporary ideas about how governments ought to behave, both in dispute resolution and more generally. While a good deal of contemporary writing focuses on the role of courts in producing legal rules of various kinds and disseminating information, the contributions of adjudication's open practices are more far-ranging.

Hundreds of years ago, in and through adjudication, premises developed that ruling powers ought to provide even-handed and, in some respects, equal treatment to (certain) subjects when judges decided disputes. Evidence of

11. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

12. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan, trans., Vintage Books 2d ed. 1995) (1975). See also SAMUEL Y. EDGERTON, JR., *PICTURES AND PUNISHMENT: ART AND CRIMINAL PROSECUTION DURING THE FLORENTINE RENAISSANCE* (1985).

13. See Adriaan M. Lanni, Note, *Spectator Sport or Serious Politics? oi periesthokotes and the Athenian Lawcourts*, 117 J. HELLENIC STUD. 183 (1997); Kathryn Slanski, *Mesopotamia: Middle Babylonian Period*, in 1 A HISTORY OF ANCIENT NEAR EASTERN LAW 485, 491–96 (Raymond Westbrook ed., 2003).

14. See VI JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM 355–70* (Edinburgh, William Tait 1843) (1827) (reprinting I JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE*); see also Fred Cutler, *Jeremy Bentham and the Public Opinion Tribunal*, 63 PUB. OPINION Q. 321 (1999).

such ideas come from Renaissance Town Halls in which, in rooms dedicated to resolving cases, one can find the Latin phrase, *Audi & Alteram partem*—"Hear the other side as well."¹⁵ Over time, the idea took hold that the power of judgment could not be exercised in an utterly arbitrary fashion but instead required some justification, with outcomes reflective of the relevant facts and the governing customs and rules. In some eras and in some jurisdictions, the need for information was used to justify torture, imposed in centuries past as a predicate to punishment rather than as a punishment.¹⁶ In later eras, rules of evidence and procedure served not only to impose the power of the state but also to alter the distribution of power between litigants.

The obligations of judges also changed, as the concept developed that judgments should not be influenced or corrupted by judges' personal ties to or receipt of money from disputants. Allegorical scenes in Town Halls showed judges who demonstrated their loyalty to the state by ordering that their own children be harmed when found to have violated the laws of the state.¹⁷ Further, while parties once gave "gifts" to judges, rulers came to prohibit that practice by recasting such gifts as illicit "bribes."¹⁸ Instruction against receipt of money from litigants can be found in many rooms in which judgments were made. For example, in the Town Hall of Geneva, a 1604 fresco called *Les Juges Aux Mains Coupées* showed a panel of judges, all with cut-off hands. At one side is a phrase from the Old Testament that warned that the taking of gifts "blindeth the wise, and perverteth the words of the righteous."¹⁹ In Bruges, its City Hall showed the flaying of a judge who had accepted a bag of money.²⁰ With such prohibitions, judges became more dependent upon kings, who funded their positions when parties no longer

15. The Town Hall of Amsterdam provides one such example. See KATHARINE FREMANTLE, *THE BAROQUE TOWN HALL OF AMSTERDAM* 76 (1959) (describing the phrase in gold lettering above the entrance to the Magistrates' Court, a room in the Town Hall).

16. See JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF* (1977).

17. Resnik & Curtis, *supra* note 8 (discussing the scenes in the tribunal of the Amsterdam Town Hall in which Brutus is shown ordering the death of his son for joining a conspiracy against Rome and in which Zaleucus is portrayed as gouging his own eye and that of his son, who had violated the edict against adultery).

18. See NATALIE ZEMON DAVIS, *THE GIFT IN SIXTEENTH-CENTURY FRANCE* 86–90 (2000).

19. *Id.* at 85 (providing a translation of the words, taken from *Exodus* 23:8). A reproduction of that image can be found in Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 *YALE L.J.* 1727, 1736 fig.4 (1987) [hereinafter, Curtis & Resnik, *Images of Justice*]. The fresco, from 1604 and by Cesar Giglio, was commissioned for the chambers; subsequent refurbishing covered the wall, and the image was not found again until 1901. See BARBARA ROTH-LOCHNER & LIVIO FORNARA, *THE TOWN HALL OF GENEVA* 10 (Jean Gunn trans., 1986).

20. See Curtis & Resnik, *Images of Justice*, *supra* note 19, at 1737 fig.5a, 1738 fig.5b, 1749–50.

contributed to judicial livelihoods.²¹ But the ban has come to mean that, for decisions to be perceived to be fair, judges must not be beholden to parties.

Public performance (aimed to enable catharsis, information development, or explanatory didacticism) is another longstanding attribute of adjudication.²² For example, visitors to Amsterdam's seventeenth century Town Hall (now called the Royal Palace, due to its use by Napoleon Bonaparte) may enter the Tribunal where judgments were pronounced and sentences, including death, were imposed. That marble chamber is on the ground floor, with windows through which those on the street could see the proceedings.²³ Public punishments had elaborate rituals that marked the import of that event.²⁴ Such displays were the means by which rulers showed their power, insisted on their capacity to command obedience, and gave content to the practices with which they sought compliance.²⁵

Through such public presentation of evidence, information about conflicts became available to a wider audience. And once disseminated, the state could not always contain the effects of its own processes. The consequences of a lack of containment ranged from uncontrollable crowds (as Foucault recounted²⁶) to the generation of new information (as Jeremy Bentham argued when noting that public processes gave witnesses reputational stakes and, at times, prompted new witnesses to come forward²⁷). More recently, as injuries can be experienced across a wide spectrum of persons, publicity about conflict enables individuals, situated similarly to those already-identified as "victims," to perceive themselves as sharing problems that are redressable through law. In a world of mass torts, consumer fraud, and sexual abuse, open conflict may serve to expose wrongdoers continuing to place others in harm's way. In this respect, knowledge about conflicts may be a source of yet more conflict.

21. See DAVIS, *supra* note 18, at 86–90 (also noting that judges defended the practice on the basis that both sides gave gifts).

22. See Lanni, *supra* note 13, at 183 (noting Bentham's reference to the "theatre of justice" and providing a description of the "social drama" enacted in ancient Greek law courts, in which spectators "played a crucial role"); Milner S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81 (1975); see generally John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168 (1996).

23. FREMANTLE, *supra* note 15, at 80.

24. See FOUCAULT, *supra* note 12; EDGERTON, *supra* note 12; see also Beth A. Berkowitz, *Negotiating Violence and the Word in Rabbinic Law*, 17 YALE J.L. & HUMAN. 125 (2005) (describing these rules of the Rabbis of the second century).

25. See generally MARTIN LOUGHLIN, *SWORD AND SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS* 65–110 (2000).

26. FOUCAULT, *supra* note 12, at 59–65.

27. Bentham argued that publicity served as a check on "mendacity and incorrectness," in that the wider the circle of dissemination of a witness's testimony, the greater the likelihood of truth and accuracy. "Many a known face, and every unknown countenance, presents to him a possible source of detection." BENTHAM, *supra* note 14, at 355 (quoting himself in an earlier volume).

Another early function of adjudication was recordation. For hundreds of years, in Europe and then the Americas, churches and courts provided locations for people to gather, to record, and to disseminate information. By some time during the twelfth century, courts came to be relied upon to verify facts. As Pollock and Maitland explain, courts were able to create “indisputable evidence of . . . transaction[s]” in eras when forgeries “were common.”²⁸ Long before public archives and private title companies existed, courts (actually often rooms within multi-purpose Town Hall buildings) were government-based document repositories.

As countries have become more committed to democratic practices, the openness of courts and their information-forcing capacities continue to serve as visible demonstrations of rulers’ power. Violence remains a critical feature of adjudication. The imposition of the state’s norms results in the dislocation of persons and property. Yet democracies have also developed a rich understanding of the rights of individuals under government. The public dimensions of court processes have become embedded in a language of entitlements, as can be found in the constitutional doctrine of the United States,²⁹ in the texts of state constitutions,³⁰ in some transnational agreements,³¹ and in rules of courts.³² In addition to express provisions, public access today rests on tradition, on opposition to certain forms of secretive state processes, and on claims

28. 2 FREDERICK POLLOCK & FREDERIC MAITLAND, *THE HISTORY OF ENGLISH LAW* 94–95 (Lawyers’ Literary Club 1959) (1898) (describing the development in England of the “seisin under a fine,” a “final concord levied by the king’s court,” which was “in substance a conveyance of land and in form a compromise of the action”); *id.* at 540 (discussing the commonplace events of forgery and perjury). While in some instances a real dispute existed, in many instances the litigation was begun to enable a compromise to be entered. Further, through fines, parties were bound to perform and had rights against third parties. Compromising without permission was an offense, and the king made money from licenses sold to justices. Thus, the system of reliance on courts as notaries had various utilities. *Id.* at 97–99. See also S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 181–82 (2d ed. 1981).

29. See, e.g., U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

30. See, e.g., CONN. CONST. art. 1, § 10 (“All courts shall be open . . .”); S.C. CONST. art. 1, § 9 (“All courts shall be public . . .”).

31. See, e.g., Article 14 of the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 54, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (“[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” The press and the public may be excluded for limited reasons.); Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), *opened for signature* Nov. 4, 1950, Europ. T.S. No. 005 (“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.”).

32. See, e.g., S.C. R. CIV. P. 41.1 (entitled “Sealing Documents and Settlement Agreements” and including the statement that it was enacted “to set forth with clarity the fact that the courts of this State are presumed to be open and to set forth with particularity when documents and settlement agreements, submitted to a court for approval, may be sealed”).

for its utility, both educational and supervisory.³³ And the rights of disputants and obligations of the state to perform in public have in turn also generated rights of access for non-parties to watch some of the state's decisionmaking.³⁴

The openness of court-based processes has also helped to anchor the idea that governments have to account for their own authority by letting others know how and why power was used. Over time, governments themselves, as plaintiffs or defendants, have become subject to the constraints of adjudicatory processes and have had to bear the exposure that revelations can entail. As courts developed practices of explanations, reduced to writing and published in opinions, they disseminated their findings, initially through a designated reporter and, more recently, in a marketplace of providers.³⁵ These public dimensions of adjudication are now part of a more general idea, "transparency," which in recent decades has become an important attribute of legitimate state decisionmaking—sometimes implemented by Freedom of Information Acts or other legislative directives mandating disclosure.

As these examples also suggest, being able to watch the resolution of conflict and to know about the sanctions that flow also permits policing of the decisionmakers. Jeremy Bentham captured this idea with his statement that "[p]ublicity is the very soul of justice. . . . It keeps the judge himself, while trying, under trial."³⁶ Judge and jurors are regularly criticized (some may argue, too often criticized) because of the decisions that they render. And again, accountability is both desirable and anxiety producing, as one aspires to a form of judgment in adjudication that is sensitive to context but not aiming to please. This accountability also has an egalitarian aspect, for government and litigant alike are both subject to scrutiny as we give meaning to our legal rules. Further, under current norms in the United States, courts oblige partici-

33. Bentham described courts as "school[s] of the highest order." BENTHAM, *supra* note 14, at 355. See generally Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 405–26 (1987) [hereinafter Resnik, *A Public Dimension*] (analyzing the justifications proffered by courts identifying constitutional rights of access to court proceedings, both civil and criminal).

34. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). See also *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 96 (2d Cir. 2004) (holding that "docket sheets enjoy a presumption of openness and that the public and the media possess a qualified First Amendment right to inspect them" and explaining the utility of such an approach); see also *Public Trial. Exclusion of Spectators*, 16 YALE L.J. 341 (1907) (describing Roman practices of private taking of evidence that came to be associated with subsequent Ecclesiastical courts in England, the discretion accorded judges to close courts under an English statute of 1848, and the American commitment to public criminal trials in both federal and state constitutions). The author concluded that judges had discretion to exclude disruptive persons but not those of "mature years and whose moral standard" were not "notably deficient" for judges did not have the power to order "a wholesale exclusion of persons not directly interested." *Id.* at 344.

35. Bentham proposed that any note-takers should be permitted to disseminate their materials on what had transpired in courts. See BENTHAM, *supra* note 14, at 356.

36. BENTHAM, *supra* note 14, at 355; see also NEIL ANDREWS, *ENGLISH CIVIL PROCEDURE: FUNDAMENTALS OF THE NEW CIVIL JUSTICE SYSTEM* 79–81 (2003) (citing Bentham's precept).

pants to provide information (through discovery and disclosure) to each other, and that obligatory exchange puts courts in the business of empowering—equalizing in some respects the stature of—disputants.

In addition to demonstrating inter-litigant obligations and disclosing facts, processes, and outcomes, open court-based conflict resolution teaches (a) that the appropriate solutions and remedies, as well as the underlying rights, are not necessarily fixed, and (b) that decisions on liability and remedy do not belong exclusively to the disputants. The public and the immediate participants see that law varies by contexts, decisionmakers, litigants, and facts.³⁷ These activities reveal that the legitimate imposition of legal norms occurs through interactions among disputants, the government, and outsiders bearing witness to the fact of state-based resolutions.

Openness both imposes and creates connections among those in conflict and the communities whose norms govern resolution. Thus, through the public activities of adjudication and adjudicators' obligations to give fair hearings to both sides, power is shifted among disputants. Further, through open courts, governments account for the development of legal rights and remedies. Such iterations may produce new obligations or reinforce prior legal commitments. Law application becomes a process constituted through these various sectors of participants.

To appreciate the political and social utilities of the public dimensions of adjudication is not to ignore the costs and burdens imposed.³⁸ The immediate participants in a dispute may find the exposure to the public disquieting. In public adjudication, parties may find common ground or deeper discord; they may reveal truths or make false claims about each other or themselves. Moreover, even the disclosure of accurate information can be uncomfortable. Further, while connecting with a community around a dispute may result in support and in the creation of new rights and remedies, it can also produce anger, which may prompt vengeful consequences in a particular case and more generally. As for the spectators, watching state-authorized decisionmakers may prompt celebration or boredom, as well as distress at perceived errors

37. Political theorists focus on this public elaboration through democratic iterations, although not always on courts as a central stage for such dialogues. *See, e.g.*, JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg, trans., MIT Press 1996) (1992); SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS (2004).

38. While providing many explanations of the utility of public processes, Bentham also argued the costs of public disclosure as he analyzed justifications for privacy (such as protecting participants from "annoyance," avoiding unnecessary harm to individuals through disclosure of "facts prejudicial to their honour" or about their "pecuniary circumstances," and preserving "public decency" and state secrets), and he argued that a presumption in favor of public trials could upon occasion give way. BENTHAM, *supra* note 14, at 360–70.

and missteps made by disputants, witnesses, or decisionmakers. Concerns about privacy and about too-easy, too-truncated, or too-unbalanced dissemination of information are grounded in this range of responses and require rules that take into account both new and old challenges entailed in the public display of conflict.

In short, adjudication predated democracy and facets of its practices—public performance, some degree of fair treatment of those within a dispute, the revelation and the evaluation of information about conflict, and fettered decisionmaking by government-empowered judges who are not to be influenced by gifts or personal affiliations—became aspects of democratic governance more generally. And, of course, democracy not only drew from adjudication but also changed it in many respects—most notably by endowing women and men of all colors with rights to their own personhood and with rights against the state. As more persons gained rights against governments and as polities imposed obligations of accounting and of transparency on governments, public processes became a method of enforcement of these rights as well as a means of giving life to those rights. Indeed, the challenge of provisioning all of those rightsholders has, in turn, become one of the justifications for the privatization of process.

To identify the continuity of aspects of adjudication over time and their social import should not, however, deflect the focus from how radically different are the ways in which judges today work. Courts have developed bureaucratic infrastructures, in part to respond to the volume of claimants and in part from views about the need to revitalize juridical process. As a consequence, what constitutes “openness” and the modes by which court-based information is gathered and exchanged vary across time and place. Before the twentieth century, the public gained knowledge via the open doors and windows of courtrooms in which trials and hearings took place, through the episodic publication and dissemination of opinions, and by personal inspection of papers filed with courts. With the rise of the newspaper business, the press provided another route, as did commercial publishers of opinions.

Today’s technologies have many times amplified the possibilities. In addition to the publication of decisions through the web and access to files through electronic databases,³⁹ some jurisdictions (both inside the United States and beyond) facilitate access through broadcasting some court proceedings. For example, proceedings may be televised in the Supreme Court of

39. See Jason Krause, *Towering Titans*, A.B.A. J., May 2004, at 51 (providing some of the history of John B. West & Co. and its evolution as well as some discussion of its competition).

Canada⁴⁰ and in the International Criminal Tribunal for the Former Territories of Yugoslavia.⁴¹ Experiments in televised proceedings have also taken place in New York⁴² and California.⁴³ Although television is not commonly used in the federal system,⁴⁴ media access to hearings in court and perhaps more gen-

40. Only Supreme Court proceedings are televised. As to the method, most "courtroom proceedings are televised by the Canadian Parliamentary Affairs Channel (CPAC)." See Supreme Court of Canada, Frequently Asked Questions, http://www.scc-csc.gc.ca/faq/faq/index_e.asp (last visited Feb. 27, 2006). See generally A. Wayne MacKay, *Framing the Issues for Cameras in the Courtrooms: Redefining Judicial Dignity and Decorum*, 19 DALHOUSIE L.J. 139 (1996) (exploring whether, under Section 2(b) of the Canadian Charter of Rights, providing for freedom of the press and of expression, electronic media ought to have access to court proceedings).

41. All proceedings other than deliberations "shall be held in public, unless otherwise provided." Int'l Criminal Tribunal for the Former Territories of Yugoslavia [ICTY], *Rules of Procedure and Evidence*, at Rule 78 (Open Sessions), ICTY Doc. IT/32/Rev.37 (March 29, 2006), <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev37e.pdf>. When needed for protection of victims or witnesses or for reasons of security or justice, the trial chambers may make provisions for private or in camera processes. *Id.* at Rule 75 (Measures for the Protection of Victims and Witnesses), Rule 79 (Closed Sessions). Full transcripts and, when appropriate, video recordings are made. See *id.* at Rule 81 (Records of Proceedings and Evidence). The tribunal's working languages are English and French; in addition, the accused has a right to use his or her own language. *Id.* at Rule 3 (Languages). Transmission is provided via a web link, enabling the public, including people in the former territories, to see the proceedings; the languages offered include French, English, and Serbo-Croatian. See ICTY, Courtroom Schedule: Online Broadcasting, <http://www.un.org/icty/latest-e/schedule/proceedings-e.htm> (last visited Feb. 27, 2006). When witnesses or proceedings raise security problems, the screened images and voices are scrambled. See ICTY, *Rules of Procedure and Evidence*, at Rule 75(B)(i)(c) (Measures for the Protection of Victims and Witnesses).

42. Beginning in 1987, the New York State Legislature authorized courts to use discretion but to permit on occasion televising of certain hearings. See N.Y. JUD. LAW § 218 (McKinney 2005) (providing that notwithstanding other sections of New York law, the chief judge of the state could create an experimental program "in which presiding trial judges, in their discretion, may permit audio-visual coverage of civil and criminal court proceedings, including trials"); 22 N.Y. COMP. CODES R. & REGS. §§ 131.1–131.13 (1995) (providing implementing procedures). See generally N.Y. STATE COMM. TO REVIEW AUDIO-VISUAL COVERAGE OF COURT PROCEEDINGS, AN OPEN COURTROOM: CAMERAS IN NEW YORK COURTS (1997) (recommending the use of cameras in courts and including an overview of usage in other states).

That provision came atop another New York law, generally banning televising of proceedings. Section 218 also included sunset provisions. The state legislature did reauthorize the experiment a few times but in 1997 let the sunset provisions take effect. In 2005, the State's highest court concluded that no constitutional right existed to televise a trial and hence that the decision rested with the legislature. See *Courtroom Television Network LLC v. New York*, 833 N.E.2d 1197 (N.Y. 2005) (upholding New York's Civil Rights Law section 52, prohibiting most audiovisual coverage of courtroom proceedings). In other words, while the provision for television remains in the New York statutes and regulations, it has been superseded by other laws.

43. See CAL. R. CT. 980 (providing that photography, recording, and broadcasting courtroom proceedings may occur in a manner that ensures that the fairness and dignity of the proceedings are not adversely affected," and that judges are to decide whether to permit media coverage by considering more than a dozen factors including the "[p]rivacy rights of all participants, . . . including witnesses, jurors, and victims"), available at <http://www.courtinfo.ca.gov/rules/titlethree/titlethree.pdf>. Local rules provide additional procedures. See, e.g., L.A. SUPER. CT. R. 4.1 ("Recording and Photographing in the Courthouse"). In contrast, some federal district court rules prohibit photographs or broadcasting of judicial proceedings. See, e.g., S.D. CA. CIV. R. 83.7; C.D. CAL. R. 83.6.

44. See Statement of Judge Diarmuid O'Scannlain on Behalf of the Judicial Conference of the United States Regarding S. 829 as Applied to Federal Trial Courts, <http://www.uscourts.gov/testimony/exhibit4CameraTest05.pdf> (Nov. 9, 2005) (statement to the Senate Judiciary Committee); *Bills Would Bring Rent Relief to Judiciary, Allow Cameras in Courts, Shape*

erally to court dockets and files⁴⁵ relies on constitutional commitments anchored in the First Amendment and the Due Process Clauses, coupled with common law practices and, when applicable, mandates in state constitutions and in state and federal legislation.

Yet, over the last several decades, new modes of dispute resolution and new venues for adjudication have diluted the opportunities for effective public access. As of 2002, a trial started in fewer than two of one hundred civil cases filed in federal courts. As a smaller percentage of cases are going to trial than had been in the past, commentators have raised concerns about the “vanishing trial.”⁴⁶ Further, while the number of cases appealed has risen, the processes of decision on appeal have also become less open to the public. Oral arguments are not held in cases. Summary dispositions are commonplace and, as of 2001, only about one fifth of decisions rendered by the federal appellate courts were described as “for publication.”⁴⁷

Judicial Security and Review, and Create Inspector General, 38 THIRD BRANCH 3 (May 2006), available at <http://www.uscourts.gov/ttb/05-06/rentbill/index.html> (discussing Judicial Conference policy to permit appellate courts, at their option, to televise oral arguments but to oppose “cameras in federal trial courtrooms”). The Sunshine in the Courtroom Act of 2005, S. 829, 109th Cong. (March 30, 2006), available at <http://thomas.loc.gov>, would authorize district judges to permit, at their discretion, the televising of proceedings.

In February of 1996, the trial of a defendant charged with bombing the Murrah Federal Building in Oklahoma City was moved to Denver, Colorado. The trial judge then declined to provide for broadcasting the proceedings. But, in April of 1996, Congress included in its enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) a provision that, when a trial is moved “out of the [s]tate” and more than 350 miles from its original venue, the trial judge “shall order” that it be broadcast via closed circuit television “for viewing by such persons the court determines have a compelling interest in doing so and are otherwise unable to do so.” See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 235, 110 Stat. 1214, 1246–47 (codified at 42 U.S.C. § 10608 (2000)).

45. See *supra* note 34 (discussing *Richmond Newspapers*, and *Hartford Courant*). Whether that presumption includes exchanges beyond live testimony is debated, as can be seen by comparing several of the essays in this Symposium. See, e.g., Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463 (2006); Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.-KENT L. REV. 357 (2006); Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT L. REV. 375 (2006); Richard L. Marcus, *A Modest Proposal: Recognizing (at Last) that the Federal Rules Do Not Declare that Discovery is Presumptively Public*, 81 CHI.-KENT L. REV. 331 (2006). See also *infra* notes 117–63 and accompanying text.

46. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459–60 (2004) [hereinafter Galanter, *The Vanishing Trial*]. As he explains, in 1962, 11.5 percent of the civil cases were tried; both the proportion and absolute numbers of trials have declined. *Id.*

47. See generally Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1465 (2004); Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002); Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and to Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757 (1995). “Published” opinions can be as short as one word—affirmed. See Pether, *supra*, at 1465, n.139.

The declining percentage of cases tried, the cut-backs in oral arguments, and the number of decisions denoted as “not for publication” are in part aimed at responding to the pressures generated by the large number of litigants seeking decisions. But changes at both trial and appellate levels also derive from decades of reconfiguration of adjudication. Beginning in the late 1930s, with the promulgation of the Federal Rules of Civil Procedure, pretrial processing (including discovery, judicial management, and promotion of settlement) shifted the work of trial judges from courtrooms to chambers.⁴⁸ With the rise of the administrative state and a growing commitment that individuals have rights *against* the state and to be protected *by* the state, venues for adjudication multiplied. Not only have many more judges and staff attorneys been added to courthouses, but administrative agencies have become “court” systems, hosting a volume of adversarial proceedings that far outstrips what takes place in the federal trial courts around the United States.⁴⁹

These changes require consideration of how the practices of openness in courts have—and will—change over time, whether certain functions performed by open courts can be provided by other institutions, and whether new methods of information-forcing should be crafted in order to make public that which has become private through changing modes of resolution. For example, during eras when few institutions kept secure records of land transfers or of changes in personal status (such as citizenship, marriage, and adoption), courts provided social services not otherwise available. Today, archival and evidentiary systems in places such as libraries, municipal centers, and banks permit verification and provide repositories that make certain court-based record keeping unnecessary or duplicative.

Further, while courts continue through public trials to provide the social good of producing a stated narrative (documented through transcripts, pro-

A new federal rule, prospective in application, will require that litigants be able to cite to decisions, whether deemed “published” or not. See FED. R. APP. P. 32.1 (approved on April 12, 2006 by the Supreme Court and, absent congressional action, to apply in December of 2006, but only to opinions issued after January 1 of 2007 and stating that courts may not “prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like”). See Supreme Court Action: Rules and Amendments Approved 4/12/06, available at <http://www.uscourts.gov/rules>. See also ROBERT TIMOTHY REAGAN, CITING UNPUBLISHED OPINIONS IN FEDERAL APPEALS (Fed. Judicial Ctr., 2005) (surveying judges and lawyers about their attitudes toward the then proposed new rule and reviewing decisions including some that cited unpublished opinions), and discussion, *infra* note 161 and accompanying text.

48. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

49. See Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783, 800 fig.2 (2004) [hereinafter Resnik, *Migrating, Morphing, and Vanishing*], and *infra* text accompanying notes 94–99.

ceedings, and exhibits⁵⁰) about a particular event,⁵¹ courts are one of many government-based investigatory mechanisms available. Other institutions—from South Africa’s Truth and Reconciliation Commission to blue-ribbon investigatory panels focused on tragedies such as 9/11—also serve that function.⁵²

But courts offer something different than do such specially-convened commissions. Courts do not rely on ad hoc enabling acts or national traumas to prompt their creation. Courts are extant institutions, providing their services for ordinary, daily conflicts as well as for extraordinary moments. Courts enable one to see both the repetition of certain kinds of conflicts as well as the variations in response. By knowing and seeing many claims of right, the judgments made, and the forms of sanctions imposed, a range of individuals and of groups can debate what sanctions are appropriate and, more basically, what the underlying norms ought to be.

Recent examples of public courts’ contributions to norm creation include the development of prohibitions on sexual harassment and on domestic violence. Both kinds of actions were tolerated (if sadly so) until recently, when they came to be understood as deserving of state-based penalties. Courtroom dramas, intersecting with legislative action, mapped the kinds of injuries incurred and helped to delineate the scope of rights enforced.⁵³ And of course, judgments by courts not only generate but can also limit rights. Illustrative here is the political success of arguments that many tort victories are predicated on “junk science,” manipulated evidence, and deceived juries.⁵⁴ That contested view, interacting with assertions that insurance premiums escalated as a consequence, has helped to support new laws imposing caps on damages—reforms that some praise and others bemoan.⁵⁵ In short, the public

50. The Nuremberg Trials, whose sixtieth anniversary was marked in November of 2005, are exemplary. See BBC News, Germany Marks Nuremberg Tribunals, <http://news.bbc.co.uk/2/hi/europe/4453790.stm> (Nov. 20, 2005).

51. See Resnik, *A Public Dimension*, *supra* note 33; Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL’Y REV. 155 (1999).

52. See, e.g., MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419 (2005).

53. See Judith Resnik, *The Rights of Remedies: Collective Accountings for and Insuring Against the Harms of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 247 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

54. See, e.g., PETER W. HUBER, *GALILEO’S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991). But see Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 731–32 (1998) (describing media distortion of cases, including the litigation around the scaldingly-high temperatures of coffee served at the restaurant chain, McDonald’s).

55. See Nancy S. Marder, *The Medical Malpractice Debate: The Jury as Scapegoat*, 38 LOY. L.A. L. REV. 1267 (2005).

norm production function serves both to open up and to close off avenues of recovery.

In sum, norms of openness in courts are not only about access to information but also embody understandings of what law is and how it is made. Open adjudication is a technique of performing a commitment that disputants are equal (or of marking that such commitments do not encompass all persons, but may be limited to “citizens” or others with a certain status). Open processes may license state power as well as make it possible to understand the rationales for its exercise. By obliging differently-situated disputants to exchange information, court-based processes can alter the respective power of each. Further, through open processes, courts make plain the fluidity of appropriate solutions and remedies as well as of the underlying rights.

Openness undermines the ability of the government to control the social meaning of conflicts and their resolutions.⁵⁶ Patent procedures can teach that conflicts do not belong exclusively to the disputants or to the government. The public as an audience has an important role in witnessing, in interpreting, in owning, and in disowning what has occurred.

III. INVESTING IN THE FEDERAL COURTS: PRODUCTION AND DISCLOSURE

Translating these aspirations into contemporary practices is the current challenge. Given the prominence of federal adjudication and the recent rule-making changes on electronic discovery, the federal system provides the context for my discussion. But explanation is appropriate about why rulemaking in the federal courts has both a saliency and an influence disproportionate to its share of litigation. The bulk of America’s lawsuits—many millions of cases—occur in state, not federal, courts.⁵⁷ Further, the fifty states are free to make their own rules, consistent with constitutional minima. Yet, through the confluence of several factors during the twentieth century, the federal courts became a center of publicly-based dispute resolution.

56. As Foucault detailed, government lost control literally in that at times the public processes of executions were sites in which crowds turned into mobs sometimes animated by protests of verdicts or punishments. FOUCAULT, *supra* note 12, at 59–65.

57. More than 300,000 civil and criminal filings occur annually in federal district courts, as well as more than 1.5 million bankruptcy filings. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2005, at 14 (2006) [hereinafter 2005 JUDICIAL BUSINESS], available at <http://www.uscourts.gov/judbus2005/front/judicialbusiness.pdf>. State totals vary depending on whether one counts traffic violations as well as many other kinds of disputes in the tally. Excluding traffic cases, one tally counts about forty-five million filings annually in the state systems. See CONFERENCE OF STATE COURT ADM’RS, BUREAU OF JUSTICE STATISTICS, & NAT’L CTR. FOR STATE COURTS’ COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 2004, at 13–14 (2005), available at http://www.ncsconline.org/D_Research/csp/2004_Files/EWOoverview_Final_2.pdf.

Specifically, in the 1930s, the drafters of the Federal Rules of Civil Procedure invented an obligation—called “discovery,” entailing the exchange of information (orally and in writing) and the production of records—that not only multiplied the information available to the parties but created the possibility for others to learn more details, in advance of trial, through the disputants’ filings. Those Rules came into being because Congress gave to the federal judiciary the authority to make national procedural rules, just as Congress also increased the number of judicial officers and the kind and array of federal rights.⁵⁸ The Rules’ innovations were part and parcel of a project begun in the 1920s to expand federal judicial capacity. While some argue that the dissemination of information through the system of discovery was inadvertent,⁵⁹ the normative instruction provided by the 1938 Federal Rules suggests otherwise. The then-new Federal Rules reiterated the themes of other legal projects of that era, eager to facilitate national economic capacities, welcoming of some kinds of regulation and embodying beliefs that fact-based inquiries were useful methods to achieve just results.⁶⁰

The 1938 Federal Rules, expressive of and coupled with an impressive investment in the infrastructure of the federal courts, not only governed “practice and procedure”⁶¹ but also represented a political commitment to federal power through adjudication. In the wake of the Depression, many saw federal governance as a necessary and desirable response to political and economic conditions. The expansion of federal jurisdiction and uniform federal processes were mechanisms by which to enforce the national legal regime and to enhance the development of national markets. Over the decades, Congress authorized litigants to bring a host of new claims involving civil rights, environmental rights, consumers’ rights, and workers’ rights. Congress also enlarged the power of federal prosecutors to pursue criminal actions. Federal procedure needs thus to be understood as a part of a larger national constitutional project, relying in part on equipping individuals and groups to come to court as rights-seekers and upon judges to determine in public the obligations of disputants.

58. See Act of Sept. 14, 1922, Pub. L. No. 67-298, 42 Stat. 837. In 1934, Congress authorized the United States Supreme Court to promulgate federal procedural rules that had the power to displace local practices with national norms. Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2000)). The classic articles on their creation are Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 943–45, 955 (1987), and Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

59. See Marcus, *supra* note 45.

60. See generally Judith Resnik, *Procedure’s Projects*, 23 CIV. JUST. Q. 273 (Adrian Zuckerman ed., Symposium Volume, Sweet and Maxwell 2004).

61. 28 U.S.C. § 2072(a).

The import of the Rules—as a vehicle for adjudication’s expansion as a visible mechanism of regulation—can be mapped through the growing sizes of the federal courts’ dockets and budgets. Between the 1960s and the 1990s, caseloads within the federal system tripled, as hundreds of new statutory causes of action were enacted.⁶² In terms of funding, Congress provided substantial resources to the federal courts, whose budget grew from about \$250 million in the early 1960s to the more recent figure of about \$4.2 billion.⁶³

The conceptual foundation of this regime is a Due Process model of procedure.⁶⁴ Due Process Procedure endows state officials with power that is legitimated through obligations that dispositive decisions be explained by findings of fact and conclusions of law.⁶⁵ When that model of procedure was coupled with open court files and access to filed discovery materials, the federal courts became a kind of fabulous “document depository,” an excellent resource from which to gather information.

The federal courts were not only the receivers of information but also the producers and systemizers of knowledge. In 1939, the Federal Courts gained an Administrative Office; in the late 1960s, the Federal Judiciary Center was created to focus on research and education.⁶⁶ As of 2003, the annual budget of the Administrative Office was about sixty-two million dollars, with the Federal Judicial Center receiving about twenty million dollars.⁶⁷ The import of those allocations can be seen in the data about the sealing of court records that is the basis for one of the contributions to this Symposium,⁶⁸ as well as in many other research projects conducted by the Federal Judicial Center. With such resources, the federal judiciary produces a monthly newsletter, called *The Third Branch*, begun in 1968 and now disseminated in print and through

62. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 957–58, 958 n.119 (2000).

63. See Galanter, *The Vanishing Trial*, *supra* note 46, at 501–05 (discussing and graphing the growth of judicial expenditures on the federal courts from \$246 million in 1962 to \$4.254 billion—both in 1996 dollar values—over a forty-year span); Resnik, *Migrating, Morphing, and Vanishing*, *supra* note 49, at 791–804 (discussing the wealth of the federal courts as compared to the state courts and administrative courts).

64. See Resnik, *Procedure as Contract*, *supra* note 9, at 600–05; Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

65. See, e.g., FED. R. CIV. P. 12(b); FED. R. CIV. P. 56(d). See generally Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

66. See 28 U.S.C. §§ 601–613 (2000) (Administrative Office); 28 U.S.C. §§ 620–629 (2000) (Federal Judicial Center).

67. *The FY 2003 Budget and the Federal Judiciary*, 35 THIRD BRANCH 2 (March 2003), available at <http://www.uscourts.gov/ttb/marc03ttb/mar03ttb/budget.html>.

68. Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439 (2006).

the web.⁶⁹ The Administrative Office is another font of data compiled annually and found in the yearly publications of *The Judicial Business of the United States Courts*, as well as in the many charts and tables that detail filings by kind of case, by district, and by circuit.⁷⁰

The federal budget allocations for courts are used to support an administrative apparatus with its central staff housed in the Thurgood Marshall Building, a new major Washington building opened in 1992 across from Union Station.⁷¹ From there, senior administrators oversee the more than 30,000 federal judicial staff supporting some 1,700 federal district, magistrate, bankruptcy, and appellate judges who are dispersed in some 800 locations nationwide.⁷² One estimate, focused on the ratio between staff and life-tenured judges only, identified ninety-two support personnel per judge.⁷³ Such personnel are the predicate to the production, collection, tabulation, and positioning of data about the 300,000 civil and criminal trial level filings, the more than a million and a half bankruptcy petitions, and the sixty-five thousand or so appellate filings each year.⁷⁴ And the availability of such information, in turn, makes the federal courts so appealing as a resource for research and as a window into some of the conflicts in this country.

The relative (not the absolute) riches of the federal courts can be seen through a comparison of funding levels for research on state courts, whose caseloads number in the millions; states are the venues for most of the nation's court-based litigation.⁷⁵ In addition to whatever research is undertaken by individual states,⁷⁶ the National Center for State Courts has a budget of

69. See *The Third Branch: The Newsletter of the Federal Courts*, <http://www.uscourts.gov/ttb/index.html> (last visited Feb. 28, 2006) (for *The Third Branch* online); Jill Ann Duffy & Elizabeth Ardella Laub Lambert, *Researching the Supreme Court of the United States: Available Resources for Commonly Asked Questions*, LEGAL REFERENCE SERVICES Q., 2000, no. 2, at 25, 37, available at: http://www.supremecourthistory.org/06_research-06_602.html (on the beginning of the publication in 1968).

70. See, e.g., U.S. District Court—Judicial Caseload Profile, <http://www.uscourts.gov/cgi-bin/cmsd2004.pl> (select “All District Courts”) (2004).

71. The depth and breadth of activities are well summarized in a recent publication. See RUSSELL WHEELER, A NEW JUDGE'S INTRODUCTION TO FEDERAL JUDICIAL ADMINISTRATION (Fed. Judicial Ctr., 2003).

72. See Understanding the Federal Courts, Administrative Office of the United States Courts, at 1–4, available at http://www.uscourts.gov/understanding_courts/80016.htm (last visited Mar. 3, 2006).

73. See William G. Young, *An Open Letter to U.S. District Judges*, FED. LAW., July 2003, at 30, 31, 33.

74. See 2005 JUDICIAL BUSINESS, *supra* note 57, at 11.

75. What counts as a “case” varies from jurisdiction to jurisdiction, and because each state collects its data individually, cross-state comparisons are complex. See Galanter, *The Vanishing Trial*, *supra* note 46, at 506–07.

76. I have not located any national compilation of the total outlays spent in administrative support, research, and teaching for each state's judiciary. Some raw numbers are available but comparing outlays (state-to-state or state-to-federal) is difficult because of variations in sizes of judiciaries, dockets, population rates, legal rights, and infrastructure.

under twenty-five million dollars, which also funds the work of the National Conference of State Supreme Court Justices.⁷⁷ The State Justice Institute, the other national organization devoted to the state courts, has even more limited funds, under four million dollars in 2005.⁷⁸

In contrast, between the Administrative Office of the United States Courts and the Federal Judicial Center, some eighty million dollars provides annually for education, research, and the many clerical services throughout the country.⁷⁹ And despite these resources, many members of the federal judiciary are gravely concerned that these courts are seriously under-funded, putting at risk their capacity to sustain current services.⁸⁰

For example, in 1999–2000, the California judiciary received some \$118 million for its Judicial Council, which has a mandate that includes administration, teaching, and research, and therefore is somewhat similar to that of the Administrative Office of the U.S. Courts and of the Federal Judicial Center. California trial courts deal with about eight million cases a year, as contrasted with the federal docket of about 300,000 civil and criminal filings and one and one-half million bankruptcy petitions in the federal courts. See *supra* note 57, and Galanter, *The Vanishing Trial*, *supra* note 46, at 546 tbl.A-11 (civil filings), 554 tbl.A-17 (criminal defendants), 558 tbl.A-20 (bankruptcy filings). California's judiciary is comparable in size if not somewhat larger than that of the federal courts. California has about 1,500 trial judges, and another 400 commissioners and referees. See ADMIN. OFFICE OF THE COURTS, JUDICIAL COUNCIL OF CAL., FACT SHEET: CALIFORNIA JUDICIAL BRANCH 1–3 (2005), available at <http://www.courtinfo.ca.gov/reference/documents/factsheets/caljudbranch.pdf>.

In contrast, in New Jersey where approximately seven million cases are filed each year, the 2004 judiciary budget was \$502.2 million, with \$12.6 million spent on administration and \$2.5 million on public affairs and education. See OFFICE OF MGMT. & BUDGET, STATE OF NEW JERSEY BUDGET: FISCAL YEAR 2003–2004, at D-513 to 514 (2003), available at <http://www.state.nj.us/treasury/omb/publications/04budget/pdf/98.pdf>.

77. See *Summary of Income and Expense*, COURTING THE FUTURE: NCSC 04 ANN. RPT. (Nat'l Ctr. for State Courts, Williamsburg, Va. 2005) at 24, available at http://www.ncsconline.org/D_Comm/Images/04AnnualReport.pdf. About half of that amount (\$14.7 million) comes from federal grants and contracts, while \$10.3 million comes from assessments and consultations that are paid by the states. Association, service, and tuition fees result in about \$2.6 million more.

78. The State Justice Institute was established in 1984. At some points, its funding was about thirteen million dollars annually. See *Attorney General's Evaluation Finds SJI "Effective,"* 13 SJI NEWS 1 (Fall 2002); U.S. ATT'Y GEN., REPORT ON THE STATE JUSTICE INSTITUTE PURSUANT TO PUBLIC LAW 107-109, at 9–10 (2002), available at <http://www.statejustice.org/pdf/SJI%20Report.pdf>. More recently, SJI faced extinction but survived with the allocation of smaller sums. See *SJI Reborn! Science, State, Justice, and Commerce Conference Report Crosses House Floor*, SJI NEWS EXTRA (SJI, Alexandria, Va.), Fall 2005, available at <http://www.statejustice.org./pdf/SJI%20E-News-November-Extra.pdf> (reporting on a \$3.5 million appropriation in November of 2005).

79. See *supra* note 67 and accompanying text. Of the total 2005 budget of \$5.43 billion, the Administrative Office reported that, within the eighty percent allocated for court salaries and expenses, rental costs were about twenty percent, salaries and benefits for judges and staff about sixty-five percent. See *Where the Money Goes: A Look at How the Judiciary's FY 2005 Budget is Divided*, 37 THIRD BRANCH 1 (Feb. 2005), available at <http://www.uscourts.gov/ttb/feb05ttb/budget/index.html>.

80. See *Judiciary Seeks to Avert Cuts*, 37 THIRD BRANCH 1 (Nov. 2005), available at <http://www.uscourts.gov/ttb/nov05ttb/avertcuts/index.html>. (describing concerns that the budget of less than 5.8 billion dollars for 2005 does not permit the judiciary to carry out minimally necessary functions); *Courts Work Hard to Serve Public Despite Resource Challenges*, 37 THIRD BRANCH 3 (Nov. 2005), available at <http://www.uscourts.gov/ttb/nov05ttb/challenges/index.html> (describing the reduction in hours and in sites of operations in light of budget constraints).

IV. DIVESTING: DELEGATION, OUTSOURCING, AND INTERNALIZATION

For some, an array of venues and personnel in federal and state courts and agencies that provide adjudicative services is to be celebrated. For others, growing dockets are a source of dismay. While the number of life-tenured judges has increased significantly over the last century, Congress did not provide—and the federal judiciary did not press for—the hundreds of additional life-tenured judges who would have been necessary to respond to demand for adjudicatory services generated through the interaction of democratic equality norms, new statutory rights, and judicial interpretations. Rather, public and private actors developed three strategies—delegation and devolution, outsourcing, and revamping internal procedures—to channel disputes elsewhere and to alter the ways in which they were processed. The enforcement of many rights has been relocated outside of courts and the process refocused on resolution through conciliation.

A. Agency Adjudication

Over the course of the twentieth century, lawmakers have created new kinds of judges and new venues for judging, both within and outside of the federal courts. Included are magistrate and bankruptcy judges,⁸¹ special tax court judges,⁸² Administrative Law Judges (ALJs) working under the Administrative Procedure Act (APA),⁸³ and hundreds of hearing officers serving as judges inside agencies but outside the protective parameters of the APA. The impact of that delegation can be seen by comparing the number of adversarial hearings in administrative agencies with those taking place in federal courthouses.

As discussed above, the Litigation Section of the American Bar Association launched the research project, *The Vanishing Trial*,⁸⁴ to consider the rising filing rates coupled with declining trial rates, such that now, of one hundred federal civil cases begun, fewer than two are resolved by trial.⁸⁵ The

81. Discussion of their roles and number can be found in Judith Resnik, "Uncle Sam Modernizes His Justice": *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 614–15 (2002) [hereinafter Resnik, *Inventing the Federal District Courts*].

82. See 26 U.S.C. § 7443A(a) (2000), creating "special trial judges," appointed by the Chief Judge of the Tax Court and distinct from Tax Court judges themselves who are appointed by the President and serve a fifteen-year, renewable term, per 26 U.S.C. § 7443(b), (e).

83. See Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706 (2000)).

84. See Galanter, *The Vanishing Trial*, *supra* note 46, at 459 n.* (discussing the impetus for the project).

85. *Id.* at 459.

declining rate contrasts with increased filings, now around 350,000 civil and criminal cases a year. Moreover, on the civil docket, 4,569 civil trials took place in 2002, in contrast to 1962, when 5,802 trials occurred.⁸⁶ Looking at the aggregate picture, using data from 2001, and relying on the Administrative Office's definition of a trial as all proceedings, civil and criminal, before Article III judges that are "contested hearings at which evidence is presented" whether or not tried to judgment, Article III judges presided at about 13,500 trials.⁸⁷ Turning to all proceedings involving the taking of evidence and including cases before district, magistrate, and bankruptcy judges, in 2001, about 85,000 such proceedings took place.⁸⁸ As for public access, one assumes that these evidentiary processes occurred in courtrooms open to visitors.

Another way to understand how much the public can watch proceedings in court is to consider data on courtroom usage that were developed when the federal judiciary requested funds for the building of more courthouses. During the last several years, some members of Congress have expressed skepticism about budgeting for more courthouse construction. Repeatedly, they have questioned⁸⁹ the current custom that each federal judge has a courtroom of his

86. *Id.* at 461 (also noting that the drop has not been constant but rather was "recent and steep").

87. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2001 ANNUAL REPORT OF THE DIRECTOR 25 (2002), available at <http://www.uscourts.gov/judbus2001/front/2001artext.pdf> (specifying that 13,558 trials were conducted by Article III judges, both active and senior) [hereinafter 2001 JUDICIAL BUSINESS]. As for the definition cited in the text, the Administrative Office defines "trial" in statistical compilations to include proceedings that result in "jury verdicts or other final judgments" and "contested hearings at which evidence is presented." *Id.* at 24–25.

In 2004, the absolute number of trials declined to 12,938. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS: 2004 ANNUAL REPORT OF THE DIRECTOR 23 (2005), available at <http://www.uscourts.gov/judbus2004/front/JudicialBusiness.pdf>. [hereinafter 2004 JUDICIAL BUSINESS]. Civil filings increased that year over the previous year—by eleven percent on the civil side and by about 380 cases on the criminal side. *Id.* at 14.

88. Magistrate judges presided at 10,663 proceedings, including 1,079 civil cases tried with the consent of the parties, 589 misdemeanors, 4,768 petty offense trials, 3,690 evidentiary hearings, and 537 mental competency proceedings. Bankruptcy judges presided at 67,140 adversary proceedings. 2001 JUDICIAL BUSINESS, *supra* note 87, at 25, 30.

89. See, e.g., H.R. REP. NO. 106-1005 (Conf. Rep. Accompanying H.R. 4942, Making Appropriations for the Government of the District of Columbia and Other Activities), U.S. House of Rep. 106th Cong., 2d Sess. at 287–88 (Oct. 25, 2000) ("[A]ny reduction in the number of courtrooms and associated court space could significantly reduce rental payments, which continue to consume an inordinate amount of the Judiciary's available resources.").

The federal judiciary pays rent—the amount of which constituted twenty percent of its 2005 court services' dollars—to the General Services Administration, which is the division of the federal government that is the statutory owner of the buildings. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-673, COURTHOUSE CONSTRUCTION: INFORMATION ON PROJECT COST AND SIZE CHANGES WOULD HELP TO ENHANCE OVERSIGHT 8 (2005) (describing the judiciary as reporting that rent accounts "for just over 20 percent of its operating budget" and the expectation that the amount would increase to 25 percent by 2009); GSA's *Public Building and Courthouse Program: Hearing before the S. Committee on Environment and Public Works*, 105th Cong. 37 (1998) (statement of Robert A. Peck,

or her own.⁹⁰ Such inquiries have led to a series of commissioned studies on

Comm'r, Public Buildings Service), available at <http://www.access.gpo.gov/congress/senate/senate09sh105.html> (follow hyperlink for S. Hrg. 105-921) (discussing that the PBS is the "largest commercial-style real estate organization in the United States," that it funds its budget from rent payments from tenants, which are agencies of the federal government, and that rents are set to approximate commercial rates).

In 2006, members of Congress introduced a rent-relief proposal, to change the calculation of rents from commercial rates to one based on "the actual costs incurred by GSA to maintain and operate federal court buildings." See *Senator Specter Acts to Provide Rent Relief for Judiciary*, 38 THIRD BRANCH 1 (Mar. 2006) (noting the introduction of S.2292, similar to HR4710, introduced by Representative F. James Sensenbrenner and that both bills, known as a "Judiciary Rent Reform Act," would change what the Judiciary is paying, which was \$926 million in fiscal year 2005 but according to the bill's sponsors, would have been "only \$426 million").

90. See U.S. GEN. ACCOUNTING OFFICE, GAO-01-70, COURTHOUSE CONSTRUCTION: SUFFICIENT DATA AND ANALYSIS WOULD HELP RESOLVE THE COURTROOM-SHARING ISSUE, 57 app. IV (2000) [hereinafter GAO COURTHOUSE CONSTRUCTION 2000] (Comments from the Chair, Judicial Conference, Committee on Security and Facilities, Oct. 31 2000) (underscoring the "value of unfettered access to a courtroom and its importance to the fair and efficient administration of justice").

Conflict between Congress and the judiciary on this issue has prompted several reports. A commissioned Ernst and Young Study came under fire from the General Accounting Office (GAO), which described the Ernst and Young report as flawed because it was based upon a mathematical formula of questionable validity (lacking "data, rationale, or analytical basis") and incorrectly used earlier data. *Id.* at 8, 16. Ernst and Young concluded that courtroom sharing would not be feasible in districts with fewer than five courtrooms and would result in serious scheduling problems in places with six to ten courtrooms. *Id.* at 11. The GAO commented that ninety-one percent of the courthouses fall within the category of five or fewer courtrooms. But, "about 40 percent of all current, active district judges are located in the remaining 9 percent of the courtrooms." *Id.* at 19.

Another study, from the Congressional Budget Office (CBO), modeled a reduction in courtroom space while keeping trial rates at their 1995 levels as well as an increase in trial rates while keeping the numbers of courtrooms and of trials per judge constant. Both models suggested that a small delay in trials (ranging from about two to four percent) would result. CONGRESSIONAL BUDGET OFFICE, THE ONE COURTROOM, ONE-JUDGE POLICY: A PRELIMINARY REVIEW 10-12 & tbl.2 (2000) [hereinafter CBO, ONE COURTROOM]. Further, with the assumption of a greater number of trials "but the same number of courtrooms and trials per judge," the CBO model predicted that "courtrooms would still be unused for almost forty percent of the available time." *Id.* at 12. The judiciary responded by eliciting policy statements from each of the federal circuits about the plausibility of courtroom sharing, by raising the possibility that senior or visiting judges might share courtrooms, and, in a few instances, by judges sharing courtrooms. U.S. GEN. ACCOUNTING OFFICE, GAO-02-341, COURTHOUSE CONSTRUCTION: INFORMATION ON COURTROOM SHARING 21-39 (2002) [hereinafter GAO COURTHOUSE CONSTRUCTION 2002].

Through 2003, the judiciary's leadership remained committed to individual courtrooms, produced through new construction and through renovations. The argument is that each judge's access to an available courtroom makes for better and more efficient justice. Further, the judicial committees are concerned about the rising filing rates and new judgeships that would be likely during the interval from a proposed project to its completion. Reflective of that view was a construction proposal for 2002-2006 that projected forty-five new or renovated facilities at a cost estimated to be \$2.6 billion. *Id.* at 3. Each courtroom, with its adjacent office space, was estimated as costing some \$1.5 million. See CBO, ONE COURTROOM, *supra* at 2-3.

The economic retrenchment in the wake of 9/11, coupled with heightened security risks, reshaped the plans for courthouse construction. As Congress hesitated, the judiciary scaled back its proposals and retreated from several of the sought-after projects. Moreover, with some judges taking senior status and others appointed, a few districts provided for judges to share courtrooms. See *The Judiciary's Ability to Pay for Current and Future Space Needs: Hearings Before the Subcomm. on Economic Development, Public Buildings and Emergency Management of the H. Comm. on Transportation and Infrastructure*, 109th Cong. 92-98 (2005) (prepared statement of Hon. Jane R. Roth, U.S. Court of Appeals for the Third Circuit; Chair, Judicial Conference Committee on Security and Facili-

courtroom usage, as well as to a debate about how to define when a courtroom is in fact “in use.” A 1997 General Services Administration study defined courtroom usage as “any activity” (including but not limited to trials) for any portion of a day⁹¹—a measure that the GSA later noted was generous in counting “lights on” for less than a couple of hours as a day of use.⁹² With that metric, the GSA found a fifty-four percent usage rate of available days in the sixty-five courtrooms at the seven locations that were studied.⁹³

One could conclude from these data that not much conflict exists, and hence, that there is not much to see. But by enlarging the context to include the numbers of evidentiary proceedings in federal agencies, one learns about a much higher volume of trial-like proceedings.⁹⁴ The Social Security Administration is, as Paul Verkuil and Jeffrey Lubbers recently described, the only “program of the federal government . . . [that] serves over ten million beneficiaries [and that] involves expenditures that [were] \$100 billion in FY 2002.”⁹⁵ According to Verkuil and Lubbers, the “SSA adjudication system is probably the largest system of trial-type adjudication in the world.”⁹⁶

Yet despite the SSA’s import and economic girth, a look at the website of this agency reveals relatively little about the bases for resolution of its

ties), available at http://www.uscourts.gov/Press_Release/Roth062105.pdf (describing a two-year moratorium on more than thirty-five courthouse construction projects, a review of the judiciary’s design standards, and a reevaluation of space needs including renewed consideration of the question of individual courtrooms for each jurist).

91. See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-97-39, COURTROOM CONSTRUCTION: BETTER COURTROOMS USE DATA COULD ENHANCE FACILITY PLANNING AND DECISIONMAKING 8–10 (1997) (relying on 1995 data from a sample analyzing the use of sixty-five courtrooms in seven district courts and crediting “each courtroom with one day of usage for all days that the records showed that there was any activity”) [hereinafter GAO COURTROOM CONSTRUCTION 1997]. Also noted was that in all but two locations, “courtrooms were used more often for nontrial purposes than they were for trials.” *Id.* at 11. To determine the nature of the activity, the researchers reviewed the calendars and minute order books of court clerks. *Id.* at 39 app. 1 (Objectives, Scope and Methodology). In a related letter from Bernard L. Unger, the Director of the Government Business Operations Issues for the GSA, the GSA detailed the use of courts for “nontrial use only, two hours or less.” See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-97-59R, B-275225, COURTHOUSE CONSTRUCTION: INFORMATION ON THE USE OF DISTRICT COURTROOMS AT SELECTED LOCATIONS 9 tbl.I.3 (1997), available at <http://archive.gao.gov/papr2pdf.158673.pdf>.

92. GAO COURTHOUSE CONSTRUCTION 2000, *supra* note 90, at 8, 18 (disagreeing with an analysis by Ernst and Young and noting that the “lights-on measure overstated the numbers of hours judges actually spent in the courtrooms” and that the GAO’s measure was “actually a measure of workdays when there was any use at all, even if the events lasted for less than an hour,” *id.* at 8).

93. GAO COURTROOM CONSTRUCTION 1997, *supra* note 91, at 10.

94. Comparing proceedings in courts and agencies is complex. More than a decade ago, Paul Verkuil estimated that “ALJs probably decide more ‘cases’ each year than do their federal judicial counterparts.” Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1343 (1992).

95. Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 738 (2003).

96. *Id.* at 759; see also *id.* at 738 (noting that “[n]o other program of the federal government produces such a large and complicated caseload for the federal courts to review”).

cases, nor does the website make clear the various kinds and quantities of dispositions. Only through able research assistance and calls to many sources could data on the number of evidentiary hearings be assembled—which we (Bertrall Ross, Jennifer Peresie, Natalie Ram, and I) estimate to be about 500,000 a year.⁹⁷ Coupling data from the SSA with information from three other major federal agencies deciding disputes about immigration, veterans' benefits, and equal employment within the federal government,⁹⁸ and attempting to identify only adjudicative proceedings in which a hearing officer or a judge listens to oral presentations (sworn or unsworn) so as to apply legal rules to factual claims, we estimate that roughly two-thirds of a million such proceedings take place annually in these four high-volume federal agencies.⁹⁹ But these many evidentiary hearings are invisible to most members of the public who would be hard-pressed to find the rooms inside the agency buildings where the proceedings occur. Even if able to locate *where* to go, spectators are not permitted to attend many of these proceedings.¹⁰⁰

97. See SOC. SEC. ADMIN., PERFORMANCE & ACCOUNTABILITY REPORT 46–47 (2004), available at http://www.socialsecurity.gov/finance/2004/Full_FY04_Par.pdf. This number represents the hearings “processed by OHA [Office of Hearings and Appeals].” See also Resnik, *Morphing, Migrating, and Vanishing*, *supra* note 49, at 799. Thanks are also owed to Michael Asimow, Jerry Mashaw, Elizabeth Magill, Steven Croley, Jeffrey Lubbers, Gene Fidell, Camilla Tubbs, and Gene Coakley for help in locating information.

98. To determine the number of evidentiary proceedings involving immigration, we looked at the number of proceedings before immigration judges. The definition of “court proceedings” under the relevant regulations are those in which “aliens appear before an Immigration Judge, and either contest or concede the charges against them.” EXECUTIVE OFFICE OF IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2004 STATISTICAL YEARBOOK, at B1, D1, available at <http://www.usdoj.gov/eoir/statspub/fy04syb.pdf>. Complainants can present direct evidence, and the immigration judge renders a decision based on the evidentiary record. 8 C.F.R. §§ 1003.12–1003.37 (2005). In our count of EEOC hearings involving federal employment, we looked to those in which a complainant presents evidence and the Administrative Law Judge “issue[s] a decision on the merits of the complaint.” 29 C.F.R. §§ 1603.214, 1603.217 (2005). For determining hearings in the Board of Veteran Appeals, we considered those in which the Board “receive[s] argument and testimony relevant and material to the . . . issue” in order to make a decision on the complaint. 38 C.F.R. § 20.700 (2005).

99. Resnik, *Migrating, Morphing, and Vanishing*, *supra* note 49, at 798–800 & fig.2; Natalie Ram & Bertrall Ross, *Analyzing Federal Administrative Adjudication* (May 2006) (on file with the author) (detailing questions of classification).

100. In terms of the regulatory framework permitting access, the SSA hearings are open to the public unless the Administrative Law Judge, based on “good cause,” closes a hearing. 20 C.F.R. § 498.215(d) (2005). Immigration hearings involve different issues, including deportation, asylum, removal, and exclusion. With the exception of exclusion hearings and certain kinds of other proceedings, immigration hearings are presumptively open. 8 C.F.R. § 1003.27 (2005) (providing that an Immigration Judge “may place reasonable limitations upon the number in attendance at any one time with priority being given to the press over the general public” and that hearings involving an abused “alien spouse” may be closed); see also *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003) (holding that the Attorney General had the power to close deportation hearings presenting national security issues). *But see* *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (holding that a First Amendment right of access to deportation proceedings existed and that a blanket directive closing them was impermissible). The EEOC limits access to those with information relevant to the complaint. 29 CFR § 1614.109(e). As for the Board of Veterans Appeals (BVA), the description of the hearings (informal, ex parte, etc.) does not detail a role for the

Similarly, within the legal academy, detailed knowledge about the practices and outcomes at these many proceedings is minimal. As recently noted by the United States Supreme Court (when disapproving of a Tax Court practice that the reports of its special trial judges not be made public nor included in records on review¹⁰¹), hearing officers' reports are routinely made part of files.¹⁰² Yet no "reporter service" either in print or online regularly compiles and reproduces decisions of administrative judges and hearing officers. Rather, one would have to search case files to gather systematic information about the various agencies and their adjudicative decisionmaking.¹⁰³

One reason we lack data in the aggregate is the lack of funding for research on agencies. The Administrative Conference of the United States (ACUS), an entity created to serve as a repository of information about and research on administrative agencies, lost its funding in the mid-1990s.¹⁰⁴ As of this writing, some funds may be forthcoming for a modest resuscitation, but not at the level that would enable data-gathering and the integration of information about filings across many agencies.¹⁰⁵

public. 38 C.F.R. § 20.701 (2000) (stating that "only the appellant and/or his or her authorized representative may appear and present argument in support of an appeal"). The agency considers the hearings closed and relies in part on the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896, which protects disclosure related to medical and education records. The Board of Veterans Appeals permits open hearings only if agreed to by the claimant. See E-mail from BVA personnel to Natalie Ram, Apr. 28, 2006 (on file with the author).

See generally Section of Admin. Law & Regulatory Practice, Am. Bar. Ass'n, *A Blackletter Statement of Administrative Law and Regulatory Practice*, 54 ADMIN. L. REV. 17, 20 (2002) (describing a general presumption that administrative hearings are open); Jonathan L. Hafetz, *The First Amendment and the Right of Access to Deportation Proceedings*, 40 CAL. W. L. REV. 265 (2004).

101. *Ballard v. Comm'r*, 544 U.S. 46 (2005) (describing that practice as "concealment"). This approach, dating from 1984, also left unclear whether Tax Court judges had modified, rejected, or adopted the special trial judge's initial report. *Id.* at 56. Justice Ginsburg's opinion for the Court found that the concealment was not authorized by the rules; therefore the Court did not reach the question of whether what it described as the "idiosyncratic" practice of the Tax Court, if continued, would violate due process or other federal rules. *Id.* at 64. In July of 2005, the Tax Court promulgated new rules, making available the reports. See U.S. TAX CT. R. 182(e), 183 (a)–(c), available at http://www.ustaxcourt.gov/rules/new_092005.pdf (effective September 2005) (modeling a process for proposed findings by special trial judges in Tax Court akin to that used for district court review of proposed findings of magistrate judges under 28 U.S.C. § 636(b)(1)(B)); Louise Story, *Secrecy Is Lifted in Some Tax Court Trials*, N.Y. TIMES, July 12, 2005, at C1.

102. *Ballard*, 544 U.S. at 62 (citing 5 U.S.C. § 557(c), that "[a]ll decisions, including initial, recommended, and tentative decisions, are a part of the record" on appeal). Also in files are the findings of magistrate judges, special masters, and bankruptcy judges. *Id.*

103. See, e.g., NINTH CIRCUIT GENDER BIAS TASK FORCE, THE EFFECTS OF GENDER IN THE FEDERAL COURTS, THE FINAL REPORT, reprinted in 67 S. CAL. L. REV. 745, 859 (1994) (describing the method for researching social security dispositions).

104. See Administrative Conference Act, Pub. L. No. 88-499, 78 Stat. 615 (1964) (codified as amended at 5 U.S.C. §§ 591–596 (2000)). Funding stopped in 1995. See Toni M. Fine, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 ARIZ. ST. L.J. 19, 23 (1998).

105. See Federal Regulatory Improvement Act of 2004, Pub. L. 108-401, 118 Stat. 2255 (2004) (amending 5 U.S.C. § 591 and § 596 to authorize the appropriation of three million dollars for fiscal

Further, because many claimants in agencies do not have lawyers, and those who do cannot provide significant compensation for such service, publishers have not focused on marketing services to gather and disseminate information. A few special projects—such as the efforts at Hastings Law School to assemble a database on asylum opinions¹⁰⁶—permit windows into small subsets of the decisions made and enable law teachers and commentators to have some basis on which to discuss content and process. On occasion, distress at agency processes and outcomes produces a body of federal appellate law.¹⁰⁷ But these episodic exposures, and particularly the insights gleaned from court oversight, provide a skewed sample of the quality and kind of decisions rendered.

In short, and borrowing from the language of political economy, during the course of the twentieth century, through successful efforts of both public and private institutions and actors, the federal courts became the most prominent and the best-endowed court system in the nation. When trials occur in any of their hundreds of facilities, the public can attend. Decisions from its jurists can be read (even if not “published”¹⁰⁸) through online and print services. In contrast, a large quantum of adjudicatory-like decisionmaking goes uncompiled, under-recorded, and minimally represented. A good many trial-like procedures (more than two-thirds of a million evidentiary proceedings annually in federal agencies) cannot be seen by any but the immediate participants. Delegation to agencies of adjudication may provide many benefits (usually catalogued as including informality, lower costs, expertise, and more

year 2005 and small increases thereafter); Letter from Robert D. Evans, Director, Am. Bar. Ass’n Gov’t Affairs Office, to Hon. Christopher S. Bond, Chair, and Hon. Patty Murray, Ranking Member, Subcomm. on Transp., Treasury, the Judiciary & Hous. & Urban Dev. of the Senate Comm. on Appropriations (July 1, 2005), available at <http://www.thecre.com/pdf/unfinished/ABAletter.pdf> (seeking support for appropriation of the such sums); Randolph J. May, *Bring Back ACUS*, NAT’L L.J., Jan. 3, 2005, at 27 (calling for Congress to appropriate the funds authorized).

106. See Ctr. for Gender and Refugee Studies, Univ. of Cal. Hastings College of the Law, Case Law, <http://cgrs.uchastings.edu/law> (last visited May 1, 2006) (providing access to materials from the Center for Gender and Refugee Studies).

107. See, e.g., *Benslimane v. Gonzales*, 430 F.3d 828, 829–30 (7th Cir. 2005) (describing a “staggering 40 percent” reversal rate of the 136 petitions reviewing the Board of Immigration Appeals that were resolved on the merits and concluding that “the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice”); *N’Diom v. Gonzales*, 442 F.3d 494, 500 (6th Cir. 2006) (Martin, J., concurring) (“There are no doubt many conscientious, dedicated, and thorough immigration courts across the country. Unfortunately, their hard work is overshadowed by the significantly increasing rate at which adjudication lacking in reason, logic, and effort from other immigration courts is reaching the federal circuits.”); *Wang v. Attorney General*, 423 F.3d 260, 269 (3d Cir. 2005) (expressing disappointment that the immigration judge “chose to attack Wang’s moral character rather than conduct a fair and impartial inquiry into his asylum claims”). See also Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) (discussing the government’s response to rulings overturning Social Security adjudication).

108. See REAGAN, CITING UNPUBLISHED OPINIONS IN FEDERAL APPEALS, *supra* note 47; Pether, *supra* note 47.

judging for more claimants) but it also imposes significant costs in terms of reducing the openness of dispute resolution processes and access to information about both processes and outcomes predicated on claims of public rights.

B. *Enforcing Contracts to Resolve Disputes Outside of Courts*

In addition to delegation from one public institution to another, outsourcing to private venues is another means of putting dispute resolution beyond public purview. Private dispute resolution has a long history,¹⁰⁹ but during decades past, the law was ambivalent about enforcing obligations to participate in private systems that required disputants to pledge to forgo access to public processes. Judges guarded their own monopoly power and regularly refused to enforce compulsory arbitration contracts.

Over the course of the twentieth century, however, the attitudes of legislators and court-based adjudicators changed. In 1925, Congress enacted the Federal Arbitration Act (FAA), recognizing arbitration contracts as enforceable obligations.¹¹⁰ Yet judges sometimes declined to enforce agreements that contained waivers of federal litigation rights and were made before actual conflicts arose. Jurists found arbitration too flexible, too lawless, and too informal when contrasted with adjudication, esteemed for its regulatory role in monitoring adherence to national norms.¹¹¹

However, in the 1980s, the United States Supreme Court revised its earlier rulings and upheld broad grants of authority to arbitrators, even when federal statutory rights to bring lawsuits were claimed.¹¹² Instead of objecting

109. See, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 132–33 (1992); see also ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

110. See United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2000 & Supp. III 2005)). As first enacted, it was called the “U.S. Arbitration Act,” but it is now commonly referred to as the Federal Arbitration Act. Professors Michael Leroy and Peter Feuille argue that the claim of historic judicial hostility to arbitration is overstated. See Michael H. LeRoy & Peter Feuille, *Judicial Enforcement of Pre-dispute Arbitration Agreements: Back to the Future*, 18 OHIO ST. J. ON DISP. RESOL. 249 (2003).

111. See, e.g., *Wilko v. Swan*, 346 U.S. 427 (1953). See generally Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995) [hereinafter Resnik, *Many Doors? Closing Doors?*].

112. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985) (both upholding ex ante arbitration agreements as sufficient despite claims of violation of federal securities and antitrust rights). Thereafter, the Court enforced arbitration clauses despite allegations of discrimination under federal or state law. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Further, the Court has required that ambiguity about the scope of such contracts is to be decided, in the first instance, by arbitrators. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); see also *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204 (2006) (overturning a decision by the Supreme Court of Florida that because a clause of the contract failed under state law, the arbitration

to the informality of arbitration, judges praised its flexibility. But judges did not simply alter their attitudes toward arbitration; they also changed their views of adjudication, which came to be described as only one of several techniques appropriate for the resolution of disputes.¹¹³ Today, law often sends contracting parties (including employees and consumers) to mandatory arbitration programs created by employers, manufacturers, and the providers of goods and services.¹¹⁴

My own contract from a cell phone provider offers one such example. Under the heading “Independent Arbitration,” it reads: “Instead of suing in court, you’re agreeing to arbitrate disputes arising out of or related to this or prior agreements. . . . You and we are waiving rights to participate in class actions, including putative class actions begun by others prior to this agreement”¹¹⁵

Gaining knowledge and access to such private dispute resolution processes is difficult. Professor Marc Galanter, the data collector-in-chief for *The Vanishing Trial* project, noted the challenges when, in October of 2003, he distributed to the other researchers (myself included) a thick booklet of statistics that had been compiled. But the sections “Administrative Adjudication” and “The Number of ADR Proceedings” had not been written; as he ex-

provision was unenforceable; sending the disputants to arbitration for consideration of the contract’s validity).

113. Resnik, *Many Doors? Closing Doors?*, *supra* note 111, at 253–54.

114. See, e.g., *Circuit City*, 532 U.S. 105; *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000). See generally Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses; *The Average Consumer’s Experience*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 55. Demaine and Hensler sampled services, such as moving companies, department stores, car dealers, hospitals, airlines, and credit card dealers and learned that about one third (fifty-seven of the 161 sampled businesses) included arbitration clauses in their contracts. Almost seventy percent of financial services (credit cards, accounting, banking) required arbitration. Of the fifty-two arbitration clauses analyzed, about one-third expressly prohibited class actions. Of thirty clauses that dealt with costs, about half provided that the consumer and service company would split the costs, unless the arbitrator decided otherwise. *Id.* at 58–72.

Some constraints exist. If litigants challenge contractual obligations, courts inquire into the adequacy of arbitral tribunals and sometimes find the process insufficient or the form of contracting unconscionable. See generally Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004). See also Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1996); Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 279; Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 253.

115. This text comes from a mailing I received in 2002 from Verizon Wireless, which also counseled that I “read [it] carefully before filing [it] in a safe place.” A copy is on file with the author. The 2006 version—also purporting to bar aggregate arbitrations even if permitted by an ADR provider—can be found online. See Customer Agreement, http://www.verizonwireless.com/b2c/globalText?name=Customer_Agreement&jspName=footer/customerAgreement.jsp. See also Jane Spencer, *Signing Away Your Right to Sue: In Significant Legal Shift, Doctors, Gyms, Cable Services Start to Require Arbitration*, WALL ST. J., Oct. 1, 2003, at D1.

plained, such data are “elusive.”¹¹⁶ Some private providers are free-standing institutions (such as the American Arbitration Association that also provide services to in-house programs); some are industry-based, and others are run by the entity requiring the alternative. Given that range, knowledge of their metes and bounds is very limited, and watching them at work is not an option offered.

C. *Pressing for Conciliation Inside Courts*

The third method of privatization of public processes comes through the changes in the ways in which courts themselves work. As a variety of different kinds of concerns have converged, the movement for Alternative Dispute Resolution (ADR) has succeeded in winning congressional attention and in altering court processes and doctrine.

Given the concerns of this Symposium about privacy and secrecy, of particular relevance here are those processes that encourage settlement. The 1938 Rules did not use the term “settlement,” nor did they charge judges with the task of promoting settlements. The drafters did include a provision under one Federal Rule (68) for an “offer of judgment,”¹¹⁷ and they prohibited class actions from being “dismissed or compromised without the approval of the court.”¹¹⁸ In contrast, the 2004 version of the Federal Rules of Civil Procedure uses the word “settlement” in the texts of Rules 11,¹¹⁹ 16, 23,¹²⁰ and 26.¹²¹

116. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts* 91 (Litig. Section, Am. Bar. Ass’n, Working Paper compiled in October of 2003 for the symposium held in San Francisco, Cal., Dec. 12–14, 2003) (on file with the author).

117. Rule 68 explained that if an adverse party failed to obtain a judgment more favorable than had been offered, a court had the power to award costs from the time the offer was made against a winning party. See FED. R. CIV. P. 68, 308 U.S. 645, 746 (submitted in 1937 to be effective in 1938) [hereinafter 1938 FEDERAL RULES]. The 1987 revisions substituted language of “offeree” for party but retained the model of the 1938 rules. The definition of “costs” varies depending on whether statutes also provide for shifting either costs or attorneys’ fees, sometimes defined as an element of costs and other times not. See 28 U.S.C. § 1920 (2000); *Marek v. Chesney*, 473 U.S. 1 (1985).

118. FED. R. CIV. P. 23(c), 1938 FEDERAL RULES, *supra* note 117, 308 U.S. at 690.

119. The original Rule 11 was called “Signing of Pleadings.” See 1938 FEDERAL RULES, *supra* note 117, 308 U.S. at 676. The current Rule 11, now called “Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions,” provides that “[m]onetary sanctions may not be awarded on the court’s initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.” FED. R. CIV. P. 11(c)(2)(B). Further, the 1993 Advisory Committee Notes comment that Rule 11 motions should not be used to “exact an unjust settlement” and further explain that parties “settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case.”

120. The 1938 version, “Class Actions,” prohibited dismissal or compromise without court approval. FED. R. CIV. P. 23(c), 1938 FEDERAL RULES, *supra* note 117, 398 U.S. at 690. The 2003 Rule has a subsection entitled “Settlement, Voluntary Dismissal, or Compromise,” and under that subsection, the process of

The key innovation came in 1993, when Rule 16 was amended to detail more of the work and the power of the managerial judge, authorized to direct “a party or its representative” to “be present or reasonably available by telephone in order to consider possible settlement of the dispute.”¹²² Added to the Rule’s text was that the goal of such intervention was to “assist in resolving the dispute,”¹²³ in contrast to the prior statement that the aim was “to resolve the dispute.”¹²⁴

Judges moved from resolution by *adjudication* to resolution by *negotiation*. As the drafters explained:

Even if a case cannot be settled immediately, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits.¹²⁵

Furthermore, although the notes explaining the 1983 amendment to Rule 16 had cautioned judges against imposing “settlement negotiations on unwilling litigants,”¹²⁶ the 1993 ruledrafters gave judges power (the parameters of

settlement for class actions is detailed to some extent, with more discussion in the Advisory Committee Notes. See FED. R. CIV. P. 23(e) & Advisory Committee’s Notes.

121. The word “settlement” was first used in the context of Rule 26 in the 1970 Advisory Committee notes to amendments promulgated at that time. As the Advisory Committee explained:

[D]isputes have inevitably arisen concerning the values claimed for discovery and abuses alleged to exist. . . .

The Committee . . . invited the Project for Effective Justice of Columbia Law School to conduct a field survey of discovery. . . .

The Columbia Survey concludes, in general, that there is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules. No widespread or profound failings are disclosed. . . . The costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement. On the other hand, no positive evidence is found that discovery promotes settlement.

Advisory Committee’s Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 489–90 (1970).

In 1993, Rule 26 was again amended to provide that the parties must, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case. . . .

See FED. R. CIV. P. 26(f) (1993) (“Meeting of Parties: Planning for Discovery”).

In 1970, Rule 26 (b)(2) made plain that parties could obtain discovery of insurance policies even though they were neither admissible nor likely to lead to admissible evidence. Rather, disclosure was appropriate to enable “counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation.” See FED. R. CIV. P. 26(b)(2) & the Advisory Committee’s Notes (1970) (“Insurance Policies”).

122. FED. R. CIV. P. 16(c)(16) (1993).

123. FED. R. CIV. P. 16(c)(9)(1993) (emphasis added).

124. FED. R. CIV. P. 16(c)(7) (1983).

125. FED. R. CIV. P. 16(c)(9) Advisory Committee’s Notes (1993).

126. FED. R. CIV. P. 16(c)(7) Advisory Committee’s Notes (1983).

which are unclear¹²⁷) to compel participation even when parties are reluctant to do so. As the Advisory Committee noted, the rule “acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties.”¹²⁸

Moreover, court-based ADR has itself relied heavily on less public modes of resolution. Trials are not the only proceedings that have “vanished” from courts. Arbitrations, which are more trial-like than other forms of ADR and which could provide a venue in which the public could gain knowledge of conflicts, are also hard to find. As of 2002, ten of the ninety-four district courts had statutory authority for both mandatory and voluntary court-annexed arbitration programs for certain kinds of cases. But only seven of the ten districts then had operating programs¹²⁹—taking references for less than eight percent of the cases on those districts’ civil dockets.¹³⁰ The other three designated “arbitration districts” had stopped providing that process because

127. See, e.g., *In re Atl. Pipe Corp.*, 304 F.3d 135, 138 (1st Cir. 2002) (holding that a district court may order “an unwilling party to participate in, and share the costs of, non-binding mediation” either through local rules or statutory provisions or under its “inherent powers as long as the case is an appropriate one and the order contains adequate safeguards”); *In re Novak*, 932 F.2d 1397, 1407 (11th Cir. 1991) (concluding that courts have inherent authority to “direct parties to produce individuals with full settlement authority at pretrial settlement conferences”). The *Novak* court also concluded that such power extended to named parties or nonparty insurers in charge of a litigation but that a judge could not order an employee of a nonparty insurer to participate. *Id.* at 1407–08. The appellate court also reminded lower court judges that they lack the power to compel parties to settle. *Id.* at 1405 n.15 (citing *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985)). Cf. *In re African-Am. Slave Descendants’ Litig.*, 272 F. Supp. 2d 755, 758–60 (N.D. Ill. 2003) (concluding that where a local rule provides only for voluntary mediation and no federal statute compels mandatory mediation, neither the Federal Rules nor a court’s inherent powers should be used to require mediation).

See generally Jeffrey A. Parness & Lance C. Cagle, *Guiding Civil Case Settlement Conferences and Their Aftermath: The Need to Amend Illinois Supreme Court Rule 218*, 35 LOY. U. CHI. L.J. 779 (2004) (reviewing opinions on the enforceability of judicial insistence on requiring settlement discussions and calling for written rules for participants in pretrial conferences); Morton Denlow & Jennifer E. Shack, *Judicial Settlement Databases: Development and Uses*, JUDGES’ J., Winter, 2004, at 19 (describing efforts to develop databases to use as parameters for “fair” settlements). For discussion about the possibility of coercive uses of settlement powers before the 1983 change, see Resnik, *Managerial Judges*, *supra* note 48, at 412–13.

128. See FED. R. CIV. P. 16(c)(9) Advisory Committee’s Notes (1993).

129. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 2002 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 20 (2003) [hereinafter JUDICIAL BUSINESS 2002], available at <http://www.uscourts.gov/judbus2002/front/jdabus2002.pdf>. As that report explains, courts had the power to mandate arbitration only if the plaintiff sought no more than \$150,000 in money damages. Further, in 2002, 3,965 civil cases were referred to arbitration from seven of the ten districts authorized to do so; that number represented a twenty percent increase over referrals the year before. Seven districts (the Northern District of California, the Middle District of Florida, the Western District of Missouri, the Eastern District of New York, the District of New Jersey, the Eastern District Pennsylvania, and the Western District of Oklahoma) accounted for “all new arbitration cases in the district courts during 2002.” *Id.* According to staff at the Western District of Missouri, no court-annexed arbitrations have occurred since 1998 because of the use of an early neutral evaluation program. Telephone Interview by Andrew Goldstein with staff, U.S. Dist. Court for the W. Dist. of Mo. (Nov. 21, 2003).

130. JUDICIAL BUSINESS 2002, *supra* note 129, at 56 tbl.S-12, available at <http://www.uscourts.gov/judbus2002/tables/s12sep02.pdf>.

they had shifted to mediation—thereby joining some forty-five other districts then relying on activities focused on settlement of disputes.¹³¹

Within those seven programs, relatively little public access was permitted. Working with Andrew Goldstein (the author of another essay in this Symposium¹³²), I tried to learn about whether and how individuals who were not parties could attend the arbitrations. The local rules of the seven district courts were relatively uninformative. Most neither addressed the question of whether the public has a right to be present at court-annexed arbitrations nor specified where court-annexed arbitrations were to take place.¹³³

In response to phone calls to the various districts, staff in clerks' offices provided information; in some courts, the arbitrations were held in courtrooms if space existed or at an off-site neutral location such as an arbitrator's office.¹³⁴ As to whether non-participants could be present, the deputy clerk of one district informed us that the proceedings were private.¹³⁵ In another district, where the local rule provided for the arbitration hearing to take place in a room in the courthouse,¹³⁶ a clerk explained that non-parties could attend only with the consent of the parties and the arbitrator.¹³⁷ In one district, the Eastern District of Pennsylvania, court-annexed arbitrations were listed as a part of the court calendar and took place in the courthouse in rooms open to the public.¹³⁸

Consider then the more common forms of ADR—mediation and judge-run settlement conferences. These activities often take place in lawyers' offices and in judges' chambers. A few federal courthouse projects now include

131. *Id.* at 20 (“Currently, 52 percent of all U.S. district courts use federal mediation procedures to settle cases eligible for alternative dispute resolution programs.”). As Deborah Hensler has pointed out, how much of that is what mediators would call “mediation,” as contrasted with settlement conferences focused on obtaining dispositions, is a question not yet answered. See Deborah Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, DISP. RES. MAG., Fall 1999, at 15. See also Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787 (2001).

132. Goldstein, *supra* note 45.

133. Compare, e.g., W.D. MO. R. 16.5 (entitled “Alternative Dispute Resolution” and describing the use of neutral third parties to resolve controversies but providing no details as to where such processes occur), with D.N.J. CIV. R. 201.1(f) (providing that a court order specify the time and place of the arbitration).

134. See, e.g., N.D. CAL. ADR R. 4-4 (providing that arbitrations could be held anywhere within the physical boundaries of that district, “including a room at a federal courthouse, if available”).

135. Telephone interview by Andrew Goldstein with Deputy Clerk, U.S. Dist. Court for the Dist. of N.J. (Nov. 14, 2003).

136. See E.D.N.Y. CIV. R. 83.10(f).

137. Telephone interview by Andrew Goldstein with Deputy Clerk, U.S. Dist. Court for the E. Dist. of N.Y. (Nov. 14, 2003).

138. Telephone interview by Andrew Goldstein with staff, U.S. Dist. Court for the E. Dist. of Pa. (Nov. 14, 2003); see also E.D. PA. R. 53.2 (“Arbitration: The Speedy Civil Trial”); 53.2(5) (“Arbitration Trial . . . The trial shall take place in the United States Courthouse in a room assigned by the arbitration clerk.”).

plans to build ADR suites,¹³⁹ but at least one such room (dedicated to mediation in a federal district court in Portland, Oregon) is tucked inside an area that is not regularly visited by the public. While bargaining *in* the shadow of the law is a phrase often used,¹⁴⁰ bargaining is increasingly a requirement *of* the law of procedure. Also increasing are *ex parte* contacts between judges and lawyers; some local rules and some case law license these exchanges in service of the goal of promoting settlement.¹⁴¹ Such discussions not only take place away from public scrutiny, they may be closed to some of the parties in the very case at issue.

Moving from the structure of rules to contemporary court-based practices, privacy or secrecy (again depending on one's vantage point) can also stem from party-negotiated and court-enforced terms of agreements. One option is to bargain for privacy/secrecy through the payment of premiums or the conditioning of settlements on nondisclosure of information. In the federal system, parties may conclude agreements by dismissals. Filed with courts are the notices of dismissal; separately, the parties specify the relevant terms in contracts. Some (unknown) number of those non-filed contracts include "confidentiality clauses" that prohibit disclosure of the terms to others. The frequency with which reference is made in case law and commentary¹⁴² to the existence of such "confidential settlement agreements" and the general lack of debate about them suggest that such confidentiality clauses are commonplace (unlike the formally filed settlements that FJC researchers found infrequently included sealing¹⁴³).

A distinct question—again open currently to bargaining—is access to the underlying information, produced during the course of litigation and specifically through discovery. We know that parties bargain to hide materials unearthed. And, anecdotal evidence supports the thesis that discovery confidentiality clauses are routinely included as a predicate to the initial disclosures, making nondisclosure the baseline from which special negotiations are required to enable the information to be revealed to others. That settlement

139. Telephone Interview with Staff Architect, U.S. Dist. Court for the Cent. Dist. of Cal. (Nov. 2005).

140. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

141. See *Ex Parte* Contacts: Local Rules and Ethical Obligations, Memorandum from Alison MacKenzie and Jennifer Peresie to Judith Resnik (May 2005) (on file with the author).

142. See, e.g., *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206 (9th Cir. 2002) (discussing access to confidential settlement materials); *Hasbrouck v. BankAmerica Hous. Servs.*, 187 F.R.D. 453 (N.D.N.Y. 1999) (finding good cause to protect disclosure of a settlement that the plaintiff had reached in a prior lawsuit with a different defendant). See generally Arthur R. Miller, *Confidentiality, Protective Orders and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457 (1991).

143. See FJC SEALED SETTLEMENT STUDY, *supra* note 6.

may hinge on agreements to make data inaccessible can be gleaned from the few cases that do make the press or the reported decisions.

One such headline-grabbing example was a sex-discrimination case against a major Wall Street firm¹⁴⁴ that had been accompanied by a good deal of advance media coverage. One story ran under the banner: "Women of Wall Street Get Their Day in Court."¹⁴⁵ Instead, the case was settled with promises of nondisclosure not only by the individual plaintiff but also by the Equal Employment Opportunity Commission (EEOC). As the *Wall Street Journal's* reporters explained,

although the EEOC had planned to introduce statistics about women's pay and promotion at trial, details on the alleged disparities between the firm's male and female employees were never made public. . . . As part of the settlement, the parties agreed to honor a pre-existing confidentiality order, designed to keep many of the documents related to the case under wraps.¹⁴⁶

In addition to such party-based negotiations and court rules stemming from ADR, other methods are available to keep information about conflicts from the public. Many states have created a privilege for information obtained in mediations.¹⁴⁷ Federal law providing for mediation has a similar feature.¹⁴⁸ Strategically, parties may, by bringing documents and information into a mediation, shelter them from subsequent disclosure in litigation.¹⁴⁹ Private pro-

144. See EEOC & Allison Schieffelin v. Morgan Stanley & Co., No. 01 Civ. 8421, 2004 U.S. Dist. LEXIS 12724 (S.D.N.Y. July 8, 2004), *aff'g in part* 324 F. Supp. 451 (S.D.N.Y. July 2, 2004). Judge Ber- man's July 8th district court opinion reviewed Magistrate Judge Ellis's rulings on pretrial motions challeng- ing the admissibility of expert testimony about the occupational choices of women and men and workplace practices to protect against gender bias.

145. See Patrick McGeehan, *The Women of Wall Street Get Their Day in Court*, N.Y. TIMES, July 11, 2004, § 3, at 5. See also Susan E. Reed, *When a Workplace Dispute Goes Very Public*, N.Y. TIMES, Nov. 25, 2001, § 3, at 4 (discussing the sex discrimination litigation against Merrill Lynch, its settlement with hear- ings, and efforts by unhappy litigants to bring the issues back to public attention, including through hiring an airplane to pull a banner, "Merrill Lynch Discriminates Against Women" through the air).

146. See Kate Kelly & Colleen DeBaise, *Morgan Stanley Settles Bias Suit for \$54 Million*, WALL ST. J., July 13, 2004, at A1; see also Susan Antilla, Op-Ed, *Money Talks, Women Don't*, N.Y. TIMES, July 21, 2004, at A19 (arguing that "Morgan Stanley, and all of Wall Street, scored" by keeping the statistics private).

147. See Doré, *supra* note 45, at 495-97.

148. See 5 U.S.C. § 574 (2000) (requiring confidentiality, and specifically restricting the use of discov- ery to force disclosure of exchanges made during administrative processes); 28 U.S.C. § 652(d) (2000) (requiring district courts to provide local rules for confidentiality in ADR). Cf. FDIC v. White, 76 F. Supp. 2d 736 (N.D. Tex. 1999) (concluding that the provision does not prevent use of evidence disclosed at medi- ation to challenge a settlement agreement). See generally Ellen E. Deason, *Procedural Rules for Complemen- tary Systems of Litigation and Mediation—Worldwide*, 80 NOTRE DAME L. REV. 553, 565-66 (2005); Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441 (1984).

149. See, e.g., *Rojas v. Superior Court*, 93 P.3d 260, 270-71 (Cal. 2004) (holding that mediation privi- lege applies to "writings" that include analyses of test data and photographs prepared during mediation and that a "good cause exception" did not apply); *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 25 P.3d 1117 (Cal. 2001) (finding that statements made in mediation are privileged); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Price*, 78 P.3d 1138 (Colo. Ct. App 2003); *State Bd. of Labor Relations v. Freedom of Info. Comm'n*, 709 A.2d 1129 (Conn. 1998); see also Deason, *supra* note 148 (proposing more protection for

viders of ADR are also rulemakers. Some pre-dispute contracts or the dispute resolution systems they mandate may impose confidentiality. Further, some of the large-scale, mass tort settlements create claimant payment systems that include confidentiality requirements.¹⁵⁰

These many privatizing modes put into a different context the oft-invoked proposition that public access exists for all documents filed with the court.¹⁵¹ Hold aside that, as a matter of law, some courts have distinguished among the kinds of documents in courts' files, for example, by providing access to discovery material annexed to substantive motions but ruling that "material filed with discovery motions is not subject to the common-law right of access."¹⁵² Even if a rule prevailed that all court files were "accessible," public knowledge about a given dispute could still be constrained—depending upon what information is filed with courts. The Federal Rules once required that all discovery materials be filed unless a court ordered otherwise.¹⁵³ In contrast, relatively recent amendments now provide the opposite: that "discovery requests and responses must not be filed until they are used in the

confidentiality in mediation). A few examples of narrow construction of the privilege can be found. *See, e.g., Ala. Dep't of Transp. v. Land Energy, Ltd.*, 886 So.2d 787, 805 (Ala. 2004).

150. For example, the Dalkon Shield litigation concluded with a trust authorized to make payments to claimants. *See* Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 *FORDHAM L. REV.* 617 (1992) (describing the trust's insistence on evaluating each case individually); Georgene M. Vairo, *The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 *LOY. L.A. L. REV.* 79 (1997). The trust did not provide public information about the amounts paid to individuals; claimants represented by lawyers who appeared repeatedly may have gathered information through informal networks. According to one of the trustees, the decision not to disclose was prompted by the view that it helped to individualize each claimant's payment. *See* E-mail from Georgene Vairo, who had served as a trustee and who is a Professor of Law at the Loyola School of Law, L.A., to the author (Oct. 22, 2004) (on file with the author).

151. FJC SEALED SETTLEMENTS STUDY, *supra* note 6, at 1.

As the Eleventh Circuit explained

[i]t is immaterial whether the sealing of the record is an integral part of a negotiated settlement between the parties, even if the settlement comes with the court's active encouragement. Once a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case. Absent a showing of extraordinary circumstances . . . , the court file must remain accessible to the public.

Brown v. Advantage Eng'g, Inc., 960 F.2d 1013, 1016 (11th Cir. 1992); *see also* *Jessup v. Luther*, 277 F.3d 926 (7th Cir. 2002) (requiring disclosure of a settlement because it had been filed with the court); *Hermreiter v. Chi. Hous. Auth.*, 281 F.3d 634 (7th Cir. 2002); *Enprotech Corp. v. Renda*, 983 F.2d 17 (3d Cir. 1993); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339 (3d Cir. 1986).

152. *See, e.g., Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312 (11th Cir. 2001).

153. *See* FED. R. CIV. P. 5(d), which had provided that discovery materials were to be filed "within a reasonable time." *See* 1938 RULES, *supra* note 117, 308 U.S. at 669. An accompanying note to amendments in 1980, from the Advisory Committee, commented that, while cumbersome in size for courts to store, such materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally. Accordingly, this amendment and a change in Rule 30(f)(1) continue the requirement of filing but make it subject to an order of the court that discovery materials not be filed unless filing is requested by the court or is effected by parties who wish to use the materials in the proceeding.

proceeding or the court orders filing.”¹⁵⁴ Only if materials obtained through discovery are reflected in or appended to motions or affidavits does that information make its way into the public realm.

Above, I suggested that the Federal Rules of 1938 incorporated a view of procedure fairly described as a Due Process Model. One way to capture the shift over the last three decades is to use the phrase *Contract Procedure* to denote the degree to which rules, statutes, and practices have been reframed to support conciliation in lieu of adjudication. At least thus far, such bargaining, conducted at the prompting of courts, results in the privatization of process.

I should also note that settlement pressures are not confined to the trial courts. Appellate courts have also changed their processes to aim for disposition through conciliation. Federal rules now permit appellate courts to “direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement.”¹⁵⁵ More than half of the federal circuits run such a “civil appeals management program” (CAMP) and oblige attorneys for disputants to meet with a staff member of the appellate court to negotiate settlements.¹⁵⁶ Further, in many

154. See FED. R. CIV. P. 5(d) (as amended in 2000).

155. See FED. R. APP. P. 33. The rule is described as “entirely rewritten” in the early 1990s by the Advisory Committee Notes to the 1994 amendment.

156. See, e.g., 1ST CIR. R. 33 (b)(1) (discussing a pre-argument conference “to consider the possibility of settlement” with a person designated by the court as a “Settlement Counsel”); 2D CIR. R. app.D (Guidelines for Conduct of Pre-Argument Conferences under the Civil Appeals Management Plan) (describing the importance of an objective evaluation by Staff Counsel that considers “the possibility of settlement” as well as the simplification of issues, and that in many instances the result is “settlement or withdrawal of some appeals or particular issues”); U.S. Court of Appeals for the Fifth Circuit, General Order Governing the Appellate Conference Program, (Mar. 27, 2000), available at <http://www.ca5.uscourts.gov/clerk/docs/order.pdf> (describing referral of cases for conferences to explore settlement and that counsel are required to participate in such scheduled conferences); 6TH CIR. R. 33(c)(1),(3) (requiring that all civil cases be reviewed by a “mediation attorney” to decide whether a pre-argument conference would be useful and permitting either a circuit judge or a staff attorney to serve as a “mediation attorney” to discuss settlement, and noting that if a judge serves, that judge may not sit on a panel but could participate in an en banc rehearing); 8TH CIR. R. 33 (providing that civil appeals may be sent to a prehearing conference program to enable discussions of a variety of matters, including settlement and authorizing either the program director or a senior district judge to conduct such conferences); 9TH CIR. R. 33-1 (providing that the “primary purpose” of such conferences is “to explore settlement,” noting that either “the judge or court mediator” may require parties to attend, and that parties can also submit issues “to an appellate commissioner for a binding determination”); FED. CIR. R. 33, available at <http://www.fedcir.gov/pdf/cafc2006.pdf> (reiterating in part the provisions of FED. R. APP. P. 33 and permitting the court to direct “attorneys—and when appropriate the parties—to participate in one or more conferences to address any matter . . . including . . . settlement” that aids in the disposition, permitting a judge or other person “designated by the court” to preside, and the court to issue orders thereafter “controlling the course of the proceedings or implementing any settlement agreement”). Some proponents of the program report that many settlements are achieved as a result. See Mori Irvine, *A Look at Mediation*, NAT’L L. J., Aug 27, 2001, at B10 (“[E]very circuit court of appeals except the Federal Circuit has formally established a settlement program to help parties resolve their cases while pending appeal.”).

circuits, oral arguments are held only with the permission of the court, and a significant percentage of cases are decided “on the papers.”¹⁵⁷

If cases do go to judgment, many appellate decisions are made summarily, and even some of the written judgments are deemed unavailable for use as precedent by other litigants.¹⁵⁸ While new rules limit the ability of courts to ban citation of “unpublished” decisions,¹⁵⁹ published opinions represent about twenty percent of the dispositions of the federal appellate courts.¹⁶⁰ (A market response has been the creation of a new federal “reporter”—West’s *Federal*

157. JUDITH A. MCKENNA, LAURA L. HOOPER & MARY CLARK, CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURT OF APPEALS 11 (Fed. Judicial Ctr., 2000) 11 tbl.6 (providing data, as of FY 1998, that the national average of cases decided after oral argument by appellate courts was 41 percent, over all). Of cases in which litigants have counsel, the percentage of decisions after oral argument was 57 percent. *Id.*

158. The Honorable Richard S. Arnold of the Eighth Circuit helped to bring attention to this issue with his opinion in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

159. In 2003, the Advisory Committee on the Federal Rules of Appellate Procedure proposed a new rule, 32.1, stating, “No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘no precedent,’ or the like, unless the restriction is generally imposed upon the citation of all judicial opinions.” See Memorandum from Judge Samuel A. Alito, Chair, Advisory Comm. on Appellate Rules, to Judge Anthony J. Scirica, Chair, Standing Comm. on Rules of Practice & Procedure 28–29 (May 22, 2003), available at <http://www.uscourts.gov/rules/app0803.pdf>. (printing text of proposed rule). That text was modified in April 2004. See Memorandum from Judge Samuel A. Alito, Chair, Advisory Comm. on Appellate Rules, to Judge David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure at 42–43, available at <http://www.uscourts.gov/rules/Reports/AP5-2004.pdf> (“A court may not prohibit or restrict the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘no precedent,’ or the like.”).

Responding to concerns raised by judges, additional data were collected. See REAGAN, CITING UNPUBLISHED OPINIONS IN FEDERAL APPEALS, *supra* note 47. In 2005, the Standing Committee proposed to the Judicial Conference that the new rule be promulgated, with clarifications that a court not “prohibit or restrict the citation of federal judicial opinions” to ensure that the rule not be read to apply to state decisions. DAVID F. LEVI, STANDING COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES app. A-2 (2005), available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf>. On September 20, 2005, the Judicial Conference approved the rule, with the addition that it not apply to opinions issued before January 1 of 2007, and forwarded that rule, along with others, to the Supreme Court. See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, Sept. 20, 2005, at 36–37, available at http://www.uscourts.gov/judconf/sept05proc_final.pdf; see also Memorandum from Judge Samuel A. Alito, Chair, Advisory Comm. on Appellate Rules, to Judge David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure 2 (May 9, 2005, Revised Oct. 7, 2005), available at <http://www.uscourts.gov/rules/Reports/AP10-2005.pdf> (reflecting the change). The Court, in turn, promulgated the rule along with other changes, in the spring of 2006 and that set of rules will govern, absent congressional action, in December 2006. See Supreme Court Action: Rules and Amendments Approved 4/12/06, available at <http://www.uscourts.gov/rules>.

160. See 2004 JUDICIAL BUSINESS, *supra* note 87, at 39, tbl.S-3, available at <http://www.uscourts.gov/judbus2004/tables/s3.pdf>. As to state decisions, see Arthur G. Scotland, *The Filing and Publication of Appellate Opinions: A Survey of the Council of Chief Judges of Courts of Appeal, JUDGES’ J.*, Winter 2004, at 31.

Appendix—begun in 2001 and devoted to “unpublished” decisions.¹⁶¹) If neither an argument takes place nor a decision is published, or if a decision consists of a notation that a court has summarily affirmed or reversed a judgment, the public has no window into appellate court processes.

V. CHOOSING RULES

Given the political import and social utilities of open adjudicatory processes and the host of new techniques from pre-filing preclusion of litigation to post-filing confidentiality that limit public access to dispute resolution processes and outcomes, new lawmaking is needed. Below, I sketch some interventions that would help courts both to serve as information-producers and to enact political and social commitments about the necessarily-participatory processes of the creation and enforcement of legal norms.

One area to revisit is the common law and entrepreneurial commitment to party autonomy in adjudication. A *laissez-faire* system once permitted disputants the freedom to shape the presentation of disputes (subject to pleading, joinder, and evidentiary rules). Today’s rules now oblige disputants to bargain but a good deal of case law assumes that settlement contracts should be treated like other contracts. Even when facing post-settlement objections, many judges ignore the court pressures, *ex ante*, to bargain. Judges often act as if negotiations suffice to validate whatever deals litigants’ lawyers produce. For example, while some state procedural rules specify that a binding settlement requires a signed writing or an agreement made in open court,¹⁶² the federal courts do not currently have an equivalent national rule.¹⁶³ Rather, federal courts generally presume that lawyers’ representations of agreements made suffice to bind their clients. Further, eager to create incentives for settlement, some judges have encouraged privacy. In the words of one Second

161. These volumes include opinions issued by the federal appellate courts but “not selected for publication in the Federal Reporter.” See West—Federal Appendix, <http://West.thomson.com/product/40015694/product.asp> (last visited Mar. 8, 2006).

162. See, e.g., WIS. STAT. § 807.05 (2004); NEB. COUNTY CT. GEN. R. 4; N.Y. C.P.L.R. 2104 (McKinney 2004 & Supp. 2006); WA. SUPER. CT. CIV. R. 2A.

163. Some federal courts have enforced some oral agreements despite the absence of a written agreement. Further, some enforcement rulings rely on information from trial judges who add their own language to or recollections about the bargains made. See, e.g., *Monaghan v. SZS 33 Assocs.*, 73 F.3d 1276, 1283 (2d Cir. 1996) (noting that the parties’ agreement had not been reduced to writing nor signed in open court but that the reasonable reliance upon it made its enforcement appropriate); *Brockman v. Sweetwater County Sch. Dist. No. 1*, No. 93-8052, 1994 U.S. App. LEXIS 10095, at *2-4, *7-9 (10th Cir. May 5, 1994) (denoted “not binding precedent”) (affirming a district court’s order holding enforceable a settlement of an employment discrimination claim—despite the plaintiff’s claim that no final agreement on all the terms had been reached—when the agreement came from an oral agreement between a teacher and a school district, supported by a transcript of a discussion of its drafting with a magistrate judge); *Pratt v. Phillbrook*, 38 F. Supp. 2d 63, 69-70 (D. Mass. 1999) (detailing the course of an alleged repudiation of a settlement and the lack of agreement).

Circuit panel, “honoring the parties’ express wish for confidentiality may facilitate settlement.”¹⁶⁴ By permitting parties to a litigation to buy and sell access of third parties to the information generated through the initial dispute, courts create additional markets and affect the prices of settlements.

In contrast, a few extant statutes, rules, and doctrines do impose constraints on bargaining by conditioning court approval of case dispositions on standards imposed by law. The interventions are sometimes predicated on anxiety that litigants did not voluntarily and knowledgeably give up the opportunity to pursue public adjudication. Other rules focus on evaluating the quality of the bargain made, while yet others require information about the underlying dispute or the terms of the agreement. Based either on the kind of claim, the nature of the party, or the scale of the case, current law oversees categories of settlements. And, episodically, a particular kind of term in a specific settlement has troubled judges, when they are asked by litigants either for approval or enforcement.

Specifically, a few statutes and some court-based rules mandate that settlements can only be entered if the terms are revealed to and the fact of agreement approved by the court. Examples include class actions,¹⁶⁵ cases filed under the Tunney Act,¹⁶⁶ under the Fair Labor Standards Act,¹⁶⁷ and criminal prosecutions.¹⁶⁸ Judges have, through caselaw or rules, sometimes refused to enforce agreements to vacate otherwise valid lower court deci-

164. *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 143–44 (2d Cir. 2004) (concluding that when settlements were conditioned on confidentiality and did not include information on amounts paid, no disclosure was required). *Gambale* also concluded that despite the dismissal of the action, federal courts retained jurisdiction to deal with materials in their files. *Id.* at 141; see also *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994) (remanding for the district court to consider the utility of confidentiality).

165. See FED. R. CIV. P. 23(e),(g)–(h).

166. 15 U.S.C. §§ 16(b)–(h) (2000).

167. See, e.g., *Lynn’s Food Stores, Inc. v. United States*, 679 F.2d 1350, 1355 (11th Cir. 1982) (describing the court’s obligation to ensure that litigation under 28 U.S.C. § 201 *et seq.* be settled in a manner that is “fair and reasonable”); *Boone v. City of Suffolk*, 79 F. Supp. 2d 603, 605 (E.D. Va. 1999) (discussing this common law requirement). In *Stalaker v. Novar Corp.*, 293 F. Supp. 2d 1260 (M.D. Ala. 2003), Judge Myron Thompson both explained the rationale for judicial oversight and ordered the unsealing of a settlement between an employee and an employer.

168. See FED. R. CRIM. P. 11 (requiring that plea proceedings be conducted in “open court” and detailing the questions that must be addressed). See also 18 U.S.C. § 3553(c) (Supp. III 2005) (requiring that judges state “in open court” their reasons for imposing sentences); *United States v. Alcantara*, 396 F. 3d 189, 191–92 (2d Cir. 2004) (describing the right of access to plea and sentencing hearings, admonishing judges not to conduct sentencing hearings in their robing rooms absent adherence to procedures, including advanced notice and opportunities for a hearing, and commenting that the “power to close a courtroom” in a criminal proceeding ought to be exercised only under “urgent circumstances” and with “very clear and apparent reasons” (citations omitted)); *United States v. Smith*, 426 F.3d 567, 575–76 (2d Cir. 2005) (upholding, in light of security concerns, the imposition of photo identification requirements as a predicate to courtroom access but discussing the importance of judicial—rather than Executive Branch—control over courtroom access).

sions¹⁶⁹ or required that proponents of class action settlements disclose side-settlements.¹⁷⁰ Some jurists have also objected to provisions, such as “most favored nation clauses” promising to reopen settlements if other agreements are made on more favorable terms,¹⁷¹ or have refused to enforce confidentiality agreements in various circumstances.¹⁷² Judges have also declined to interpret parties’ agreements to preclude other litigants from access to expert information,¹⁷³ have selectively reviewed court materials and exhibits to determine whether portions involving children’s emotional and medical conditions might be sealed while leaving access open to other parts of a record,¹⁷⁴ and have endeavored to require honesty in negotiations through post-settlement enforcement of only those agreements predicated on good faith disclosure of relevant facts.¹⁷⁵

Law could do more. One example comes from a Supreme Court decision—*Kokkonen v. Guardian Life Insurance Company of America*¹⁷⁶—addressing the availability of federal jurisdiction to enforce settlements. The Court suggested that in diversity cases, one method to make federal courts available for post-settlement litigation aimed at enforcing settlements would be to incorporate settlement terms into notices of dismissal or into consent judgments.¹⁷⁷ For those litigants in search of continuing federal jurisdiction, the *Kokkonen* decision creates incentives to file agreements with courts—

169. See, e.g., *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18 (1994); see generally Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994).

170. The authority to request such information is suggested in the Advisory Committee’s notes to the 2003 revisions of the class action rule. See FED. R. CIV. P. 23(e)(2) & Advisory Committee’s Notes (requiring that parties seeking approval of class action settlements inform the court of “any agreement made in connection with the proposed settlement”).

171. See Kathryn E. Spier, “Tied to the Mast”: *Most-Favored-Nation Clauses in Settlement Contracts*, 32 J. LEGAL STUD. 91 (2003). Those clauses require that, if a settlement is made with other parties on terms more favorable than that entered by the contracting parties, the earlier settlement would be enhanced to equalize it to the later settlement.

172. See, e.g., *Llerena v. J.B. Hanauer & Co.*, 845 A.2d 732 (N.J. Super. Ct. Law Div. 2002) (permitting one employee, alleging sexual harassment by an employer, access to a settlement agreement between that employer and another employee that those parties had deemed confidential). The court provided limited access, accompanied by a protective order, authorizing only the plaintiff, her lawyers, and her experts access to information about the prior settlement. *Id.* at 739.

173. See *Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222 (1998).

174. *Jaufre ex rel. Jaufre v. Taylor*, 351 F. Supp. 2d 514 (E.D. La. 2005).

175. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 866 (1994) (quoting Petition for Writ of Certiorari at 13a, *Digital Equip.*, 511 U.S. 863 (No. 93-205)). According to the brief submitted by Desktop Direct, Digital’s chief executive officer had led Desktop’s chief executive officer to believe that the alleged infringement was an “innocent mistake” but that subsequently information surfaced that the case for “willful infringement” was strong. See Brief of Respondent at *3, *Digital Equip.*, 511 U.S. 863 (No. 93-205), 1994 WL 249425.

176. 511 U.S. 375 (1994).

177. *Id.* at 381. For analysis of the decision, see Resnik, *Procedure as Contract*, *supra* note 9, at 633–38.

which would (under current law) make those documents accessible to others. But the Court's opinion used tentative phrases, perhaps suggesting that the Justices hoped for guidance from other sources or did not agree on a broader ruling. The legal question of using settlements to confer jurisdiction on the federal courts is significant, as are the issues of whether judges have the inherent power to impose disclosure or other conditions on settlements in all cases, and/or whether the Federal Rules that address settlement give judges license to do so.¹⁷⁸

The importance and complexity of these issues is why court-based rules need not and should not be the only source of regulation. Aspects of these topics are now subject to state regulations, as statutes in some jurisdictions override litigants' agreements. Sometimes, the predicate is state oversight of professionals and of insurance, and sometimes the result is an affirmative obligation, imposed on certain professions or institutions, to make public the settlements achieved. Examples include cases involving medical malpractice and health care professionals, with regulations keyed to agreements for more than a stated amount.¹⁷⁹

Legislation is also propelled by concerns that institutional actors know of injurious products but have the power, through bargaining, to keep information private.¹⁸⁰ For example, in 1990, Florida enacted what it entitled the *Sunshine in Litigation Act*, prohibiting courts from entering an order

178. To the extent that judicial authority over settlements is understood to be an aspect of the equitable powers, Justice Scalia has twice written for the majority that the judicial role is limited, absent congressional authorization, to that exercised by the judiciary at the time of the founding. See *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 231–70 (2003).

179. See, e.g., CONN. GEN. STAT. § 19a-17a (2003) (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 are 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); New Jersey Health Care Consumer Information Act, N.J. STAT. ANN. §§ 45:9-22.21–9-22.25 (West 2004) (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). In May of 2004, a few weeks before the Act was to become effective, the Medical Society of New Jersey sued the state’s Consumer Division to enjoin implementation of the Act, argued to be in conflict with federal rights of expectations of privacy under 42 U.S.C. § 11137 and the Constitution. See *Malpractice Data Blocked*, N.Y. TIMES, May 10, 2004, at B4. Those efforts were refused in *Medical Society of New Jersey v. Mottola*, 320 F. Supp. 2d 254 (D.N.J. 2004).

180. California legislators have considered but (as of the fall of 2005) not enacted a provision focused on these issues. See An Act to Add Section 188 to the Code of Civil Procedure, Relating to Secrecy Agreements, AB 1700, 2005–06 Leg., Reg. Sess (as amended June 1, 2005), available at http://www.leginfo.ca.gov/pub/bill/asm/ab_1651-1700/ab_1700_bill_20050601_amended_asm.pdf (proposing to require court review of all “[s]ecrecy agreements and protective orders” because of the “tragic consequences” of some secrecy, such as injuries from “dangerous defects in Firestone tires, which have reportedly caused more than 150 deaths and more than 500 injuries worldwide,” kept from the “public eye by secretly

which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.¹⁸¹

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.¹⁸² At least twenty other states have statutes or court rules constraining in various ways the ability to make unavailable court documents and outcomes.¹⁸³

Parallel federal legislation (also called a Sunshine in Litigation Act) has been proposed but not enacted.¹⁸⁴ One district court—the District of South Carolina—filled a part of the gap by prohibiting the sealing of settlements filed in court and, by doing so, became the focus of a good deal of commentary.¹⁸⁵ Other federal district court local rules also address these issues from a range of perspectives. Some restrain the length of time in which documents can be sealed,¹⁸⁶ while others note the availability (with and without court supervision) of agreements to keep information confidential and to “return or destroy” discovery documents.¹⁸⁷ Yet another potential source of regulation

settling many lawsuits brought as a result of crashes related to defective tires”). The provision would permit secrecy only upon a judicial finding and only if narrowly tailored and would not affect the “ability of the parties to enter into a settlement agreement . . . that requires the nondisclosure of the amount of any money paid in a settlement of a claim.” *Id.* at § 2(f).

181. FLA. STAT. ANN. § 69.081 (West 2004).

182. See FLA. STAT. ANN. § 456.041(4) (West Supp. 2006) (requiring reporting of payments of claims that exceed \$100,000).

183. Included on that list are Arkansas, Arizona, California, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Nevada, New Jersey, New York, North Carolina, Oregon, South Carolina, Texas, Virginia and Washington. Coverage and exceptions vary widely. See, e.g., ARK. CODE ANN. §§ 16-55-122, 25-18-401 (West 2004) (prohibiting the sealing of government documents and voiding private contracts that limit disclosure of environmental hazards); N.C. GEN. STAT. ANN. § 132-1.3 (West 2000) (prohibiting sealing of settlements of “any suit, administrative proceeding or arbitration instituted against any agency of North Carolina government or its subdivisions” arising out of government actions except those related to medical care, unless the policy of openness is overridden and no other less restrictive means is available); WASH. REV. CODE ANN. § 18.71.350 (West. 1999) (requiring professional liability insurers of physicians to report settlements in excess of \$20,000 or the payment of three or more claims within a five-year period); *id.* at § 4.24.611 (West 2005) (limiting confidentiality provisions when claims involve product liability or hazardous substances). See also Goldstein, *supra* note 45.

184. See *supra* note 5.

185. See D.S.C. CIV. R. 5.03(E) (providing that “[n]o settlement agreement filed with the Court shall be sealed pursuant to the terms of this Rule”). In addition, any party seeking to “file documents under seal” must file a motion to do so, specify the documents sought to be sealed, explain the necessity for sealing, and whether “less drastic alternatives” would not “afford adequate protection.” *Id.* at 5.03(A). See generally Symposium, *Court-Enforced Secrecy*, 55 S.C. L. REV 711 (2004).

186. See, e.g., E.D. MICH. CIV. R. 5.4 (limiting the duration of sealing to a presumptive two years); W.D. MICH. CIV. R. 10.6(c) (limiting sealing, absent court order, to thirty days after the termination of a case).

187. See D.N.J. CIV. R. 5.3(b)(1)–(5) (seeming to permit such agreements without court permission but also providing for filing explanations of the reasons).

are ethical rules or statutes that address the professional propriety of lawyers restricting public access to information that might pose “substantial danger to the public health or safety.”¹⁸⁸

As the various “Sunshine” acts suggest, legislators or judges could put the possibility of confidentiality “off the table”—as an item that cannot be bought and sold when lawsuits are concluded in courts. A justification for reducing litigant freedom is that the bargaining pressures come in part from legal efforts to promote conciliation over adjudication. The connection between the disputing but contracting parties does not stem from friendly shared ventures that result in spontaneous “meetings of the minds.” Rather, an unhappy participant in a conflict brought claims of right to the public that, acting through its judges, urged the parties to conciliate. As these problems are profoundly ones of social policy, legislative engagement is needed to regulate the power of parties and judges either to enable information generation through courts or to inhibit that potential.

VI. INSTRUCTIONS FROM HISTORY AND FOR POSTERITY

A summary is in order as a predicate to concluding. As adjudication developed over the centuries, its method was to proceed in public view. The public dimensions were both an effort to legitimate the authority of government and an effort to demonstrate that government had authority. The concept of judicial independence was not yet deeply entrenched;¹⁸⁹ rather, judges were often conceived as appropriately dependent on rulers and obliged to work as loyal servants and faithful enforcers of a ruling regime’s laws. Governing powers used public processes as a technique to police judges by watching to see that their loyalty to the state was on display. In short, the public practices of adjudicatory processes were not initially developed as cheery aspects of democratic polities, committed to transparency in government, but as the means by which to perform the state’s power to do violence in its own (the law’s) name.

But inside adjudication’s practices were ideas that helped to shape democratic ideas about government. Not only was obedience to the law of the state required but through its performance of its powers, the state also came to try to demonstrate that its actions were legitimate rather than wholly arbitrary.

188. See, e.g., Written Testimony from Richard A. Zitrin to the Ethics 2000 Comm’n of the Am. Bar Ass’n Ctr. for Professional Responsibility, <http://www.abanet.org/cpr/e2kmonthear.html> (May 29, 1998) (proposing this amendment to Model Rule of Professional Conduct 3.2(B) but the change was not enacted).

189. But even in earlier eras, the idea of a jurist “speaking truth to power” came to be an understood as an important aspect of the judicial role. See Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179 (1985).

(Even so-called “show trials” of fascistic regimes can entail a justificatory effort to demonstrate the propriety of action by seeking to claim that outcomes are based in fact and law application.) Further, inside adjudication can be found the idea of equality between and fairness to disputants, such that they should be provided with hearings, with even-handed treatment, and be given a decision uncorrupted by special access or gifts given to jurists.

The rise of democracy altered the kinds of persons eligible to participate as witnesses, as litigants, and as judges, as well as the obligations of the state. Women and men of all colors gained juridical voice as the state came to be seen as obliged to account for its behavior and to provide remedies for wrongdoing. Over time, the concept of separation of powers took hold as well, resulting in an insistence that judges be free from reprisals by the state when they entered judgment in individual cases, even though those judges owed their salaries and commissions to the state.

During the twentieth century, adjudication came to be understood as a signature of functioning democracies and of market economies.¹⁹⁰ In the United States, the expansion in the early part of the twentieth century of reliance on the Due Process Model of Civil Procedure rested on a normative framework that welcomed national regulation and rights-seeking. Predicated on public and disciplined factfinding by judges and juries, adjudication licensed decisionmakers to inquire into specific problems to assess individual instances as well as collective problems stemming from alleged wrongdoing in order to enforce obligations both public and private.¹⁹¹ The process located judges, litigants, and witnesses in particularly confining roles. As Lon Fuller famously explained, the presentation of proofs by litigants and the determination based on reasons by judges are the “distinguishing” characteristics of adjudication, which puts individuals working inside its strictures to “a peculiar form of participation.”¹⁹²

The premises supporting this commitment to adjudication were both normative and political: that the state is appropriately a central regulator of conduct, that norm enforcement through transparent decisionmaking by state-empowered judges is desirable, that public resources ought to be spent upon individual complaints of alleged failures to comply with legal obligations, that litigants ought equally to be provided with opportunities to present proofs and

190. See generally DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES (Siri Gloppen, Roberto Gargarella & Elin Skaar eds., 2004); THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES (Andreas Schedler, Larry Diamond & Marc F. Plattner eds., 1999).

191. See Resnik, *Trial as Error*, *supra* note 62, at 1024–31; Owen M. Fiss, Foreword, *The Forms of Justice, The Supreme Court 1978 Term*, 93 HARV. L. REV. 1, 5–17 (1979).

192. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978).

reasoned arguments, that the power of adjudicators can be controlled by obliging them to rely on facts adduced on the record and to perform some of their duties in public, and that legitimate judgments thus result. While ad hoc juries have little by way of obligations of explanation, full-time judges are supposed to provide rationales for their application of law to fact, and those decisions are in turn subjected to appellate review at the parties' behest. Direct participants and third parties benefit through the visible display of law's requirements applied to a myriad of specific situations. Further, through public access, both lay and legal participants became socialized to the idea that disagreement about the shape of norms was an ordinary facet of a well-functioning democratic order.

As I hope this discussion has made plain, public access to and information about dispute resolution have historically been achieved through locating those processes inside courthouses. Only a subset of people fell within the then-much smaller group of rights-holding litigants, able to bring claims into those halls. When they did, and until the invention in the 1930s of important pretrial processes, judges formally encountered lawyers in open courtrooms, where nonparties could watch the proceedings.

The great broadening of rights of access to courts, both in terms of persons eligible to make claims and of claims now able to be made, was accompanied by a proliferation of sites of adjudication. Now able to contemplate that overflow, one can also find that the myriad of techniques to cope (crafted from a mixture of concerns) are not all equally facilitating of public knowledge about and public participation in rights elaboration and enforcement. As long as courts continue to be places that produce public data in volume and kind outstripping that produced about adjudication in administrative agencies, and as long as private providers do not regularly disseminate information about or provide access to their processes, then the declining trial rate, devolution, outsourcing, and internal rule changes pressing conciliation brings a diminution of public knowledge of disputes, of the behavior of judges, and of the forging, in public, of normative responses to discord.

Some would argue that more is gained than is lost, that the widening reach of adjudication imposed grave costs on efficiency, discretion, and interpersonal flourishing. The shift in the last three decades to Contract Procedure is nested in social and political attitudes less hospitable to government oversight in general and more welcoming of private development of norms and of market-based enforcement mechanisms. Unlike adjudication's preference for adjudicators' pronouncements, ADR looks to the participants to validate outcomes through consensual agreements, sometimes fashioned by bilateral negotiation and sometimes facilitated through third parties. As detailed by the

description of new rules of courts and of legislatures, these attitudes are now held by many, judges included. As one circuit court recently explained, the current job of a federal district court judge is to “encourage settlements and to poke and prod reluctant parties to compromise, especially when their differences are not great and/or their claims or defenses are not airtight.”¹⁹³

Deliberately, ADR has far fewer role constraints. Its techniques do not commonly build in requirements of public explanation of the results obtained, do not insist that such outcomes be justified in relationship to legal norms, nor put activities of decisionmaking before the public. ADR practitioners are encouraged to “get it done” rather than obliged to explain how they “got it right.”¹⁹⁴ Indeed, ADR is often chosen because it has the advantage of private decisionmaking, made in the “shadow” rather than in the light. Public benefits are presumed to flow from the reduction of conflict and the resolutions predicated on parties’ preferences.

My hope for this essay is that, while disagreement about adjudication’s utility can be had, one ought not to assume the endurance of the ability to equate courts with public access. Procedures, laws, and norms have great plasticity. Practices that seemed unimaginable only decades ago (from the mundane example that ruledrafters assumed aggregation through class actions was ill-suited for mass torts¹⁹⁵ to the horrific events of 9/11 and the detentions at Guantanamo) are now parts of our collective landscape. Seeing the possibility for change as an opportunity, and appreciating the volume of filings and the political reticence to commit the resources requisite to supporting robust public institutions of dispute resolution that welcome all of those now entitled to make claims, we need to consider how to reformat the multiple sites of adjudication. One ought not to equate administrative agencies and private providers inevitably with secrecy. Rather, choices abound about how to structure all these processes, as one can build in or discourage public dimensions.

The “answers” to the normative questions entailed cannot come through a retreat to doctrine or rules or analogies to past practices. At issue are whether a role ought to be preserved for public participation in dispute resolution in either courts or their alternatives and how public resources will be distributed to support either sector. As the variety of rules and customs surrounding court-annexed arbitration suggest, even as judges and other dispute resolution providers move away from trials and focus on pretrial management

193. *Higbee v. Sentry Ins. Co.*, 253 F.3d 994, 995 (7th Cir. 2001).

194. See Amy Schulman, Sidebar, *Change of Venue*, in THE FUTURE OF LITIGATION: SPECIAL REPORT, A SUPPLEMENT TO THE AMERICAN LAWYER AND CORPORATE COUNSEL 26 (Fall 2003).

195. See FED. R. CIV. P. 23(b) & Advisory Committee’s Notes (1966) (providing that a “‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class action”), and discussion in Judith Resnik, *From “Cases” to “Litigation,”* LAW & CONTEMP. PROBS, Summer 1991, at 5.

and dispute resolution in chambers and conference rooms, it is possible to build in a place *for* the public or to wall off proceedings *from* the public. But to do so requires direction from judges and rules of court or from legislatures.

Recent statutory innovations suggest some of the options. For example, a small exception to the privatizing aspects of the Federal Arbitration Act came into being in 2002 for automobile dealerships who have conflicts with manufacturers. Car dealerships now have the option to insist on going to court. Further, if arbitration is used, the arbitrator must provide reasons for the decision and make them available to the public.¹⁹⁶ Pending, as of this writing, is a parallel proposal for an exception to the FAA for chicken farmers.¹⁹⁷

In sum, to conceive of the issue as adjudication versus ADR (in courts, through agencies, or by private providers) is to miss that privatization is occurring on both sides of that equation. To ensure public access requires affirmative action. This Symposium can help to shape a debate about access to court-based ADR, to court-enforced ADR, and to information about settlements.

Moreover, federal judges, functioning as an interest group in this debate, may now be under new pressures that could prompt a reconsideration of the general enthusiasm for managerial judging and settlement. As adjudication is eclipsed by the very alternatives that federal judges have promoted and sometimes mandated, the bases for enthusiastic and plentiful support for the federal courts diminishes. As judges lose their unique functions and as trials “vanish,” justifications emerge (in a culture none too friendly toward government and already well-schooled in how to be aggressive towards judges) for cutting back on budget allocations. Such concerns can be found (implicitly) within the pages of the reports of the Administrative Office of the United States Courts, which have begun to explain that, despite the absence of trials, judges need courtrooms in which to do their work, and moreover, that federal judges remain very busy.¹⁹⁸

196. See Pub. L. No. 107-273, § 11028, 116 Stat. 1758, 1835–36 (2002) (codified at 15 U.S.C. § 1226 and commonly referred to as the “Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001”). A recent comment on this provision argued that it was both the first to create an exemption from the FAA and benefited “relatively sophisticated business interests rather than individual consumers or employees who have also sought exemptions.” See Carl J. Chiappa & David Stoelting, *Tip of the Iceberg? New Law Exempts Car Deals from Federal Arbitration Act*, 22 FRANCHISE L.J. 219 (2003). The effects of this act have been the subject of some litigation addressing what contracts are affected by it. See, e.g., *DaimlerChrysler Vans LLC v. Freightliner of N.H. Inc.*, Civ. No. 03-304-B, 2004 U.S. Dist. LEXIS 316 (D.N.H. Jan. 8, 2004) (“not for publication”); *Pride v. Ford Motor Co.*, 341 F. Supp. 2d. 617 (N.D. Miss. 2004). See generally Paul D. Carrington, *Self-Deregulation, The “National Policy” of the Supreme Court*, 3 NEV. L.J. 259 (2003).

197. See Fair Contracts for Growers Act of 2003, S. 91, 108th Cong. (2003); 149 CONG. REC. S75 (daily ed. Jan. 7, 2003) (statement of Sen. Grassley).

198. See, e.g., 2004 JUDICIAL BUSINESS, *supra* note 87, at 21–22 (discussing that the level of trials had remained “essentially steady at 12,938 (down 10 trials from 2003)” but that “[i]n addition to conducting trials, judges perform many other case-related functions”). The text of the discussion about the “many other

A review of the history of adjudication makes plain that courts are always being reinvented. In the twenty-first century, courts could be refashioned as institutions of settlement but nonetheless be required to enable forms of public access and participation. Options range from letting outsiders observe ADR/DR to mandating forms of databasing that would permit either individual or aggregate knowledge about processes and outcomes in public and in private settings. As to the source of rules—legislative, court-made, or developed through doctrine—judges today are occupying the default position as long as statutes and rules are silent.

To shape practices to enhance public access requires a normative recommitment to the importance of the public dimensions of dispute resolution, coupled with the development of institutional infrastructures equipped and funded to produce and to gather the data and ideas about how to license and to protect information. Some of the proponents of privatization assume its strategic utility. In the long run, however, that approach may prove less desirable. Governments need courts, and people need governments. The public pagantry of rights, obligations, and redress underscores the interdependencies requisite for the various sectors within a democratic order to flourish. History cannot tell us how to answer the many questions about how to provide public dispute resolution for the volume of claimants so seeking it, but history can provide evidence of the many utilities and political commitments—for the already powerful as well as for those in hopes of obtaining power—of the public processes of adjudication.