COLLOQUIUM

CIVIL LITIGATION ETHICS AT A TIME OF VANISHING TRIALS

INTRODUCTION

LAWYERS' ETHICS BEYOND THE VANISHING TRIAL: UNREPRESENTED CLAIMANTS, DE FACTO AGGREGATIONS, ARBITRATION MANDATES, AND PRIVATIZED PROCESSES

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I. DIFFUSING DISPUTES AS TRIALS VANISH

Trials are a vivid variable in the world of litigation, as reflected in the title of this colloquium, *Civil Litigation Ethics at a Time of Vanishing Trials*. The conveners have wisely drawn attention to the disjuncture between legal ethics and today's litigation world. In this Introduction, I argue that the challenges for lawyers loom larger than those reflected in the declining rate of trials. More facets of contemporary dispute resolution need to be engaged when contemplating the topics and roles that legal ethics need to address in the decades to come.

Below, I sketch the contours of practices in state and federal courts, where millions of litigants appear in civil cases without attorneys. When clients *are* represented, they are often grouped by judges and lawyers into aggregates, created through a variety of methods, both formal and informal.

* Many thanks to Bruce Green for inviting me to participate in the colloquium entitled *Civil Litigation Ethics at a Time of Vanishing Trials* held at Fordham University School of Law and to the participants for a lively and insightful exchange. Thanks for help on research and thinking through this and related projects is due to Jonah Gelbach, Deborah Hensler, Sam Issacharoff, Andrew Bradt, and members of the staff of the Administrative Office of the U.S. Courts and of the Federal Judicial Center—Emery Lee, Carol Krafka, Donna Stienstra, Wendell Skidgel, and Brad Sweet, as well as to Yale Law Librarian Michael VanderHeijden; to Denny Curtis, Vicki Jackson, and Abbe Gluck; to a wonderful group of students with whom I have learned a great deal—Matt Butler, David Chen, Kyle Edwards, Clare Kane, Marianna Mao, Urja Mittal, Heather Richard, Iva Velickovic, Regina Wang, Emily Wanger; and to Bonnie Posick, for her expert editorial assistance.

As this colloquium's title reflects, trial rates are down; one in one hundred federal civil cases goes to trial. Less in focus is that case filings are also flattening and for an array of reasons, one of which is that millions of potential claimants are prevented from pursuing claims collectively (either in courts or in arbitration) because of provisions in job applications and consumer documents precluding class actions.

To the extent people *do* go to court, they are often greeted by mandates to resolve disputes privately. Courts are now venues in which public adjudication has taken a back seat to alternative dispute resolution (ADR), which generally takes place outside the public purview. Agencies are another important venue of adjudicatory procedures, where tens of thousands of adjudications take place.[1] Many of their proceedings also involve unrepresented parties, and many agencies' hearings are not readily accessible to the public.

In short, vanishing trials are but a piece of the privatization and relocation of process. In an earlier article, I used the term "dispute diffusion" to capture the eclipse of adjudication in courts as the central paradigm of government-based dispute resolution.[2] I further argued that a variety of sources are producing this new policy through statutes, federal and state regulations, procedural rulemaking, and by way of court-made doctrine. In the 1980s, I identified a shift to "managerial judges"[3]—deploying judges to become conciliators. In addition, other individuals are enlisted to serve as "neutrals" or as arbitrators, both in and out of courts. More recently, I identified an array of provisions, which I called "Alternative Civil Procedure Rules" (ACPR), that organize these diverse sets of practices but do so through a maze of different promulgations.[4] Rather than an accessible and public codification, of which the Federal Rules of Civil Procedure are an iconic example, the ACPR are hard to find and to piece together. But taken collectively, the ACPR—like the Federal Rules of Civil Procedure—reflect norms about what procedural systems should do. The ACPR value privatized processes. Further, unlike contemporary rule systems based in courts, the ACPR neither address the

1. A new, ambitious database, which is a joint project of the Administrative Conference of the United States (ACUS) and Michael Asimow at Stanford Law School, seeks to catalog, compare, and describe formal and informal federal agency adjudication and the federal administrative judiciary. The searchable materials (coming from the agencies) include data on caseloads, time to disposition, and legal representation. The database compiles information from each agency separately; our tally is that it includes 110 federal agencies reporting pending caseloads. *See Caseload Statistics*, STAN. U.: ADJUDICATION RES., https://acus.law.stanford.edu/reports/caseload-statistics (last visited Mar. 25, 2017) [https://perma.cc/5NA3-F59N]; *see also* Judith Resnik, *Migrating, Morphing,* and *Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783 (2004) [hereinafter Resnik, *Migrating, Morphing,* and *Vanishing*].

2. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2807–08 (2015) [hereinafter Resnik, *Diffusing Disputes*].

3. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); *see also* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

4. Resnik, *Diffusing Disputes*, *supra* note 2, at 2807.

needs of indigent users nor attend to making a place for public observers to attend proceedings.[5]

Lawyers representing clients as well as those serving as judges are the sources and the objects of many of the developments and new rules. Lawyers' ethical codes speak of lawyers as zealous advocates[6] and as officers of the courts, obliged to support the administration of justice.[7] Ethical codes likewise ask judges to work to improve the courts.[8] Admission to the bar in some states is conditioned on providing public service, and judges around the country have called attention to the difficulties of an underfunded, underlawyered legal system.[9]

All of these shifts that I have sketched (and that I will discuss more below) change both the roles of lawyers and the prices of certain forms of lawyers' work—producing new markets and reducing the relevance of others. The doctrine, legislation, and procedural rules marginalize constitutional norms of open and public courts—practices that have long served to regulate both lawyers and judges by enabling public observation of and therefore debate about the processes and outcomes of the decisions that result. Elsewhere I have detailed the resulting power asymmetries; this colloquium brings questions of lawyers' ethics to the fore.

Can and will lawyers impose regulation on themselves in response? Ought regulations be placed instead in statutes and court rules? And what shape should such provisions take, with what potential impact on the norms of lawyering and the body politic? This colloquium offers a series of articles responding to aspects of these new and daunting challenges.

II. DEPICTING THE CHANGING LANDSCAPE OF CIVIL LITIGATION

A few charts and brief commentary provide a picture of the dockets of the state and federal courts. Figure 1 is important to frame the discussion here because it helps to bring state and federal courts—and the ethics of the

5. *See id.* at 2807–08.

6. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (AM. BAR ASS'N 1980) ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of law.").

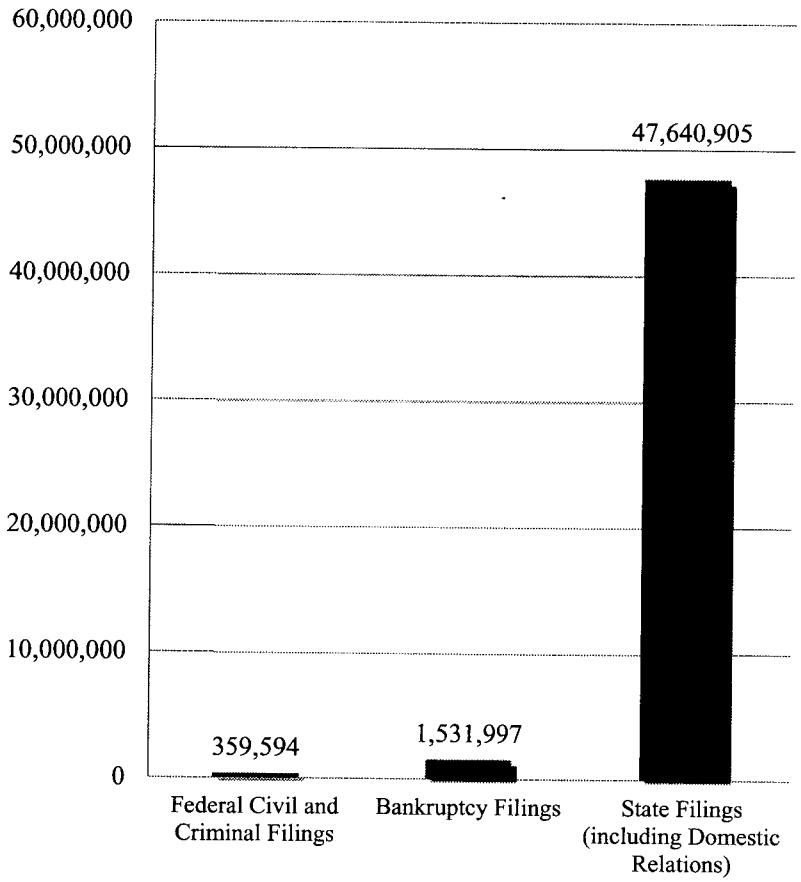
7. MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR. ASS'N 1983) ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

8. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT Canon 1 (AM. BAR ASS'N 2010) ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary . . . ."); *id.* Canon 2, r. 2.2 ("A judge shall uphold and apply the law . . . .").

9. In New York, for example, "[e]very applicant admitted to the New York State bar . . . shall complete at least 50 hours of qualifying pro bono service prior to filing an application for admission with the appropriate Appellate Division department of the Supreme Court." N.Y. CT. R. § 520.16(a); *see also* JONATHAN LIPPMAN, THE STATE OF THE JUDICIARY 2015: ACCESS TO JUSTICE: MAKING THE IDEAL A REALITY (2015), http://www.nycourts.gov/ctapps/news/SOJ-2015.pdf [https://perma.cc/6L6Q-M9VU]; Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415 (1999).

lawyers who practice before them—into view.[10] As its title reflects, it is a snapshot of the volume of filings in federal and state trial courts in 2010.

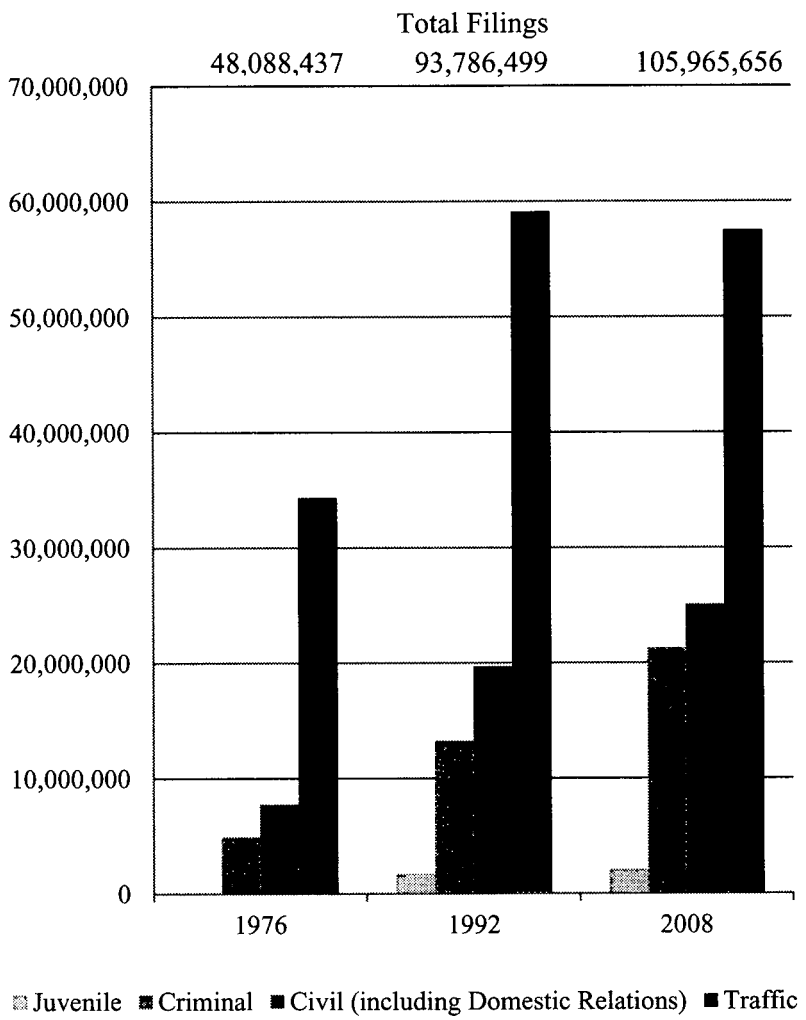
Figure 1: Comparing the Volume of Filings: State and Federal Trial Courts, 2010



10. Federal information was gathered from the Administrative Office of the U.S. Courts. Data on the state filings came from the National Center for State Courts. The number of state filings was an estimate. This figure was also published in Resnik, *Diffusing Disputes*, *supra* note 2, at 2833 fig.2.

The figure details that about 360,000 civil and criminal cases were filed in the federal trial-level courts in 2010, along with more than a million bankruptcy petitions. State filings numbered more than 47 million, and that figure excludes what figure 2 includes—filings that states have catalogued as juvenile and traffic cases.[11]

Figure 2: State Trial Court Filings, 1976–2008



11. Data were gathered from the National Center for State Courts's annual reports, and these figures are estimates as not all states report data in all categories. This figure was also published in Resnik, *Diffusing Disputes*, *supra* note 2, at 2833 fig.3.

What do we know about who brings cases and how they are handled? Given the volume of activity in state courts, the development of national data is challenging. Yet the National Center for State Courts provided a window through its 2015 publication, *The Landscape of Civil Litigation in State Courts*, which analyzed almost a million cases that were disposed of during 2012–2013 in ten major urban counties.[12] As the report details, most of the cases concluded within a year. In most, at least one party was without a lawyer, and most of the dispositions were administrative conclusions, rather than by trials or other forms of adjudication.

Figure 3 brings the work of state courts into focus by providing details about state court filings.[13] This chart highlights some of the major findings of the report, specifically that about two-thirds of the filings involved contract claims and that more than one-half of that set of claims were landlord-tenant and debt collection cases.[14] The more recent survey contrasts with the 1992 data collection, when about half of the claims analyzed were tort cases.[15] The National Center for State Courts's 2012–2013 data put tort cases at 7 percent.[16]

12. NAT'L CTR. FOR STATE COURTS & STATE JUSTICE INST., CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS, at iii (2015) [hereinafter STATE COURT 2012–2013 CIVIL LITIGATION].

13. Data for figure 3 were drawn from *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts*. *See* STATE COURT 2012–2013 CIVIL LITIGATION, *supra* note 12, at 17–20; *see also* Judith Resnik, *Revising Our "Common Intellectual Heritage": Federal and State Courts in Our Federal System*, 91 NOTRE DAME L. REV. 1831, 1929 n.481 (2016) [hereinafter Resnik, *Revising Our "Common Intellectual Heritage"*].

14. *See* STATE COURT 2012–2013 CIVIL LITIGATION, *supra* note 12, at iii.

15. The 1992 data were drawn from case outcomes in the seventy-five "most populous counties" in the country. Of about 762,000 tort, contract, and property dispositions, approximately 378,000 were tort cases. *See* STEVEN K. SMITH, CAROL J. DEFRANCES, PATRICK A. LANGAN & JOHN A. GOERDT, U.S. DEP'T OF JUSTICE, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: TORT CASES IN LARGE COUNTIES 6 (1995), https://www.bjs.gov/content/pub/pdf/TCILC.PDF [https://perma.cc/N4KL-WQ7A]; *see also* CAROL J. DEFRANCES, STEVEN K. SMITH, PATRICK A. LANGAN, BRIAN J. OSTROM, DAVID B. ROTTMAN & JOHN A. GOERDT, U.S. DEP'T OF JUSTICE, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 2 (1995), https://www.bjs.gov/content/pub/pdf/cjcavilc.pdf [https://perma.cc/RC5J-MBBR].

16. STATE COURT 2012–2013 CIVIL LITIGATION, *supra* note 12, at iv.

Figure 3: National Center for State Courts: The Landscape of Civil Litigation in State Courts, 2015

925,344 civil cases, 10 major urban counties

Contracts	**64%**
Debt collection	37%
Landlord/tenant	29%
Foreclosure	17%
Small claims	**16%**
Other civil cases	**9%**
Tort	**7%**
Automobile tort	40%
Personal injury/property damage	20%
Medical malpractice	3%
Products liability	2%

Case dispositions N = 925,344		Cases without lawyers N = 649,811	
Dismissed	35%	Parties without representation	
Judgment unspecified	26%	Both parties	6%
Default judgment	20%	Defendants	74%
Settled	10%	Plaintiffs	8%
Trial, summary judgment, or binding arbitration	4%		

As to the parties, information was available about the presence of lawyers in about 650,000 cases. In most, "at least one party was self-represented, usually the defendant."[17] The researchers found that the results of the lawsuits were that, in about three-quarters of the judgments, the sums were

17. *Id.* In 1992, attorneys had represented both parties in 95 percent of the cases; in 2012–2013, in 24 percent of the cases. *See id.* at 31; *see also* CONFERENCE OF STATE COURT ADM'RS & NAT'L CTR. FOR STATE COURTS, STATE COURT GUIDE TO STATISTICAL REPORTING 31–32 (version 2.0 2014).

under $5,200. As for the means of resolution, the study reported that 4 percent were disposed of by trials.[18]

The data on other forms of dispositions are what social scientists call "noisy," in that about a quarter have an "unspecified judgment," and the grounds for the 35 percent dismissed or the 10 percent settled were not obvious from the court documents.[19] Yet overall, the National Center for State Courts's analysis resonates with the discussion in this colloquium by Taunya Banks about civil trials as "a film illusion."[20] Further, the numbers put into sharp relief the importance of identifying the ethics of settlement, as Howard Erichson analyzes, "in the absence of anticipated adjudication."[21]

Turn then to the federal courts, where the arena to study is narrower, the resources are greater, and hence more data are available. A first point is that an assumption of the federal courts as crowded and overworked is not supported by the aggregate data. Filings in the federal court system, which had more than doubled between 1970 and 1985, have experienced little growth in the last three decades. An overview of filings in the U.S. district courts during the last century is provided in figure 4.[22]

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18. STATE COURT 2012–2013 CIVIL LITIGATION, *supra* note 12, at 20. Adjudication for these purposes included a judge or jury trial, summary judgment, and binding arbitration. In the 1992 survey, 62 percent of the cases were disposed of through settlements, and 3 percent were disposed of by judge or jury trial. Thus, of the almost one million cases, 32,124 trials took place, of which 1109 (3 percent) were jury trials, and 31,015 (97 percent) were bench trials. Jury awards exceeded $500,000 in 17 (3 percent) of the cases, and 75 percent of the jury awards in tort cases were below $152,000. The 2012–2013 study also noted that, as contrasted with 1992, both parties were represented in 24 percent of the bench trials. *Id.* at iv, 20–25.

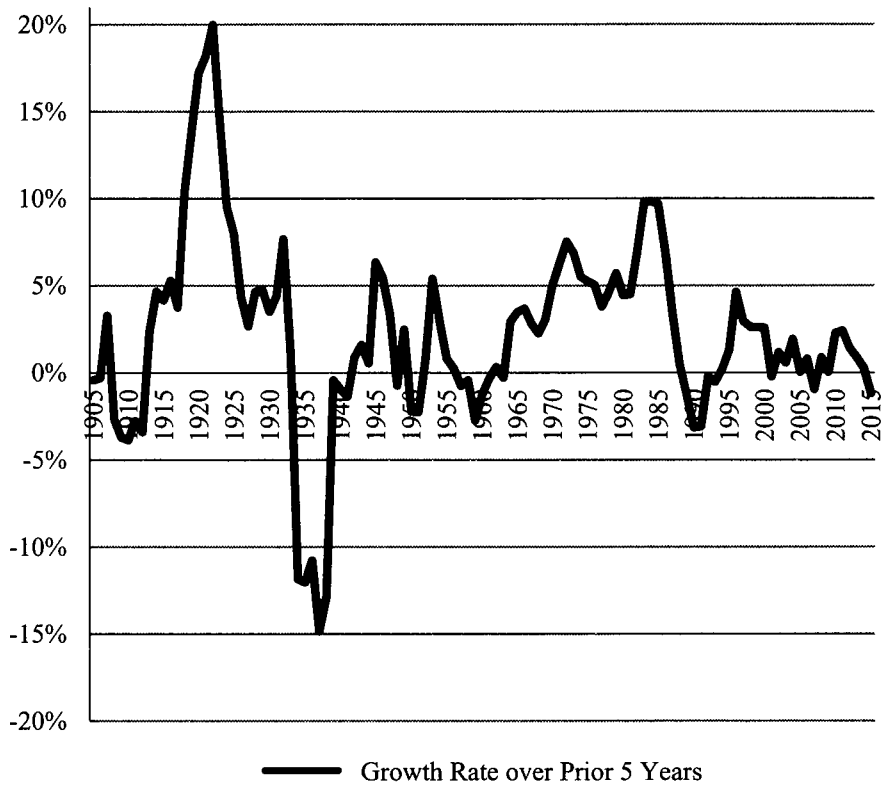
19. *Id.* at 20–21. The dismissal rate recorded in the 2012–2013 study was more than three times higher than that recorded in the 1992 study, and the settlement rate was less than one-fifth of that recorded in the 1992 study. *Id.* at 21. The authors of the 2012–2013 study noted that differences in methodology may account for the different results. The newer study collected data from courts with limited rather than general jurisdiction, and that selection affects the cases that fell into the study. *Id.* Further, data for the 2012–2013 study were taken from case management systems rather than through researchers looking at individual court files, as they had in 1992. *Id.* at 22. Therefore, the study's authors reported, "It is particularly difficult to interpret the dismissal and unspecified judgment rates in the [2012–2013] study." *Id.* For instance, the study explains that litigants may request that settled cases be dismissed with prejudice and that cases with these designations were classified as settlements in the 2012–2013 study but that if the cases were coded in the case management systems as dismissals, the study would do so as well. *Id.* Moreover, the study reports that "unspecified judgments may include a substantial proportion of cases that were actually default judgments." *Id.*

20. Taunya Lovell Banks, *Civil Trials: A Film Illusion?*, 85 FORDHAM L. REV. 1969 (2017).

21. Howard M. Erichson, *Settlement in the Absence of Anticipated Adjudication*, 85 FORDHAM L. REV. 2017 (2017).

22. While the number of filings is a function of multiple variables, based on the increase in population and new federal causes of actions, one would expect an increase in filings. The stagnancy observed instead therefore suggests a decline in federal filing, a phenomenon other scholars have noted, alongside a shift in the mix of cases. *See* Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1180; *cf.* Marc Galanter, *The Life and Times of the Big Six; or, the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 924. This figure, like some of the others in this

Figure 4: Growth Rate of Federal District Court Filings, 1905–2015



In the most recent fifteen years, civil and criminal filings ranged from about 300,000 to 360,000 cases per year. In 2015, 279,036 civil cases were filed,[23] and the federal government brought more than 60,000 criminal cases,[24] of which about a quarter involved multiple defendants.[25]

Introduction, has been used in other articles I have written. *See, e.g.*, Resnik, *Revising Our "Common Intellectual Heritage," supra* note 13, at 1910 fig.13.

23. *See* U.S. COURTS, JUDICIAL BUSINESS 2015 tbl.C-1 (2015) [hereinafter JUDICIAL BUSINESS 2015 tbl.C-1], http://www.uscourts.gov/sites/default/files/data_tables/C01Sep15.pdf [https://perma.cc/GN9H-WUWL].

24. U.S. COURTS, JUDICIAL BUSINESS 2015 tbl.D (2015) [hereinafter JUDICIAL BUSINESS 2015 tbl.D], http://www.uscourts.gov/sites/default/files/data_tables/D00CSep15.pdf [https://perma.cc/M5F3-CG24].

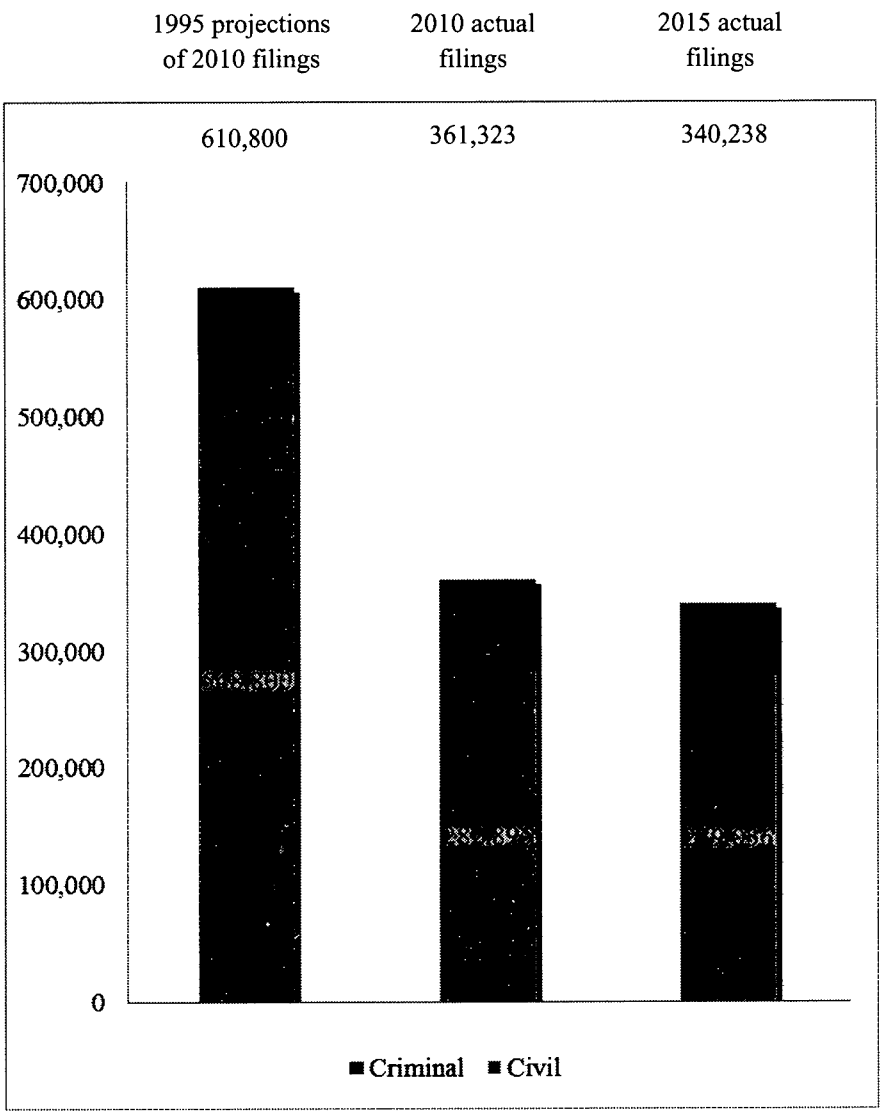
25. In 2015, the U.S. government commenced prosecutions against 80,069 defendants. U.S. COURTS., JUDICIAL BUSINESS 2015 tbl.D-1 (2015), http://www.uscourts.gov/sites/default/files/data_tables/D01FugSep15.pdf [https://perma.cc/R8XA-PBZ6]. The number of cases filed was 61,202. *See* JUDICIAL BUSINESS 2015 tbl.D, *supra* note 24.

The contemporary filings are about half of what a 1995 projection had anticipated, which predicted that more than 610,000 cases would be filed by 2010.[26] As the bar graph in figure 5 depicts, the filings in 2010 (361,323 cases) were higher than the 340,238 cases brought in 2015.[27]

26. *See* JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 15 tbl.3 (1995) [hereinafter 1995 LONG RANGE PLAN FOR THE FEDERAL COURTS], http://www.uscourts.gov/sites/default/files/federalcourtslongrangeplan_0.pdf [https://perma.cc/Y3L3-T9DS]. The *1995 Long Range Plan* is also reprinted in the Federal Rules Decisions. *See* 166 F.R.D. 49 (1995). Subsequent references refer to page numbers as printed in the original document.

27. This figure is derived from multiple sources. Data for 1995 projections of 2010 filings were derived from the *1995 Long Range Plan*. *See* 1995 LONG RANGE PLAN FOR THE FEDERAL COURTS, *supra* note 26, at 15 tbl.3. Data for 2010 actual filings and 2015 actual filings were derived from Administrative Office of the United States. *See* JUDICIAL BUSINESS 2015 tbl.D, *supra* note 24; *see also* U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2015 tbl.C (2015), http://www.uscourts.gov/sites/default/files/data_tables/C00Sep15.pdf [https://perma.cc/2V64-WQZX]; U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 138, 204 tbls.C & D (2010), http://www.uscourts.gov/sites/default/files/statistics_import_dir/JudicialBusinespdfversion_1.pdf [https://perma.cc/Y3CJ-LGEF]. Note that criminal filings are of cases, not defendants.

Figure 5: 1995 Projections of 2010 Federal Filings and Actual Federal Filings, 2010 and 2015



Moreover, the actual workload—as measured on a metric of cases per active Article III district court judge[28]—varies greatly across the United States. The judiciary has gathered data on its own caseloads for decades, in part to document for Congress the need to authorize more judgeships.[29] To

28. *See* Moore, *supra* note 22, at 1189 (discussing the complexity of measurement).

29. *See* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 938 (2000).

do so, the courts developed a system of "weighted [civil] filings by authorized judgeships."[30] While distinguishing antitrust and patent cases from student loan and other civil suits, as well as from criminal prosecutions,[31] this record-keeping system has not yet used as factors

30. The federal judiciary began to use a system of weighted filings in 1946, a few years before the Administrative Office of the U.S. Courts began its work. Judges were asked periodically to do "time diary studies" with timesheets. *See Explanation of Selected Terms*, U.S. CTS., http://www.uscourts.gov/sites/default/files/explanation_of_selected_terms_september_2016_0.pdf (last visited Mar. 25, 2017) [https://perma.cc/7EVW-T6A6]. A revised system—whose output is reflected for the last decade of data charted in figure 5—was put into place in 2004 and based on analyses of cases terminated in 2002. *Id.* The new approach uses an events-analysis approach. The Federal Judicial Center (FJC) developed the weightings by calculating "the sum of all weights assigned to civil cases, criminal defendants, and supervised release hearings" and then dividing those sums "by the number of authorized Article III judgeships assigned to each district." *U.S. District Courts—Judicial Business 2015*, U.S. CTS., http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2015 (last visited Mar. 25, 2017) [https://perma.cc/CV8Y-444E]. As also explained by the federal judiciary's administrative wings, case weights are a predictive measure of the time a judge will spend on a case. For example, the average civil or criminal case is assigned a weight of 1.00, while "[m]ore time-consuming cases" receive higher weights and "cases requiring relatively little time from judges receive lower weights." *Id.*

In March of 2016, the Judicial Conference of the United States (JCUS) adopted a new case weighting system, meant to "fine-tune its requests for new district judgeships." *Judicial Conference Addresses Judgeship Needs Issues*, U.S. CTS. (Mar. 15, 2016), http://www.uscourts.gov/news/2016/03/15/judicial-conference-addresses-judgeship-needs-issues [https://perma.cc/T3Y7-E5KN]. According to Carol Krafka, who directs the FJC's district court case weighting studies, "the re-evaluation was prompted simply by the need to update weights that had not changed since they were adopted in 2004 . . . and we knew from analyzing more recent data that there had been changes in the demand that certain case types placed on district judge time." E-mail from Carol Krafka, Fed. Judicial Ctr., to author (Oct. 5, 2016, 2:05 PM) [hereinafter Krafka, Oct. 5 E-mail] (on file with the *Fordham Law Review*).

31. *See* FED. JUDICIAL CTR., COMPARISON OF EXISTING AND PROPOSED UPDATED CASE WEIGHTS BY CASE TYPE (2016) (on file with the *Fordham Law Review*). In designing the new weighting system, the federal judiciary relied on a 2015 FJC study that included

> objective data from nearly 300,000 civil and criminal case terminations regarding the amount of time required to conduct trials and other proceedings such as evidentiary hearings or pretrial conferences, and also included subjective measures based on a survey of approximately 220 active district judges regarding their estimates of the time required to perform case-related work in chambers.

Judicial Conference Addresses Judgeship Needs Issues, *supra* note 30.

In the 2016 case weighting system, the weights assigned to a number of types of civil cases decreased, including for patent, environmental, FOIA, and death penalty habeas corpus matters, while the weights assigned to many criminal case type categories increased. *See* Krafka, Oct. 5 E-mail, *supra* note 30.

The method of computing weights comes through deputy court clerks, sitting in court at all hearings, conferences, and trials at which a district judge presides. No such data are recorded for the work judges do in chambers. E-mail from Carol Krafka, Fed. Judicial Ctr., to author (Nov. 16, 2016, 1:48 PM) [hereinafter Krafka, Nov. 16 E-mail] (on file with the *Fordham Law Review*). As Krafka explained, in the 2014 revisions, the courts assigned a value for the time spent on events that were recorded on the docket in the cases analyzed and did so through surveying a selected sample of active district court judges who were asked to estimate the times spent on various activities, such as discovery motions in different types of cases. Then, case weights were computed by summing "the time associated with all of the proceeding and non-proceeding events docketed in a large sample of cases" and categorizing "individual cases into case types" to determine averages of time spent within a case time, so as to have "the basis for (non-normalized) weights." *Id.*

whether a litigant is unrepresented[32] or whether a case is grouped with other cases or is a certified class action.[33]

But what the current methods do show is a significant variability in dockets, as figure 6 depicting five district courts evinces.[34] As is detailed, life-tenured judges in active status in the District of Columbia had, between 2001 and 2015, about 200 cases per authorized judgeship; in the Central District of California, such judges had more than 600 cases. These measures neither include the contributions of Article III judges who have taken senior status nor of magistrate judges.[35]

For more on the method's development, see generally PATRICIA LOMBARD & CAROL KRAFKA, FED. JUDICIAL CTR., 2003–2004 DISTRICT COURT CASE-WEIGHTING STUDY (2005), and Philip Habel & Kevin Scott, *New Measures of Judges' Caseload for the Federal District Courts, 1964–2012*, 2 J.L. & CTS. 153 (2014).

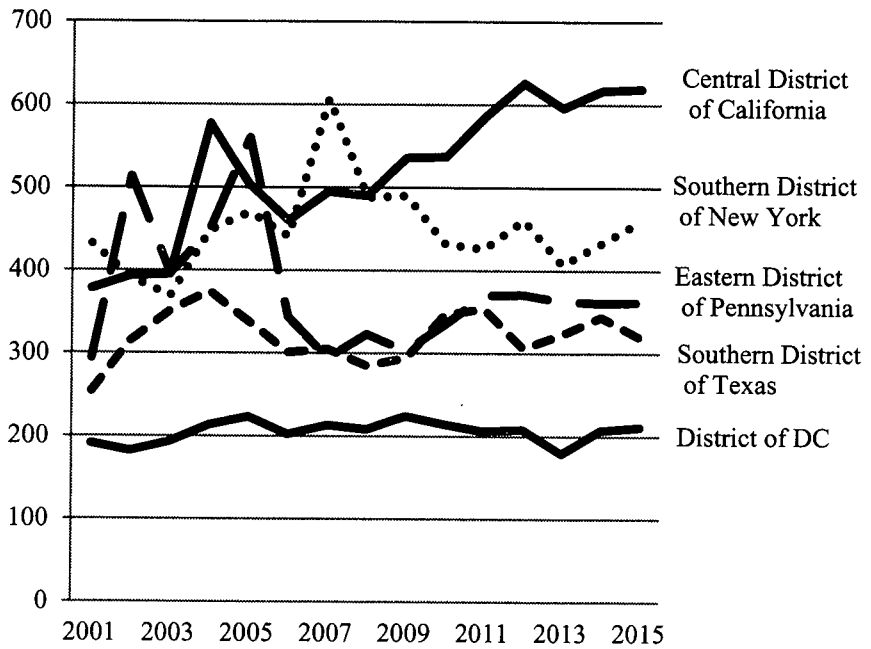
32. The data collected by the Administrative Office denote unrepresented individuals as "pro se." Pro se district court filings were not counted in either the 2004 or 2016 weighting systems. *See* E-mail from Brad Sweet, U.S. Cts., to author (Oct. 2, 2016, 1:35 PM) [hereinafter Sweet, Oct. 2 E-mail] (on file with the *Fordham Law Review*). In contrast, the Administrative Office of the U.S. Courts adjusts for pro se cases in its calculation of weighted caseloads for appellate courts, with pro se case filings weighted as taking one-third of the time of non-pro se filings. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-862T, FEDERAL JUDGESHIPS: THE GENERAL ACCURACY OF DISTRICT AND APPELLATE JUDGESHIP CASE-RELATED WORKLOAD MEASURES (2013), http://www.gao.gov/assets/660/657661.pdf [https://perma.cc/U3WB-AYJE].

33. Weights "are assigned only to those cases in district courts that arise as original proceedings, by removal from state court, or by interdistrict transfer" and hence exclude cases stemming from "reopenings, remands, appeals from magistrate judgments, or transfers by order of the Judicial Panel on Multidistrict Litigation." *U.S. District Courts—Judicial Business 2015*, *supra* note 30; *see also* Sweet, Oct. 2 E-mail, *supra* note 32. As Sweet explained, because the weighted case data include only cases that originate in a particular district court, cases that are removed to the district court from state court, cases that are transferred from another district, and multidistrict litigation (MDL) cases transferred into a district court for pretrial are all not included in the weighted case data. Sweet, Oct. 2 E-mail, *supra* note 32. However, individual cases, when filed, that become part of an MDL or if remanded back for trial thereafter are counted in the weighted case law through the "original" proceeding measure. MDLs are a part of an assessment of the need for new judgeships by way of the U.S. Judicial Conference's Judicial Resources Committee, which seeks to consider both quantitative and qualitative impacts (including some analysis of a district's weighted caseload with and without the inclusion of MDL cases), in part to assess whether an influx in filings is temporary. MDLs also have some impact on case weight computations. *See* Krafka, Nov. 16 E-mail, *supra* note 31.

34. These data come from Administrative Office of the U.S. Courts. *See Caseload Statistics Data Tables*, U.S. CTS., http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (last visited Mar. 25, 2017) (search by table number "X-1A"; then, to access the data, click on the report corresponding with each year) [https://perma.cc/5L5R-2G2N].

35. "Authorized Article III judgeships" excludes senior judges and magistrate judges, and this metric also does not take into account law clerks or staff attorneys. *See* Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 23–31 (2012) (detailing the significant workload contributions of senior judges); *see also* 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, 615–16 (2002).

Figure 6: Weighted Civil Filings per Authorized Judgeship, 2001–2015

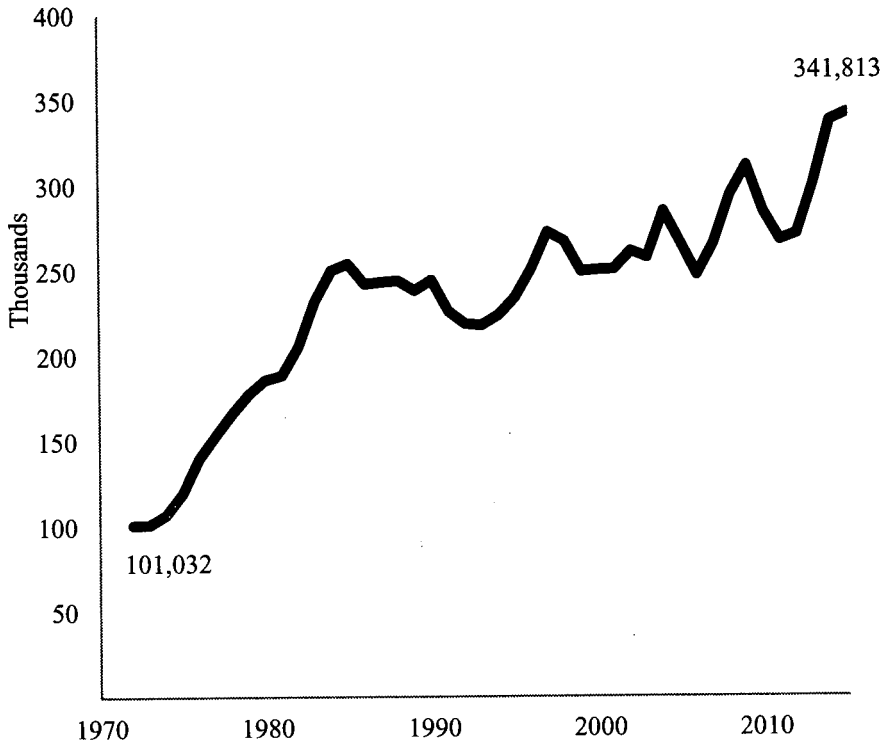


In addition to this kind of disuniformity, a remarkable amount of civil litigation in the federal courts is clustered together, consolidated under the 1968 "multidistrict litigation" (MDL) statute[36] and distributed in an uneven pattern to specific district court judges around the United States. Understanding the prevalence of aggregation in the federal courts requires a shift from looking at *filings* to analyzing *pending cases*. In contrast to the flattening filings in the last three decades, the number of pending civil cases (tracked in figure 7) has grown—more than tripling between 1970 and 2015 and increasing from about 300,000 cases in 2010 to 341,813 cases in 2015.[37]

36. 28 U.S.C. § 1407 (2012).

37. The data from 1972 to 1990 come from Annual Reports of the Judicial Conference of the United States. For the data for 1991 to 2015, see *Caseload Statistics Data Tables*, U.S. CTS., http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (last visited Mar. 25, 2017) (search by table number "C-6"; then, to access the data, click on the report corresponding with each year) [https://perma.cc/5L5R-2G2N]. Data for each year between 1968 and 1990 are for the year ending in June 30; data for each year between 1991 and 2015 are for the year ending in September 30. I am in the midst of writing about the relationship between class actions and MDLs and the role played by aggregation more generally, and this chart is drawn from drafts of those articles, forthcoming in essays on class actions.

Figure 7: Total Civil Cases Pending in Federal District Courts, 1972–2015



But tens of thousands of these cases are not dealt with individually. Rather, as of the fall of 2015, almost 40 percent of federal civil cases were part of MDLs,[38] created when a panel of judges ruled that the statutory criteria for pretrial aggregation ("civil actions involving one or more common questions of fact . . . pending in different districts") were met.[39] In 1968, Congress authorized the Chief Justice to designate seven federal judges to serve on the Judicial Panel on Multidistrict Litigation (JPML), which decides whether to transfer pending cases to one judge and selects

38. Specifically, 132,788 cases out of 341,813 pending cases were MDLs. U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2015 (2015) [hereinafter STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2015], http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2015_0.pdf [https://perma.cc/C92L-GR8G]; *see also* JUDICIAL BUSINESS 2015 tbl.C-1, *supra* note 23.

39. Resnik, *Revising Our "Common Intellectual Heritage," supra* note 13, at 1911 (citing STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2015, *supra* note 38, then quoting 28 U.S.C. § 1407(a)).

specific federal district court judges to preside during the pretrial phase over the cases so grouped.[40] As the essays by Lynn Baker, Theodore Rave, and Adam Zimmerman in this colloquium discuss,[41] these mandatory, non-opt-out, pretrial aggregations are run by court-appointed lead lawyers—a Plaintiff Steering Committee (PSC) or Plaintiff Executive Committee (PEC)—functioning as ad hoc law firms and representing a significant number of plaintiffs who had filed individual lawsuits.[42]

The growth of the aegis of MDL is significant, as is charted in figure 8, which shows the relationship between the pending civil docket and cases grouped together in MDL proceedings.[43] In 1991, fewer than 2,232 cases (or about 1 percent of the civil docket) were part of MDL proceedings.[44] In 2013, about a third of the caseload was in MDL proceedings.[45] By September 2015, the percentage had risen again. Of 341,813 federal civil cases pending, 132,788 were concentrated in 271 proceedings aggregated before a single judge.[46]

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40. *See* 28 U.S.C. § 1407(d).

41. *See* Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943 (2017); D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175 (2017); Adam S. Zimmerman, *The Bellwether Settlement*, 85 FORDHAM L. REV. 2275 (2017).

42. *See* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 88–89 (2015); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017); Howard M. Erichson, *Foreword: Multidistrict Litigation and Aggregation Alternatives*, 31 SETON HALL L. REV. 877, 880 (2001); Judith Resnik, Dennis Curtis & Deborah Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 321 (1996); *see also* Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5, 23 (1991) [hereinafter Resnik, *From "Cases to "Litigation"*].

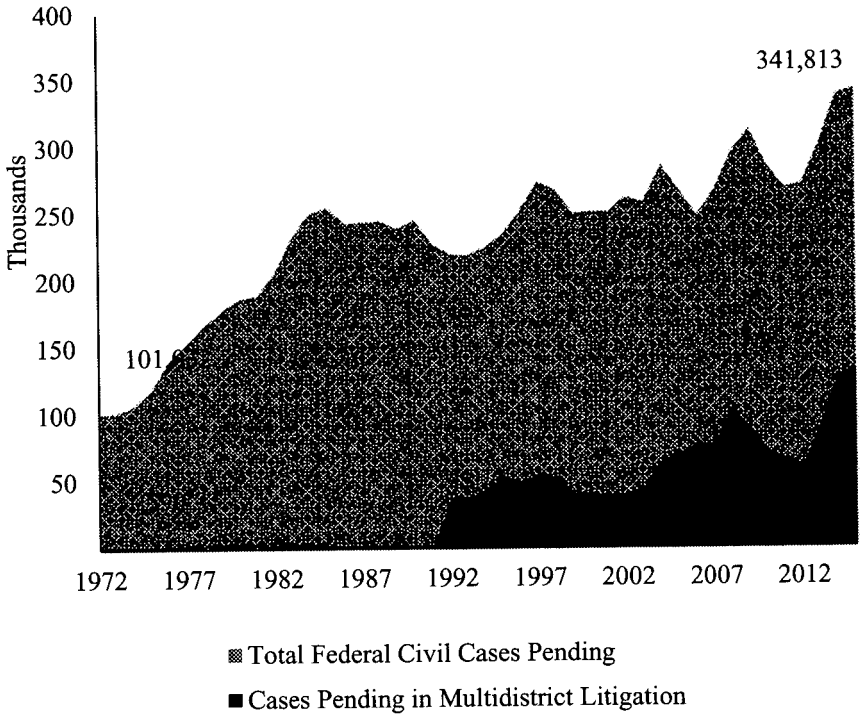
43. The data on pending civil cases come from the Administrative Office of the U.S. Courts. *See supra* note 37. The MDL data for 1972 to 1990 are from the Annual Reports of the Judicial Panel on Multidistrict Litigation. For the MDL data from 1991 to 2015, see *Statistical Information*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., http://www.jpml.uscourts.gov/statistics-info (last visited Mar. 25, 2017) [https://perma.cc/SA7W-A6CJ]. Data for each year from 1972 to 1990 are for the year ending on June 30; data for each year from 1991 to 2015 are for the year ending on September 30.

44. JUDICIAL PANEL ON MULTIDISTRICT LITIG., ANNUAL REPORT OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION (1991).

45. *See* Hatamyar Moore, *supra* note 22, at 1214. For further discussion on the increased use of aggregate litigation, see Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 U. KAN. L. REV. 775, 776 (2010), and Emery G. Lee III, Catherine R. Borden, Margaret S. Williams & Kevin M. Scott, *Multidistrict Centralization: An Empirical Examination*, 12 J. EMPIRICAL LEGAL STUD. 211, 214 (2015).

46. *See* JUDICIAL BUSINESS 2015 tbl.C-1, *supra* note 23, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT—DISTRIBUTION OF PENDING MDL DOCKETS BY DISTRICT (2015), http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-October-15-2015.pdf [https://perma.cc/5QWJ-6VY4].

Figure 8: Pending Cases in the Federal Civil Docket and Multidistrict Litigation, 1972–2015



In 2015, for example, more than 150 judges were assigned one MDL; 28 had two MDLs each; and 10 had three or more, some of which involved different manufacturers of a product alleged to be harmful.[47] Thus, the assumption that cases are randomly assigned to individual district judges

47. To calculate the number of MDLs per judge, we relied on the "Summary by Docket of Multidistrict Litigation Pending as of September 30, 2015, or Closed Since October 1, 2014." *See* STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2015, *supra* note 38. After tabulating the numbers presented in the report in an Excel spreadsheet, we were able to generate a pivot table wherein we could filter the data for active MDLs only and then calculate the number of MDLs each judge was assigned. One judge was assigned seven cases involving mesh used in pelvic surgeries. *See Id.*

(and in some districts, also to magistrate judges "on the wheel"),[48] does not apply during the pretrial process for this large segment of the docket.[49]

Another facet of the federal courts is the absence of lawyers in a significant portion of the federal docket. As can be seen in figure 9[50] and figure 10,[51] more than 25 percent of the plaintiffs filing civil cases in federal courts do so without counsel at the trial level;[52] more than 50 percent seek appellate review without lawyers' assistance.[53]

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48. The image of assignments as random—at both trial and appellate levels—is not always reflected in practice in other areas. *See* Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1, 8 (2015) (identifying assignments that undermine the "long-standing assumption of panel randomness").

49. It should be noted that a few MDLs have played a disproportionate role in contributing both to the federal docket and to the overall number of MDLs. Specifically, the asbestos MDLs, at their height, numbered 59,227 in 2008. U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2008 (2008), http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical%20Analysis%20of%20Multidistrict%20Litigation_2008.pdf [https://perma.cc/5UUV-FLND]. In 2015, the product liability litigation on transvaginal mesh—in seven MDLs before the Honorable Joseph R. Goodwin in the Southern District of West Virginia—numbered 73,080. *See* STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2015, *supra* note 38. Each of the seven MDLs corresponded to a different defendant: C.R. Bard, Inc. (MDL-2187); American Medical Systems, Inc. (MDL-2325); Boston Scientific Corp. (MDL-2326); Ethicon, Inc. (MDL-2327); Coloplast Corp. (MDL-2387); Cook Medical, Inc. (MDL-2440); and Neomedic (MDL-2511). *Id.*

50. Data for the years 2004–2014 were taken from the Administrative Office of the U.S. Courts by searching table C-13 for each of the corresponding years. *See Judicial Business*, *supra* note 52. The categories provided by the Administrative Office are "Prisoner Petitions" and "Nonprisoner Petitions." This figure also appears in Resnik, *Revising Our "Common Intellectual Heritage," supra* note 13, at 1914.

51. Data for the years 1996–2014 were taken from the Administrative Office of the U.S. Courts by searching table B-19 for each of the corresponding years. *See Judicial Business*, U.S. CTS., http://www.uscourts.gov/report-names/judicial-business (last visited Mar. 25, 2017) (search by table number "B-19"; then, to access the data, click on the report corresponding with each year) [https://perma.cc/2XGZ-2XFU]. Data for 1995 were from table 2.4 in the Administrative Office of the U.S. Courts of Appeals Judicial Facts and Figures. *See* JUDICIAL FACTS AND FIGURES 2014 tbl.2.4, *supra* note 53. The categories provided by the Administrative Office are "Criminal," "Prisoner Petitions," "U.S. Civil," "Private Civil," "Bankruptcy Appeals," "Administrative Agency Appeals," and "Original Proceedings" including miscellaneous applications. *Id.* This figure also appears in Resnik, *Revising Our "Common Intellectual Heritage," supra* note 13, at 1913.

52. The federal district court database details pro se filings back to 2005. Every year with data has seen at least 25 percent of civil cases filed by unrepresented plaintiffs. *See Judicial Business*, U.S. CTS., http://www.uscourts.gov/report-names/judicial-business (last visited Mar. 25, 2017) (search by table number "C-13"; then, to access the data, click on the report corresponding with each year) [https://perma.cc/YF2Z-8E2M].

53. *See* U.S. COURTS, JUDICIAL FACTS AND FIGURES 2014 tbl.2.4 (2014) [hereinafter JUDICIAL FACTS AND FIGURES 2014 tbl.2.4], http://www.uscourts.gov/sites/default/files/table_2.04_0.pdf [https://perma.cc/7E3H-25ZQ]. As noted, I have sought to draw attention to the challenges of litigation by individuals with modest sums in my other articles. *See, e.g.*, Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78 (2011) [hereinafter Resnik, *Fairness in Numbers*]; *see also* Resnik, *Revising Our "Common Intellectual Heritage," supra* note 13.

Figure 9: Filings by Unrepresented Plaintiffs in the U.S. District Courts, 2004–2015

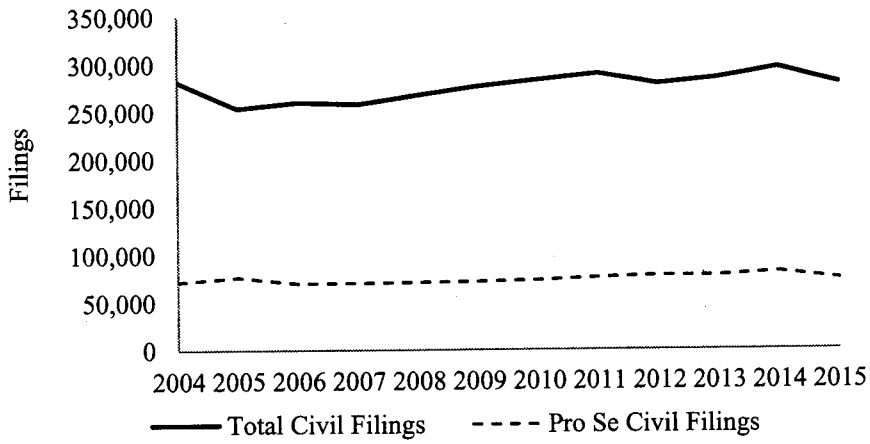
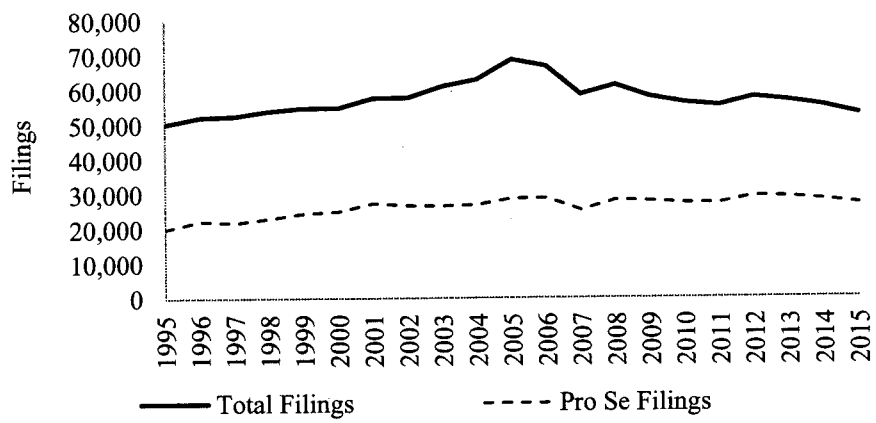


Figure 10: Filings by Unrepresented Plaintiffs in the U.S. Courts of Appeals, 1995–2015



Disaggregated by circuits, the range runs from about one-third to nearly two-thirds of the filings.[54] These numbers include both thousands of

54. As of September 30, 2015, 51 percent of cases commenced in the U.S. Courts of Appeals were pro se at the time of filing. *See* U.S. COURTS, JUDICIAL BUSINESS 2015 tbl.B-9 (2015) [hereinafter JUDICIAL BUSINESS 2015 tbl.B-9], http://www.uscourts.gov/sites/default/files/data_tables/B09Sep15.pdf [https://perma.cc/5NKS-BFHF]. Disaggregating by circuit, the D.C. Circuit had the lowest percentage of pro se filings (33 percent), while the Fourth Circuit had the highest percentage (64 percent). *Id.*

prisoner filings and many cases brought by people who are not incarcerated.[55] Thus, the analyses of lawyer activities by Andrew Pollis[56] and Morris Ratner,[57] and of the impact of new rulemaking on discovery discussed by Danya Reda,[58] need to be read with an understanding that these issues relate to a small set of cases, which could be thought of as akin to luxury goods.[59] Moreover, the concerns of Susan Saab Fortney about the need for "prying open" courthouse doors for legal malpractice claims are amplified.[60] Despite efforts made by a subset of clients to increase regulation of lawyers through new kinds of claims and to reduce costs through litigation budgets, most people cannot afford lawyers, let alone pretrial discovery.

Commentators on procedure have labeled the contemporary era the "age of austerity."[61] In the United States, state courts have been the focus of concern. States are strapped for funding, and their courts have millions of litigants without lawyers. State judiciaries have established task forces on access to courts. Reports indicate that more than four million civil litigants in California courts lacked lawyers in 2009,[62] and more than two million such litigants were unrepresented in New York courts.[63]

My hope is to enlarge the lens so that the federal courts are also brought into such discussions. Comparatively, federal courts are rich in terms of buildings, staff, and judges. Yet, federal judges regularly report worry about resources and now face a significant proportion of litigants who appear in court without lawyers.

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55. For example, in 2014 and in 2015, nonprisoners filed 24,274 and 25,117 cases pro se, respectively. *See* U.S. COURTS, JUDICIAL BUSINESS 2015 tbl.C-13 (2015), http://www.uscourts.gov/sites/default/files/data_tables/C13Sep15.pdf [https://perma.cc/7RPU-4AT3]; U.S. COURTS, JUDICIAL BUSINESS 2014 tbl.C-13 (2014), http://www.uscourts.gov/sites/default/files/statistics_import_dir/C13Sep14.pdf [https://perma.cc/T7SX-KWFL].

On appeal, nonprisoner, noncriminal cases consisted of 44 percent of all pro se cases filed. *See* JUDICIAL BUSINESS 2015 tbl.B-9, *supra* note 54. Nonprisoner, noncriminal cases consist of the following categories: "Other U.S. Civil," "Other Private Civil," "Bankruptcy," "Administrative Agency Appeals," and "Original Proceedings" including "Miscellaneous Applications."

56. *See* Andrew S. Pollis, *Busting Up the Pretrial Industry*, 85 FORDHAM L. REV. 2097 (2017).

57. *See* Morris A. Ratner, *Retraining Lawyers: From "Cases" to "Tasks,"* 85 FORDHAM L. REV. 2151 (2017).

58. *See* Danya Shocair Reda, *What Does It Mean to Say That Procedure Is Political?*, 85 FORDHAM L. REV. 2203 (2017).

59. *See* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA (Samuel Estreicher & Joy Radice eds., 2016) [hereinafter, BEYOND ELITE LAW].

60. *See* Susan Saab Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 FORDHAM L. REV. 2033 (2017).

61. *See, e.g.*, Xandra Kramer & Shusuke Kakiuchi, General Report for the XV World Congress of Procedural Law: Relief in Small and Simple Matters in an Age of Austerity 5 (July 1, 2015) (unpublished manuscript), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2610773 [https://perma.cc/JQB8-BW4W].

62. A.B. 590, 2009–10 Leg., Reg. Sess. (Cal. 2009).

63. Jonathan Lippman, *New York's Template to Address the Crisis in Civil Legal Services*, 7 HARV. L. & POL'Y REV. 13, 15 (2013).

The other structural fact about today's litigation landscape is that, as in this colloquium's title referencing "vanishing trials," almost no civil cases reach trial in the federal courts. As of 2015, about 1 in 100 civil lawsuits filed began a trial before either a judge or a jury.[64] In terms of numbers, 2,852 civil bench and 1,882 civil jury trials were completed in 2015; the count on the criminal side was 5,027 bench trials and 1,807 jury trials.[65]

Because federal data collection neither makes time-study tracking easily available nor readily identifies cases by more than one kind of category of cause of action or by class action status, it is difficult to know which cases go to trial, let alone why that subset does so. An account of federal litigation would be enriched by understanding more about the 2,000 to 3,000 cases that are tried yearly—in terms of whether the litigants are represented, in classes or MDLs, the subject matter and stakes of the claims, and their distribution across the United States.[66] Many assume that all filings without lawyers result in dismissal, that cases which do go to trial include lawyers, or that no class actions go to trial. Here, I discuss a review of the 2,973 cases identified in a database provided by the Federal Judicial Center[67] and reporting on cases ending with a trial during the year between October 1, 2014, and September 30, 2015.

Let me start with litigants lacking lawyers. About 15 percent (450 cases) in this one-year snapshot of trial data were categorized as having at least one party unrepresented, and 0.6 percent (18 cases) had at least one party on both sides unrepresented.[68] Less than 2 percent of tried cases (43 cases)

64. I am in the midst of other work trying to gain insights from inquiring into the cases that actually went to trial. Thus, we examined data released by the FJC on all civil cases. *See Federal Court Cases: Integrated Data Base, 2014 (ICPSR 36110)*, NAT'L ARCHIVE CRIM. JUST. DATA, http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/36110 (last visited Mar. 25, 2017) [https://perma.cc/5A7P-2JZD]. This dataset tracks 4.6 million civil cases brought between 1996 and 2015. Within this dataset, we counted 69,200 cases commencing a jury or bench trial by picking cases with values 6, 7, 8, and 9 in the "PROCPROG" column. Therefore, 1.5 percent of cases in the dataset proceeded to trial.

65. U.S. COURTS, JUDICIAL BUSINESS 2015 tbl.T-1 (2015), http://www.uscourts.gov/sites/default/files/data_tables/T01Sep15.pdf [https://perma.cc/G2CY-YMTF]. Recall that data from the state courts put the rate of civil trials as the mode of disposition in about 4 percent of the cases analyzed.

66. *See* Emery Lee, FJC FY 2015 Termination Data (Sept. 2016) (on file with the *Fordham Law Review*). These data are to be posted sometime in 2017 on a new FJC website. As with most of the data discussed in this overview, caveats are needed. In this context, information comes from court clerks, who use civil cover sheets and other materials prepared by lawyers and complete forms (JS5 and JS6) transmitted at least quarterly to the Administrative Office. No independent methods of verifying uniformity or accuracy are undertaken centrally. More caveats about the FJC Termination Data are detailed below.

67. *Id.* To identify cases on class actions, we filtered the civil cases database for cases with a value of 1 in the "CLASSACT" field. To obtain cases with pro se parties, we filtered the civil cases database for cases with a value of 1, 2, or 3 in the "PROSE" field.

68. Of the 450 unrepresented cases, 18 appeared to have both plaintiffs and defendants pro se; 334 had pro se plaintiffs, and 98 were defendant pro se cases. The overlap of the 18 cases brings the total to 352 terminated suits with pro se plaintiffs. The causes of action were concentrated in just a handful of categories. For the 352 cases with pro se plaintiffs, more than half were filed by prisoners, and more than half alleged civil rights violations. About one-fifth of those cases were employment cases, brought under the Age

were identified as class actions.[69] Of these, we looked further into dockets and learned that at least 29 cases actually proceeded to trial as class actions; some concluded with bench or jury verdicts, while others ended with a settlement after some phase of trial had begun.[70] Base rates are not yet knowable. For example, public data do not track what cases are styled or certified as class actions.

These data focus on lawyers in courts without trials. But the ambitious questions of this colloquium—what ethics guide lawyers in twenty-first-century dispute resolution—need also to take on administrative agency adjudication. Efforts are underway to understand more about the adjudicatory work of administrative agencies, where tens of thousands of trial-like proceedings take place, and some proceed in the aggregate.[71]

Returning to courthouses, as many have noted, judges do a good deal of adjudication without trials. Researchers have looked for other metrics, including "bench presence," tallying the hours judges spend in open court, whether on trial or not. Researchers mined statistics gathered by the Administrative Office of the U.S. Courts and reported a "steady year-over-year decline in total courtroom hours" from 2008 to 2012 that continued into 2013. The results were that judges spent less than 2 hours a day on average in the courtroom, or about "423 hours of open court proceedings per active district judge."[72] Judges may well be involved and interact more

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Discrimination Employment Act, the Equal Employment Opportunity Act, or the Performance Rating Act of 1950. *Id.*

69. *Id.* The labeling did not always correspond to the individual cases tracked down thereafter. Moreover, records are incomplete in some instances. For example, an initial review identified fifty cases, but with subsequent analyses, we learned that forty-three class actions in FY 2015 appeared to have gone to trial.

70. In the FJC FY 2015 trial data set, another fourteen (0.5 percent) of the cases had a tag denoting that they were remanded from MDL proceedings. *Id.* To obtain cases with recorded MDL docket numbers, we filtered the civil cases database for cases with some recorded MDL docket number in the "MDLDOCK" column. *See* INTER-UNIV. CONSORTIUM FOR PRACTICAL & SOC. RESEARCH, CODEBOOK FOR CIVIL TERMINATIONS DATA WITH DOCKET NUMBERS, PLT AND DEF CONTAINING ORIGINAL VALUES (2014) [hereinafter ICPSR, CIVIL CODEBOOK]. To obtain information about MDLs, we examined data released by the FJC on all civil cases. *See Federal Court Cases: Integrated Data Base, 2014 (ICPSR 36110)*, *supra* note 64. For each case, a MDL docket number may be recorded. *See* ICPSR, CIVIL CODEBOOK, *supra*.

71. *See Federal Administrative Adjudication*, STAN. U.: ADJUDICATION RES., https://acus.law.stanford.edu/ (last visited Mar. 25, 2017) [https://perma.cc/C9EW-XKGU]. The database defines adjudication as

> a decision by one or more federal officials made through an administrative process to resolve a claim or dispute arising out of a federal program between a private party and the government or two or more private parties based on a hearing—either oral or written—in which one or more parties have an opportunity to introduce evidence or make arguments.

Adjudication Research: FAQ, STAN. U.: ADJUDICATION RES., https://acus.law.stanford.edu/content/user-guide (last visited Mar. 25, 2017) [https://perma.cc/74QC-NQ4L]; *see also* Resnik, *Migrating, Morphing,* and *Vanishing*, *supra* note 1.

72. Jordan M. Singer & William G. Young, *Bench Presence 2014: An Updated Look at Federal District Court Productivity*, 48 NEW ENG. L. REV. 565, 565–66 (2014).

with litigants and lawyers in chambers, in forms of alternative dispute resolution, but these activities take place outside the public realm.[73]

A final basic fact to bring into focus is the array of new rulemaking—the ACPR I referenced at the outset—which governs ADR. Hundreds of local rules have been promulgated to govern ADR. Yet those rules rarely address, let alone protect, the rights of the public to know much about either the processes or the results. Privatization of process is the leitmotif. "Procedure as contract" was what I called this shift a decade ago, as courts promoted party-based agreement rather than dispute resolution in public courts.[74] This change in norms and practices is at the center of the essay by Norman Spaulding, looking at how the culture of independent lawyers serving as an adversarial check is eroding.[75] Whether such processes can provide fairness "beyond the adversary system," as Rebecca Hollander-Blumoff puts it, is a question further explored below.[76]

III. EQUIPAGE, AGGREGATION, DISAGGREGATION, AND PRIVATIZATION

Direct payment of lawyers, fee shifting from defendants to plaintiffs, and fee sharing through common benefit fund awards are methods of supporting access to courts and of regulating lawyers. Aggregation of cases is another way to create economies of scale. During the decades when federal dockets were growing, all these forms of subsidies were deployed; insurance and third-party financing were not much in focus.

In 1974, Congress created the Legal Services Corporation[77] (LSC) and, in 1976, enacted the Civil Rights Attorney's Fees Award Act,[78] authorizing fee shifting from losing defendants to victorious civil rights plaintiffs. The 1966 class action rule revisions provided new means to aggregate claims.[79] When these innovations were put together with fee shifting in other statutes (such as Title VII), new sets of plaintiffs made their way into the federal courts. In 1980, new opportunities for fee shifting arose in litigation against the U.S. government; the Equal Access to Justice Act (EAJA) waived sovereign immunity to impose federal government obligations to pay attorney's fees to prevailing parties against the government in certain kinds of civil litigation.[80]

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73. Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L.J. 1631, 1636–37 (2015) [hereinafter Resnik, *The Contingency of Openness in Courts*].

74. *See* Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005); *see also* Resnik, *The Contingency of Openness in Courts*, *supra* note 73.

75. Norman W. Spaulding, *Due Process Without Judicial Process?: Antiadversarialism in American Legal Culture*, 85 FORDHAM L. REV. 2249 (2017).

76. Rebecca Hollander-Blumoff, *Fairness Beyond the Adversary System: Procedural Justice Norms for Legal Negotiation*, 85 FORDHAM L. REV. 2081 (2017).

77. Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378.

78. Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified at 42 U.S.C. § 1988 (2012)).

79. FED. R. CIV. P. 23.

80. *See* Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (1980) (codified at 5 U.S.C. § 504, 28 U.S.C. § 2412(d)); *see also* Gregory C. Sisk, *The Essentials of the*

Lawyers are the key figures in this colloquium, and hence more attention is needed to funding possibilities for litigants with no resources to hire lawyers directly. In 1980, Congress appropriated $300 million to support the LSC.[81] If such funding levels had remained, in real dollar terms, by 2014, the LSC would have received $850 million.[82] Congress has not matched funding and, in 2014, provided $365 million to the LSC.[83] Congress also saw—and limited—the key role played by what were known as backup centers, which had served as networks for coordination and communication on housing, welfare, and consumer law.[84]

Moreover, in 1996, Congress barred legal services lawyers from initiating or participating in class actions.[85] Again, the litany of prohibitions is familiar, as Congress imposed limits on forms of legislative advocacy, handling voter redistricting claims, initiating representation on behalf of prisoners, advocating that welfare laws were unconstitutional, or requesting attorney's fees.[86] Those regulations brought the question of lawyers' ethics to the fore in 2001 when the U.S. Supreme Court held that aspects of the restrictions prohibiting advice on arguments related to welfare law or seeking to amend welfare law were impermissible under the First Amendment.[87] Regulations also barred LSC lawyers from working on "adversarial" enforcement of final judgment and consent decrees.[88]

Funding remains very limited. According to the LSC, in 2014, more than sixty-three million Americans were eligible for its services,[89] but LSC

Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (pt. 1), 55 LA. L. REV. 217, 220 (1994). Parties are defined to include individuals whose net worth is less than $2 million, unincorporated business owners, partnerships, corporations, associations, units of local government, and organizations with a net worth that does not exceed $7 million. *See id.* at 297. Tax-exempt organizations and cooperative agricultural organizations are not included in the net worth limitation. Organizations that employ more than 500 people are not eligible. *See id.*

81. *2013 LSC by the Numbers*, LEGAL SERVICES CORP. (July 2014), http://www.lsc.gov/media-center/publications/2013-lsc-numbers [https://perma.cc/S9ZT-FAJS].

82. Memorandum from Lisa Wood, Chair, Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Def. to Legal Servs. Corp. 2 (June 2, 2014), http://www.lsc.gov/sites/default/files/LSC/pdfs/3.%20ABA-SCLAID%20FY2016%20Budget%20Rec%20%20to%20LSC.pdf [https://perma.cc/AX65-87PZ].

83. *Id.*; *see also* Consolidated Appropriations Act, Pub. L. No. 113-76, tit. IV, 128 Stat. 5, 76 (2014).

84. *See generally* Lawrence J. Fox, *Legal Services and the Organized Bar: A Reminiscence and a Renewed Call for Cooperation*, 17 YALE L. & POL'Y REV. 305 (1998).

85. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321–53; *see also* Judith Resnik & Emily Bazelon, *Legal Services: Then and Now*, 17 YALE L. & POL'Y REV. 291, 292 (1998).

86. *See* Omnibus Consolidated Rescissions and Appropriations Act § 504(a), 110 Stat. at 1321–52; Class Actions, 45 C.F.R. § 1617.3 (2015).

87. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 537 (2001).

88. 45 C.F.R. §§ 1617.2–.3 (2016) (barring LSC recipients from initiating or participating in class actions); *see also* David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, and Oregon Describe the Costs*, 17 YALE L. & POL'Y REV. 337, 338 (1998) (describing the scope of the restrictions that the regulations place on LSC lawyers).

89. These figures are keyed to federal poverty guidelines and permit aid to families of four that earn $30,000 or less. LEGAL SERVS. CORP., 2014 ANNUAL REPORT 2 (2014),

lawyers could help only one in five of those eligible.[90] And for those hoping that their cases will attract lawyers because of the potential to recoup fees from opponents, the Court's narrowing interpretations of when success permits fee shifting can make that route riskier for lawyers.[91]

Essays in this colloquium address the issue of lawyers working for causes and social movements. Justin Hansford writes about the use of law "in Ferguson and Beyond,"[92] and Scott Cummings addresses problems of accountability and efficacy.[93] One measure of the pivotal role that lawyers play in various causes and social movements comes from congressional efforts to cut off lawyers from doing so. The targeted efforts to disempower legal services lawyers were sketched above. Congress also sought to limit lawyers representing prisoners. The Prison Litigation Reform Act[94] (PLRA), enacted in 1996, was animated by an effort to "STOP" (which was the acronym for an earlier version of the PLRA) the substantial successes that prisoners had achieved through conditions of confinement litigation.[95] The PLRA has had its own success; as Margo Schlanger, who has analyzed prisoner litigation for several decades, documents, the statute has "undermined prisoners' ability to bring, settle, and win lawsuits."[96]

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http://www.lsc.gov/sites/default/files/LSC/pdfs/LSC2014AnnualReport.pdf [https://perma.cc/5Q9L-XCVV]; *see also The Future of Legal Services: The Arthur Liman Colloquium Papers*, 17 YALE L. & POL'Y REV. 283 (1998).

90. *FY 2016 Budget Request*, LEGAL SERVICES CORP., http://www.lsc.gov/media-center/publications/fy-2016-budget-request#bfrtoc-afy-2016-budget-requests (last visited Mar. 25, 2017) [https://perma.cc/WR53-67VK].

91. *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 605 (2001); *see also* Astrue v. Ratliff, 560 U.S. 586, 600–04 (2010) (Sotomayor, J., concurring) (discussing the adverse consequences of the Court's holding on attorneys who are unable to obtain fees under the EAJA due to a Government offset to satisfy the prevailing litigant's preexisting debt). Fee-shifting statutes can have distinctive tests to determine when litigants can recoup. *See* Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749, 1756 (2014) (clarifying the "exceptional" case standard for fee shifting in patent cases under 35 U.S.C. § 285 (2012)); Hardt v. Reliance Standard Life Ins., 560 U.S. 242, 245 (2010) (holding that a litigant must obtain "some degree of success on the merits" for the litigant's attorney to recover fees under 29 U.S.C. § 1132(g)(1), the fee-shifting provision for most ERISA actions (quoting Ruckelshaus v. Sierra Club, 463 U.S. 680, 694 (1983))).

92. Justin Hansford, *Demosprudence on Trial: Ethics for Movement Lawyers, in Ferguson and Beyond*, 85 FORDHAM L. REV. 2057 (2017).

93. Scott L. Cummings, *Rethinking the Foundational Critiques of Lawyers in Social Movements*, 85 FORDHAM L. REV. 1987 (2017).

94. Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended at 18 U.S.C. § 3626 and 28 U.S.C. § 1932).

95. *Overhauling the Nation's Prisons: Testimony Before the Senate Judiciary Comm.* (July 27, 1995), 1995 WL 449222 (testimony of Steve J. Martin, General Counsel for the Texas Department of Correction).

96. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 153 (2015) [hereinafter Schlanger, *Trends in Prisoner Litigation*]; *see also* Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006) [hereinafter Schlanger, *Civil Rights Injunctions over Time*]; Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) [hereinafter Schlanger, *Inmate Litigation*].

The PLRA imposed a requirement that prisoners use difficult administrative grievance procedures and pay special filing fees; further, Congress created new work for lawyers representing prisoners, while lowering their potential attorney's fees if successful.[97] Congress authorized defendants and intervenors to move to terminate injunctive relief (including long-standing consent decrees) and directed courts to do so, absent new fact-finding identifying ongoing constitutional violations that could only be redressed through narrowly drawn remedies.[98]

Veronica Root has focused her contribution to the colloquium on monitors in litigation seeking economic redress.[99] Monitors have likewise been central in overseeing implementation of structural injunctions in prisons,[100] and the PLRA imposed new constraints on their use by layering additional statutory requirements on top of what Federal Rule of Civil Procedure 53 provides.[101] In her 2015 update on the impact of the PLRA, Schlanger concluded that the PLRA had also "succeeded in radically shrinking—but not eliminating—the coverage" of injunctive orders,[102] in part by limiting the "life span of new orders."[103] She mapped the decline from 1983 to 2006 in the percentage of jails (from 18 percent to 11 percent) and of prisons (from 27 percent to 18 percent) subjected to court orders and the rarity of statewide court orders in the twenty-first century.[104]

Prisoners and other poor people are part of a larger group of individuals whose ability to proceed collectively has been limited. In the early 1970s, in its first major interpretation of the 1966 class action rule in *Eisen v. Carlisle & Jacquelin*,[105] the Supreme Court insisted that under the then-recently amended Rule 23, plaintiffs provide and pay for notice to individual class members.[106] That requirement priced subsets of lawyers out of the class action market.

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97. 42 U.S.C. § 1997e(d)(3) (limiting attorney's fees to "an hourly rate [equal to or less] than 150 percent of the hourly rate established under section 3006A of title 18 [of the United States Code] for payment of court-appointed counsel" and setting other limitations based on reasonableness of fees).

98. *See* 18 U.S.C. § 3626(b)(1)(A) ("In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener."); *id.* § 3626(a)(2) ("Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief . . . .").

99. *See* Veronica Root, *Constraining Monitors*, 85 FORDHAM L. REV. 2227 (2017).

100. *See generally* Vincent M. Nathan, *Taking Stock of the Accomplishments and Failures of Prison Reform Litigation: Have the Courts Made a Difference in the Quality of Prison Conditions?: What Have We Accomplished to Date?*, 24 PACE L. REV. 419 (2004); Note, *"Mastering" Intervention in Prisons*, 88 YALE L.J. 1062 (1979).

101. *Compare* FED. R. CIV. P. 53, *with* 18 U.S.C. § 3626(f).

102. Schlanger, *Trends in Prison Litigation*, *supra* note 96, at 155.

103. *Id.* at 168.

104. *Id.* at 169 tbl.8.

105. 417 U.S. 156 (1974).

106. The ruling was seen as profoundly undermining Rule 23. *See* Kenneth W. Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97, 98–99.

Another focus of Congress was securities litigation. In 1995, Congress enacted the Private Securities Litigation Reform Act[107] (PSLRA), which imposed new requirements atop those in Rule 23 for that subset of cases. Before seeking class certification, "the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class."[108] This intervention altered the market for legal services, as it slowed down certification by requiring judges to decide which clients and their lawyers would gain leadership status as the "most adequate plaintiff."[109] Further, Congress sought to tie fee awards to client recoupment, by calling for fees to be based on the amount "actually paid to" the class, as contrasted with the value of the total fund established to be distributed.[110]

In the last few years, the Supreme Court has returned repeatedly to class actions,[111] often imposing new obstacles, albeit varying with the kind of class action and by the stage of class action proceedings. Lawyers were at the center of concerns recounted in the Supreme Court's decisions in *Amchem Products, Inc. v. Windsor*[112] and *Ortiz v. Fibreboard Corp.*,[113] which rejected large-scale mass tort class settlements. In 2011, the Court made certification of class actions in the employment context more expensive through imposing exacting commonality requirements.[114] Yet, other arenas of activity prove that class actions retain their vitality, with examples ranging from environmental harms (the BP oil spill and VW emissions) to prison conditions and solitary confinement. Further, as sketched above and is increasingly discussed, multidistrict litigation has become a home for mass torts.[115]

However, the Court's interpretation of the Federal Arbitration Act (FAA) has taken whole sets of potential claimants out of the courts and out of the marketplace of lawyers. Many articles have detailed the recent expansive interpretations of the 1925 congressional legislation now known as the

107. Pub. L. 104-67, § 101(b), 109 Stat. 737, 743–49 (1995).

108. 15 U.S.C. § 78u-4(a)(3)(A)(i) (2012).

109. *See id.* § 77z-1(a)(3)(A); *id.* § 78u-4(a)(3)(B)(i) ("[T]he court shall consider any motion made by a purported class member . . . and shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members . . . ."); *see also id.* § 77z-1(a)(3)(B)(i); *id.* § 78u-4(a)(3)(B)(v) ("The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.").

110. *Id.* § 78u-4(a)(6) ("Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class."); *see also* Lynn A. Baker, Michael A. Perino & Charles Silver, *Is the Price Right?: An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371 (2015).

111. *See, e.g.*, Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); *see also* Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014).

112. 521 U.S. 591 (1997).

113. 527 U.S. 815 (1999).

114. *See Dukes*, 564 U.S. at 349–50.

115. *See* Resnik, *From "Cases to "Litigation," supra* note 42, at 19–22.

FAA.[116] The Supreme Court has insisted that both state and federal courts enforce a myriad of arbitration provisions (promulgated by issuers of consumer credit, manufacturers of products, and employers) that preclude aggregation before any dispute has arisen.[117]

In "Diffusing Disputes," I discussed research seeking to understand whether the mass production of arbitration clauses (requiring claimants alleging violations of federal and state statutory and common law wrongs to proceed single file to decision makers designated by the clauses' providers) have produced a mass of arbitration.[118] But as I document there, empirical research has identified very few actual filings of individual arbitrations, as contrasted with the numbers of customers or employees subjected to those clauses. Rather than providing more paths for claimants, the provisions function to cut off users, thereby erasing as well as diffusing disputes.[119]

Lawyers are central in these developments, both as drafters of the clauses and as targets of potential defendants seeking to end the fee incentives available to lawyers if representing individuals in aggregates. To understand the ways in which court access is denied requires looking at the forms that cut off that forum, as well as at the case law interpreting their importance. As Victor D. Quintanilla and Alexander B. Avtgis discuss in this colloquium, data suggest that the public views these provisions negatively.[120] But even if public approval is lacking and the forms are not readily understood, people seeking jobs or buying products cannot negotiate the terms.

Because those provisions are buried in individual application forms or in the fine print of consumer documents, I believe it is important to publish and republish them, particularly here in an issue devoted to the work and ethics of lawyers.[121] Even though the graphics provided below are dense and hard to read, these are the real forms replete with tiny print and presented to individuals and to courts. Figure 11 is the two-page "Application for Employment" that Waffle House ("America's Place to Work, America's Place to Eat") required prospective employees to sign.[122] The document comes from the record in *EEOC v. Waffle House, Inc.*,[123] decided by the Supreme Court in 2002.[124] To clarify what is written, let me explain that in the hand-marked portions, Eric Scott Baker reported that he

116. Resnik, *Diffusing Disputes*, *supra* note 2, at 2808.

117. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 361 (2011) (Breyer, J., dissenting). These developments are detailed in Resnik, *Diffusing Disputes*, *supra* note 2, at 2889–93, Resnik, *Fairness in Numbers*, *supra* note 53, at 118–33, and J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3061 (2015).

118. Resnik, *Diffusing Disputes*, *supra* note 2, at 2893–914.

119. *Id.*

120. Victor D. Quintanilla & Alexander B. Avtgis, *The Public Believes Predispute Binding Arbitration Clauses Are Unjust: Ethical Implications for Dispute-System Design in the Time of Vanishing Trials*, 85 FORDHAM L. REV. 2119 (2017).

121. *See, e.g.*, Resnik, *Diffusing Disputes*, *supra* note 2, at 2866 fig.6.

122. This figure also appears in Resnik, *Diffusing Disputes*, *supra* note 2, at 2866 fig.6.

123. 534 U.S. 279 (2002).

124. Joint Appendix, *Waffle House, Inc.*, 534 U.S. 279 (No. 99-1823), 2001 WL 34093975, at *59, *61.

was able to start work in two weeks, that he had a diploma from high school, and the kind of car that he drove.

Figure 11: Waffle House Employment Application

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

MUST BE COMPLETED IN THE RESTAURANT

APPLICATION FOR EMPLOYMENT
(PLEASE PRINT PLAINLY)

TO BE COMPLETED UPON EMPLOYMENT

Work Location	Rate
Position	Date

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

Date JUNE 23, 1994

Name BAKER (Last) LEE (First) SCOTT (Middle) Social Security No. 251-75-4655 Telephone No. (803) 741-4777

Present Address 106 OAKDALE (No.) STR. (Street) GASTON (City) SC (State) 29053 (Zip)

Next of kin to be notified in event of emergency: Name: ROBERT & OR SYLVIA G BAKER

Relationship: FATHER/MOTHER Address: 106 OAKDALE STR. GASTON SC 29053 Telephone No. (803) 741-4777

GENERAL INFORMATION

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

Race: WHITE Birthdate: 10/2/1974 Sex: M Y F Height: 5' 8" Weight: 137 lbs.

Marital Status: Single Engaged Married Separated Divorced Widowed

Number of Dependents including yourself: 0 Are you a citizen of the U.S.A.? YES

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

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

Are you now or have you been a user of or addicted to Drugs? NO Alcohol to excess?

What kind of car do you drive? Make BUICK Model SKYHAWK Year 1985

Will you use your car to get to work? YES

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

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

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

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

List any friends or relatives working for us and where NONE

(Names)

If your application is considered favorably, on what dates will you be available for work? TWO WEEK FROM TODAY 19 94

Are there any other experiences, skills, or qualifications which you feel would especially fit you for work with the Company? I CAN A CREW, WORK IN THE FOOD BUSINESS FOR 4 YEARS.

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

Can you lift 20 lbs to shoulder height? YES

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

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

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

Rank attained: Date/Type of dismissal:

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

• IMPORTANT •
NOTICE TO APPLICANT

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

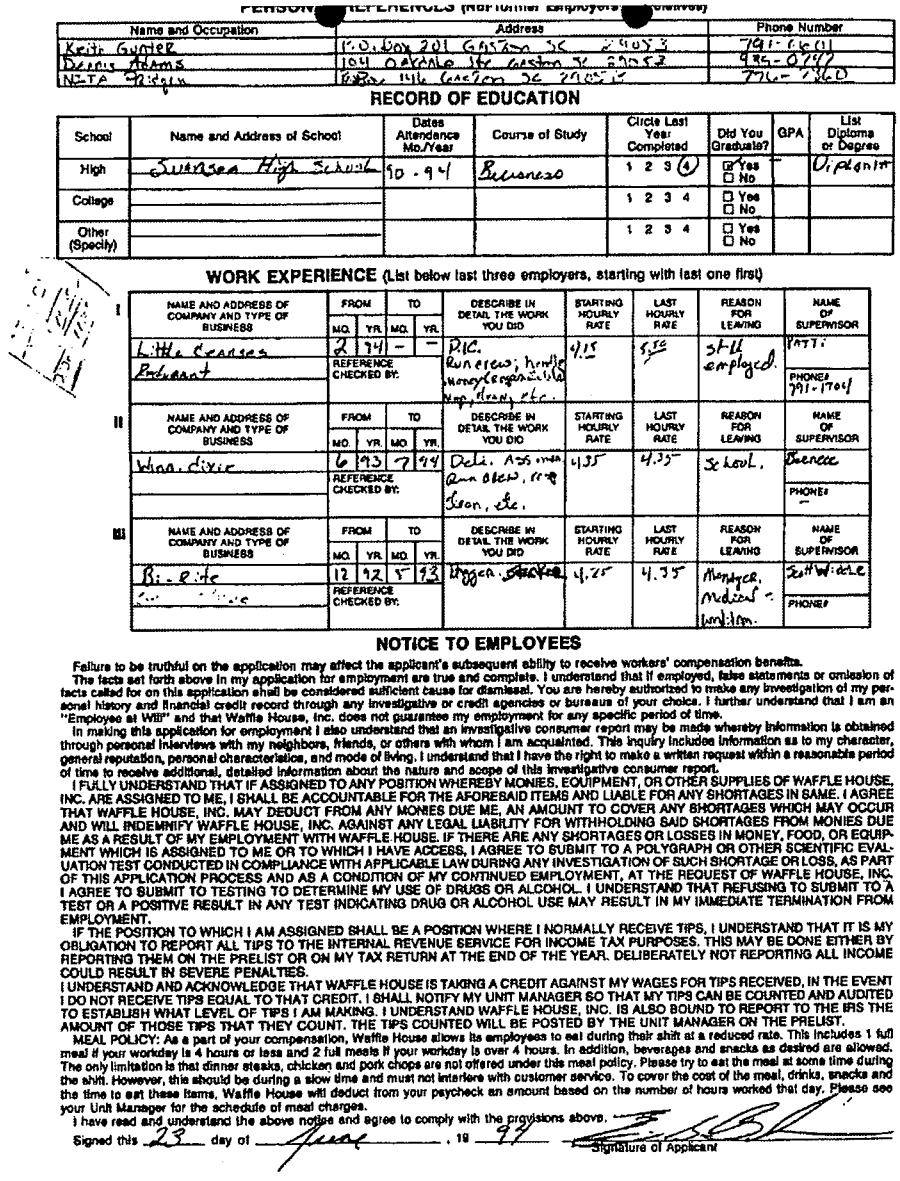
1. Drivers license with your picture AND
2. A. U.S. social security card OR an original or certified copy of your birth certificate.

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

The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

© COPYRIGHT — WAFFLE HOUSE, INC. 1992 REV 4/93
FORM # 4002

EXHIBIT A



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

Name and Occupation	Address	Phone Number
Keith Gumer	P.O. Box 201 Gaston, SC 29053	791-6611
Dennis Adams	104 Oakdale St. Gaston, SC 29053	925-0777
NITA [illegible]	Box 116 Gaston, SC 29053	776-1260

RECORD OF EDUCATION

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

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

	NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM MO.	FROM YR.	TO MO.	TO YR.	DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
I	Little Caesars Restaurant	2	94	—	—	P.I.C. Runner, cashier, handle money, keep area clean, prep, dress, etc.	4.15	5.50	still employed.	Patti PHONE# 791-1704
		REFERENCE CHECKED BY:								
II	NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM MO.	FROM YR.	TO MO.	TO YR.	DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
	Winn Dixie	6	93	7	94	Deli. Assemble Sandwiches, Clean, etc.	4.35	4.35	School.	Bernice PHONE# —
		REFERENCE CHECKED BY:								
III	NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM MO.	FROM YR.	TO MO.	TO YR.	DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
	Burger Chef	12	92	5	93	Flipper. Shake	4.25	4.35	Manager, Medical limitations.	Seth Wade PHONE#
	[illegible]	REFERENCE CHECKED BY:								

NOTICE TO EMPLOYEES

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

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

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

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

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

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

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

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

Signed this 23 day of June, 19 94

Signature of Applicant

The printed terms that were imposed by Waffle House were generic, not personal. The form told all applicants that, were they to be employed, Waffle House could

> deduct from any monies due [them], an amount to cover any shortages which may occur and that they had to indemnify the company against any legal liability for withholding wages. Moreover, if money, food, or

> equipment to which he had access was alleged to be lost, applicants had "to submit to a polygraph" or other testing.[125]

Below, I quote from the terms on dispute resolution set forth in microprint:

> The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.[126]

What we know from the several decisions by federal judges is that Eric Baker signed the application on June 23, 1994, at a Waffle House in Columbia, South Carolina. Some weeks later, he was hired at another Waffle House miles away. Soon thereafter, Baker had a seizure (that the courts described as lasting "approximately thirty seconds") at work. After he lost his job in early September of 1994, Baker complained to the Equal Employment Opportunity Commission (EEOC) that Waffle House had violated his rights under the Americans with Disabilities Act of 1990 (ADA). After the EEOC filed an enforcement action in federal district court, Waffle House sought to dismiss the case and to compel the EEOC to go to arbitration.[127]

Writing for the majority, Justice John Paul Stevens held that the form did not impose a limit on a filing by the EEOC, which was authorized by Congress to "vindicate the public interest" as well as to seek victim-specific remedies.[128] The effects of this ruling underscore the relevance of lawyers to the capacity to pursue claims. Twenty-eight state attorneys general had argued to the Court that the EEOC should be able to proceed, as should they in enforcing state statutes.[129] Since the decision, state and federal officials have brought discrimination cases, and states have successfully rebuffed defendants' arguments that the forms preclude their doing so.[130]

But for ordinary people, such forms mostly keep them out of court. Despite the Court's characterization of the employment applications and consumer documents as "contracts," these "pieces of paper" deserve no

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125. *Id.*

126. *Id.*

127. EEOC v. Waffle House, Inc., No. Civ. A. 3:96-2739-O, 1998 WL 35168489, at *1 (D.S.C. Mar. 23, 1998).

128. *Waffle House, Inc.*, 534 U.S. at 290, 296–98.

129. *See* Brief for the States of Missouri et al. Supporting Petitioner, *Waffle House, Inc.*, 534 U.S. 279 (No. 99-1823), 2001 WL 34131148.

130. *See* Rent-A-Center, Inc. v. Iowa Civil Rights Comm'n, 843 N.W.2d 727 (Iowa 2014); Joulé, Inc. v. Simmons, 944 N.E.2d 143 (Mass. 2011); People v. Coventry First LLC, 915 N.E.2d 616 (N.Y. 2009).

such stature. As explained long ago by Arthur Leff, the definition of a contract was "not only a deal, but dealing."[131] Through real negotiations—even on form provisions—"the possibility of monolithic one-sidedness" was reduced.[132] In contrast, the form that was signed by Eric Baker was one of many "products of non-bargaining"; as such, these were what Leff termed "unilaterally manufactured commodities."[133] As what Leff called a "thing," the law ought to regulate its quality as it did other products.

But, instead of limiting arbitration to negotiated contracts, the Court licensed expansive use of that product by applying the FAA to litigants claiming violations of the Credit Repair Organization Act in 2012 and to a family restaurant, Italian Colors, which argued that the American Express Company had violated the Sherman Antitrust Act in 2013.[134] Pending before the Court as I write is the applicability of the FAA to the National Labor Relations Act, which provides for collective action.[135]

As has become familiar, the Supreme Court decided the question of the enforceability of class action bans in 2011. In *AT&T Mobility LLC v. Concepcion*,[136] a five-person majority of the Court held that the 1925 FAA's authorization to enforce arbitration clauses permitted providers of those clauses to impose such bans.

Here again, lawyers and markets are key drivers of the litigation landscape. The Supreme Court addressed "class arbitration" in 2003 in *Green Tree Financial Corp. v. Bazzle*,[137] in which the Court held that the

131. *See* Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 138 (1970).

132. *Id.* at 140.

133. *Id.* at 147. As I have noted in other writings, I do not want to be read as critical of boilerplate per se, which can lower the costs of contracting and enable equal treatment across a set of contracting parties. *See* Alan Schwartz & Joel Watson, *Conceptualizing Contractual Interpretation*, 42 J. LEGAL STUD. 1, 24 (2013). My concern is about mandates in nonnegotiated documents that require consumers and employees to forgo the pursuit of public rights.

134. *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 605, 614 (1985).

135. In January of 2017, the Court granted certiorari in three consolidated cases. Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, No. 16-300, 2017 WL 125665 (U.S. Jan. 13, 2017); Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, No. 16-285, 2017 WL 125664 (U.S. Jan. 13, 2017); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, No. 16-307, 2017 WL 125666 (U.S. Jan. 13, 2017). The question, as phrased in the certiorari petition, in *Morris* is "[w]hether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the FAA of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis." Petition for Writ of Certiorari, *Morris*, 834 F.3d 975 (No. 16-300). In addition, the Court has on its 2016–2017 docket *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015), *cert. granted sub nom.* Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 368 (2016). At issue is "[w]hether the FAA pre-empts a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement." Petition for Writ of Certiorari, *Kindred Nursing Ctrs. Ltd.*, 127 S. Ct. 368 (No. 16-32).

136. 563 U.S. 333 (2011).

137. 539 U.S. 444 (2003).

question of whether a contract precluded class arbitration was to be determined initially by an arbitrator rather than a judge.[138] In response, arbitration providers offered rules for class arbitrations by incorporating aspects of the federal class action rule.[139] A database maintained by the American Arbitration Association (AAA) detailed more than 280 such actions listed by 2009.

Yet potential defendants sought to deflect the practice by drafting clauses prohibiting class arbitrations.[140] Some included symmetrical preclusions (illustrated in figure 12), with terms such as "YOU WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST US . . . AND WE WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST YOU."[141] These clauses usually included an "anti-severability provision," stipulating that if a court found the clause unenforceable, the obligation to arbitrate would become unavailable and all claims had to be brought to court.[142]

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138. *Id.* at 452–53.

139. *See* AM. ARBITRATION ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (2003), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2048284&revision=latestreleased [https://perma.cc/G9YM-2WXH]. A very helpful overview comes from Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DENV. U. L. REV. 301, 303 n.20 (2004). These issues are also discussed in Resnik, *Fairness in Numbers*, *supra* note 53, at 122–23. Looking to more recent data from the AAA, some class arbitrations continue to be filed. *See Class Arbitration Case Docket*, AM. ARB. ASS'N, http://www.adr.org/aaa/faces/services/disputeresolutionservices/casedocket (last visited Mar. 25, 2017) (searching for class arbitrations on the AAA's Class Arbitration Docket yields nineteen class arbitration proceedings in 2016) [https://perma.cc/K6E7-DBNK].

140. *See* Brief of CTIA—The Wireless Ass'n as Amicus Curiae in Support of Petitioner at 17–18, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 709799, at *17–18.

141. That provision in figure 12, which comes from a wireless cellular phone document from AT&T on file with the author, was not sui generis. *See, e.g.*, *Prepay Wireless Service Agreement*, VERIZON WIRELESS (2000), http://www.verizonwireless.com/privacy_disclosures/prepay_wireless_svc.html ("EVEN IF APPLICABLE LAW PERMITS CLASS ACTIONS OR CLASS ARBITRATIONS, YOU WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST US . . . AND WE WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST YOU.") [http://perma.cc/X3L6-8PPC].

The self-obliged symmetrical limitation aims to avoid questions about the enforceability of the provisions. *See* Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159 (5th Cir. 2004) (holding that state law may find unconscionable an agreement requiring consumers to arbitrate their claims but which permits the provider to choose between arbitration and litigation). Whether symmetrical constraints are required is an open question. *See, e.g.*, THI of N.M at Hobbs Ctr., LLC, v. Patton, 741 F.3d 1162, 1170 (10th Cir. 2014); Alltel Corp. v. Rosenow, 2014 Ark. 375, at 3, 2014 WL 4656609, at *2.

142. *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET AND CONSUMER PROTECTION ACT § 1028(a), at 45–46 (2015) [hereinafter CFPB 2015 ARBITRATION STUDY], http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/LHZ8-L8B5].

Figure 12: Document Accompanying the Purchase of a Cellular Phone, 2002

INDEPENDENT ARBITRATION

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

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

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

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

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

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

The *AT&T* litigation became the first time the Court addressed the lawfulness of preventing individuals from joining together in arbitration. Vincent and Liza Concepcion filed "on behalf of all consumers who entered into a transaction in California wherein they received a cell phone for free or at a discount . . . but were charged sales tax" in excess of that "payable [as] calculated on the actual discounted price."[143] The Concepcions,

143. Complaint at 5, Concepcion v. Cingular Wireless LLC, No. 06CV 0675 DMS NLS (S.D. Cal. Mar. 27, 2006), 2006 WL 1194855.

overcharged $30.22, alleged that the providers had violated California's consumer protection laws against deceptive and false advertising.[144]

California law was clear on the question of the potential for group-based procedures, for the state had both a statute and a decision[145] governing the issue. Under California law, when class waivers were in a "consumer contract of adhesion," predictably small damage disputes could arise between the parties,[146] and the "party with the superior bargaining power" was alleged to have "carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money," a waiver would be unenforceable because it functioned to exempt the party from responsibility for the allegedly willful injury inflicted.[147]

The U.S. Supreme Court held, however, that the FAA preempted California's rule, which stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[148] The *AT&T* Court rested its holding on "our cases,"[149] which ascribed two rationales to the FAA: "judicial enforcement of privately made agreements to arbitrate"[150] and elimination of the "costliness and delays of litigation."[151]

As many articles have since detailed, the numbers of clauses mandating arbitration have since soared in many sectors. A 1991 survey identified fewer than 4 percent of firms requiring arbitration in employment; by 2007, another study found that more than 45 percent of firms did so.[152] In 2008, the estimate was that "a quarter or more of all non-union employees in the United States"—thirty million employees—were covered.[153]

As I and others have also discussed, tens of millions of consumers are obliged to use arbitration. For example, virtually all providers of wireless services insist on mandatory arbitration, along with the option of using small claims court for individual actions.[154] Further, according to a 2015 study by the Consumer Financial Protection Bureau (CFPB), approximately

144. *See* CAL. CIV. CODE § 1760 (West 2017).

145. *Id.* § 1668; Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).

146. *Discover Bank*, 113 P.3d at 1110.

147. *Id.*; *see also* CAL. CIV. CODE § 1668.

148. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

149. *Id.* at 345 n.5.

150. *Id.* at 345 (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985)). I analyze this case in depth in Resnik, *Diffusing Disputes*, *supra* note 2, at 2889–93.

151. *AT&T*, 563 U.S. at 345 (quoting *Dean Witter Reynolds Inc.*, 470 U.S. at 220).

152. *See* Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91, 95–96 (2014).

153. Alexander J.S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 ILR REV. 1019, 1020 (2015).

154. *See* CFPB 2015 ARBITRATION STUDY, *supra* note 142, at 26, 33–34. To clarify, "[t]he CFPB review concluded that 87.5% of the major wireless providers (servicing over 99.9% of subscribers to these providers) have arbitration obligations, and 85% (servicing over 99.7% of arbitration-subject subscribers) also permit use of small claims court." *Id.*

fifty percent of credit card loans are subject to arbitration,[155] and nearly all that were studied "expressly did not allow arbitration to proceed on a class basis."[156]

That the purpose of arbitration clauses is to disable collective actions rather than to enable more access to bringing claims can be seen first by way of a brief discussion of a 2015 Supreme Court decision and by the data we gathered relating to individual claims against AT&T over a five-year period. *DIRECTV, Inc. v. Imburgia*[157] is an odd case that on many metrics would seem to merit relatively little judicial attention. At issue was a clause written in 2007 in a service agreement that provided that "if the law of your state" made a waiver of class arbitration unenforceable, the obligation to arbitrate was likewise unenforceable.[158] Amy Imburgia and Kathy Greiner had sued DIRECTV and complained that DIRECTV violated California law by imposing early cancellation penalties "often as high as $480" and did so "directly from the customers' bank accounts or credit cards, using account information provided by the customers when they first ordered DIRECTV, without consulting them or otherwise obtaining their consent."[159]

The plaintiffs claimed that the "early termination fees" bore "no relation to the damage, if any, incurred by DIRECTV in connection with an early termination of the service."[160] Rather, DIRECTV used the penalty "to force customers to pay for its services for at least 18 months (and sometimes longer) and prevent customers from readily changing to another satellite or cable provider, even if they are no longer able to use DIRECTV's service due to faulty equipment or other reasons."[161]

The plaintiff class sought injunctive relief "on behalf of all current and former DIRECTV customers who were charged or may be charged an early cancellation penalty and monetary relief on behalf of current and former DIRECTV customers who paid DIRECTV an early cancellation penalty."[162] The proposed class action alleged that DIRECTV had violated the California Consumer Legal Remedies Act by "[f]ailing to disclose" adequately the terms and the method of collecting the cancellation fees, by including "unconscionable and unenforceable terms," and by collecting fees.[163] The proposed class action also alleged that DIRECTV had violated California's false advertising law with misleading advertising.[164] Remedies

155. *See id.* at 9, 10 fig.1, 31.

156. *See id.* at 44–45. That study concluded that no issuers of credit cards had dropped arbitration clauses over the period studied; a few added such provisions. *See id.* at 11–12.

157. 136 S. Ct. 463 (2015).

158. *Id.* at 466.

159. Class Action Complaint at 1, Imburgia v. DIRECTV, Inc., No. BC398295, 2008 WL 4264463 (Cal. Super. Ct. Sept. 17, 2008).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*; *see also* CAL. CIV. CODE §§ 1770(a)(9), (a)(14), (a)(19) (West 2017).

164. CAL. BUS. & PROF. CODE § 17500 (West 2017). The proposed class also alleged that DIRECTV violated other provisions of California law, including a section in its Business

ranged from declaratory relief to "restitution, disgorgement, actual, statutory and punitive damages, and attorneys' fees and costs, including pre-judgment and post-judgment interest,"[165] as well as injunctive relief, and the complaint sought "constructive trusts on all monies by which DIRECTV was unjustly enriched as a result of collecting the early cancellation penalties" and other remedies under California statutory and common law, including "without limitation, restitution."[166]

At that time, the law of California rendered the class action waiver unenforceable.[167] That changed in 2011, when the Supreme Court decided *AT&T*. An intermediate California appellate court interpreted the clause that DIRECTV's lawyers had drafted and held that because it specifically called for the application of California law, the obligation to arbitrate was not enforceable.[168] In 2015, the U.S. Supreme Court reversed. The majority decision by Justice Breyer insisted that under the Court's approach, arbitration was obligatory.[169] The dissent, by Justice Ginsburg (joined by Justice Sotomayor), argued that courts were to "give the customer, not the drafter, the benefit of the doubt" and hence provide "effective access to justice,"[170] while Justice Thomas viewed the FAA as not applicable to the transaction.[171]

DIRECTV is a lawsuit made from lawyers' drafting of arbitration clauses. But, unlike the class action waiver at issue in *AT&T* that affected millions of people and unlike the provisions in hundreds of documents related to consumer goods and employment, the *DIRECTV* dispute related only to older claims under clauses that lawyers, working for those imposing arbitration, should no longer use. Justice Ginsburg's dissent explained that under the Court's prior cases, the federal statute could itself be "preempted . . . by parties' intent," when set forth in contracts.[172] That approach can be found in the 2008 decision in *Hall Street Associates v. Mattel, Inc.*,[173] discussing that parties could choose the governing law to apply. But in *DIRECTV*, the majority rejected what the contract drafters

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and Professions Code prohibiting any "fraudulent . . . business act or practice" and its common law prohibition on unjust enrichment.

165. Class Action Complaint at 22, Imburgia v. DIRECTV, Inc., No. BC398295, 2012 WL 7657788 (Cal. Super. Ct. Feb. 26, 2012), 2008 WL 4264463.

166. *Id.* at 2.

167. *See* CAL. CIV. CODE § 1668; Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).

168. Imburgia v. DIRECTV, Inc., 170 Cal. Rptr. 3d 190 (Ct. App. 2014), *rev'd*, 136 S. Ct. 463 (2015).

169. *See DIRECTV, Inc.*, 136 S. Ct. at 471.

170. *Id.* (Ginsburg, J., dissenting).

171. *See id.* (Thomas, J., dissenting).

172. *Id.* at 473 n.1 (Ginsburg, J., dissenting).

173. 552 U.S. 576 (2008). In her dissent in *DIRECTV*, Justice Ginsburg quoted *Hall Street*; as she understood the FAA, parties could "tailor some, even many, features of arbitration by contract, including . . . procedure and choice of . . . law." *DIRECTV, Inc.*, 136 S. Ct. at 473. Playing off the language in the majority opinion, Justice Ginsburg also noted that parties could even "choose to have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia." *Id.* at 468.

had detailed, which was to vitiate the arbitration mandate and permit a class action in court.

Proponents of arbitration argue its utility in part by claiming it creates more access to bringing claims. Thus, just as a discussion of trials pivots around their increasing infrequency, a discussion of arbitration also requires inquiries into data about their use. As I detail elsewhere and sketch here, little evidence supports the position of arbitration enthusiasts that it expands the use of dispute resolution in a speedy and effective way. In fact, the mass production of arbitration clauses has not resulted in a mass of arbitrations.[174]

I provide two examples below, first from arbitrations involving wireless service providers and then from data from the CFPB. I chose to focus on claims against AT&T Mobility because that was the company involved in the decision approving the ban on class arbitrations.[175] As detailed in "Diffusing Disputes," under California law, providers of arbitration services to consumers have to archive results in five-year intervals.[176]

The AAA has been designated by AT&T and has complied with state reporting mandates. By looking at five years of reporting, we identified 134 individual claims (about 27 a year) filed against AT&T between 2009 and 2014.[177] During that time period, the estimated number of AT&T wireless customers rose from 85 million to 120 million people, and lawsuits filed by the federal government charged the company with a range of legal breaches, including systematic overcharging for extra services and insufficient payments of refunds when customers complained.[178] More generally, the AAA, which is the largest nonprofit provider of arbitration services in the United States, averages under 1,500 consumer arbitrations annually;[179] its full docket includes 150,000 to 200,000 filings a year.[180]

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174. *See* David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 U. COLO. L. REV. 459, 463 (2014).

175. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352–53 (2011).

176. *See* Resnik, *Diffusing Disputes*, *supra* note 2, at 2812–14. Specifically, we reviewed the file documenting arbitrations from July of 2009 through June (the second quarter) of 2014 by filtering claims against AT&T. *Id.* at 2812 n.25. We then removed all claims filed by one firm after learning that it had filed the 1,149 claims in an effort to create de facto class actions. Thus, we identified 134 individual claims. *Id.* Thereafter, we sent summaries and drafts of our analyses to AAA's Vice President for Statistics and In-House Research, Ryan Boyle, who was very helpful in providing materials and explanations.

177. *See Consumer Arbitration Statistics: Provider Organization Report*, AM. ARB. ASS'N, https://www.adr.org/aaa/faces/aoe/gc/consumer/consumerarbstat (last visited Mar. 25, 2017) [https://perma.cc/UPX6-FVWG].

178. *See Number of AT&T Wireless Subscribers from 2007 to 2014 (in 1,000s)*, STATISTA, http://www.statista.com/statistics/220692/number-of-atundt-wireless-subscribers-since-2007 (last visited Mar. 25, 2017) [http://perma.cc/PU6N-FTP4]; *4Q 2014 AT&T by the Numbers*, AT&T (Dec. 20, 2016), http://about.att.com/content/csr/home/assets/4q2014-by-the-numbers.html [https://perma.cc/H9XB-447E]; *see also* Complaint for Permanent Injunction and Other Equitable Relief at 3–4, FTC v. AT&T Mobility, LLC, No. 1:14-cv-3227-HLM (N.D. Ga. Oct. 8, 2014); Stipulated Order for Permanent Injunction and Monetary Judgment at 16, *AT&T Mobility, LLC*, No. 1:14-cv-3227-HLM.

179. *See* Resnik, *Diffusing Disputes*, *supra* note 2, at 2908 fig.7 (noting that the AAA only recorded 7,303 claims labeled consumer arbitrations, excluding construction, real

Thus, were arbitration providers to be in high demand; their capacity to respond would be limited.

My second example comes from the Consumer Financial Protection Bureau, which looked at six credit-related markets for which, again, the AAA is the predominant provider of arbitration services.[181] The CFPB's "2013 Preliminary Results" reported millions of consumers subject to arbitration and found an average of 415 individual AAA filings per year from 2010 to 2012 in four consumer product markets—credit cards, checking accounts, payday loans, and prepaid cards. In its 2015 report, the CFPB added two products, private student loans and auto loans, to its analysis—bringing the three years' annual average up to 616.[182] In the figure below,[183] we summarize the findings that about two-thirds of the filings were by consumers, while the remaining filings included disputes brought by both parties as well as those by companies.

estate, other industry and employment categories); *Analysis of the American Arbitration Association's Consumer Arbitration Caseload: Based on Consumer Cases Awarded Between January and August 2007*, AM. ARB. ASS'N, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004325 (last visited Mar. 25, 2017) [https://perma.cc/LPG6-S6F9].

180. *Statement of Ethical Principles for the American Arbitration Association, an ADR Provider Organization*, AM. ARB. ASS'N, http://www.adr.org/aaa/faces/s/about/mission/ethicalprinciples (last visited Mar. 25, 2017) (describing the AAA as administering "approximately 150,000 cases" each year) [http://perma.cc/Z4QY-9TNX].

181. *See* CFPB 2015 ARBITRATION STUDY, *supra* note 142, at 10, 34–35. That study in turn relied on AAA data and described the AAA as the provider in 83 percent of credit card arbitration clauses and in 86 percent of the surveyed mobile wireless arbitration clauses. Resnik, *Diffusing Disputes*, *supra* note 2, at 2853 n.238 (citing CFPB 2015 ARBITRATION STUDY, *supra* note 142, at 36–39 tbls.4 & 5).

182. *See* CFPB 2015 ARBITRATION STUDY, *supra* note 142, at 11.

183. Data are from AAA Data, July 2009–June 2014, Provider Organization Report (on file with the *Fordham Law Review*), and CFPB 2015 ARBITRATION STUDY, *supra* note 142 at 11. This figures also appears in Resnik, *Diffusing Disputes*, *supra* note 2, at 2908 fig.7.

Figure 13: Consumer Arbitrations Filed with the American Arbitration Association, 2009–2014

Sources	Types	Estimated Number of Consumers	Average per Year	Total
AAA Data, Provider Organization Report June 2009–July 2014	AAA-defined consumer claims	85–120 million consumers	1,460	7,303
	AAA claims involving AT&T		27	134*
Consumer Financial Protection Bureau, 2015 Arbitration Study January 2010–December 2012	AAA claims in credit card, prepaid card, checking account, payday, private student, and auto loan markets	80 million credit-card consumers	616**	1,847

* All 134 of the consumer claims involving AT&T were filed by consumers.

** Of the 616 consumer arbitrations a year, approximately two-thirds were filed by consumers.

IV. THE ETHICS OF LAWYERING IN DISPUTE DIFFUSION

I have sought to frame the questions of lawyers' ethics by starting not from lawyers and their work but from the world of dispute resolution in which transactional, litigating, and problem-solving lawyers pursue their profession. A brief summary of the picture of change that I have sketched is in order, as is a discussion of its implications for the ethics and ethos of lawyers and for the regulation of both lawyers and judges.

First, some 45 to 50 million cases (holding aside juvenile and traffic proceedings) are filed annually in state courts; in contrast, very few people make their way into federal court. A significant percentage of plaintiffs who do file proceed without lawyers. Many are lawyerless because they cannot afford to pay attorney's fees.[184]

Second, the shift away from a court-centric process imposes challenges for claimants and respondents seeking to understand the contours and the methods of newly developed systems. Simply put, finding the ACPR is hard, as is getting data on the processes and results. Courts today are

184. *See* Ian Weinstein, *Access to Civil Justice in America: What Do We Know?*, *in* BEYOND ELITE LAW, *supra* note 59, at 3, 3–4.

creating a host of user-friendly materials, such as self-help kiosks, assistance from clerks' offices, and many forms accessible on the web. Parallels cannot be found in the diffuse ADR world. My students and I have poured over a sea of arbitration clauses and governing rules to try to figure out which kinds of rules ("consumer," "commercial," or "wireless") apply to which transactions. Accessible forms on fee waivers and consumer-friendly guides were difficult to locate.

Third, the new systems being built do not attend to poor people and the need for lawyers. As I have noted when analyzing rules of the AAA, some providers—by choice and as a result of their own views of their own ethics—limit the costs to be imposed on consumers in the arbitrations for which it is the designated provider.[185] In 2013, the AAA instituted a $200 filing fee for consumers and continued applying that fee in its 2014 consumer rule revisions.[186] A few state statutes in turn impose regulations. In 2002, as part of its packet of arbitration regulations, California required fee waivers for "indigent consumers," defined as those with incomes of less than "300 percent of the federal poverty guidelines." California instructed providers to give consumers notice of this option and to create forms for sworn declarations that a particular consumer qualified; providers were not to ask for additional information.[187]

The AAA has complied with a form labeled "Waiver of Fees Notice for Use by California Consumers Only,"[188] which is available on the web. Another document is available for the rest of the country, entitled an "Affidavit in Support of Reduction or Deferral of Filing and Administrative Fees."[189] That affidavit requires consumers outside of California to make

185. *See* NAT'L CONSUMER DISPUTES ADVISORY COMM., AM. ARBITRATION ASS'N, CONSUMER DUE PROCESS PROTOCOL: STATEMENT OF PRINCIPLES 17 (1998), https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014 [https://perma.cc/2BPE-ZTZV]; Resnik, *Diffusing Disputes*, *supra* note 2, at 2912 n.529 (citing CFPB 2015 ARBITRATION STUDY, *supra* note 142, at 57–64). "Moreover, '[s]ignificant shares of arbitration clauses across almost all markets . . . did not address attorneys' fees.'" *Id.* (alteration in original) (quoting CFPB 2015 ARBITRATION STUDY, *supra* note 142, at 66). "Some clauses provided that attorneys' fees were to be awarded to prevailing consumers." *Id.* (citing CFPB 2015 ARBITRATION STUDY, *supra* note 142, at 67–68).

186. AM. ARBITRATION ASS'N, CONSUMER ARBITRATION RULES 34 (2014), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&revision=latestreleased [https://perma.cc/7Z9H-WJD3]; AM. ARBITRATION ASS'N, CONSUMER-RELATED DISPUTES: SUPPLEMENTARY PROCEDURES 14 (2013), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2009997&revision=latestreleased [https://perma.cc/MKS2-D4RF].

187. CAL. CIV. PROC. CODE § 1284.3(b)(1)–(2) (West 2017).

188. *See* Am. Arbitration Ass'n, American Arbitration Association Affidavit for Waiver of Fees Notice for Use by California Consumers Only (2011), http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004304 [http://perma.cc/3GB4-PFUX]; *see also Search Forms*, AM. ARB. ASS'N, http://www.adr.org/aaa/faces/services/fileacase/forms (last visited Mar. 25, 2017) (including fifty-eight other forms as well as the fee waiver hardship form for California consumers) [http://perma.cc/6RR6-YSRZ].

189. Am. Arbitration Ass'n, American Arbitration Association Affidavit in Support of Reduction or Deferral of Filing and Administrative Fees (on file with the *Fordham Law Review*). Thanks to AAA staff for directing me to it. On the web, the AAA indicates under the heading "Administrative Fee Waivers and Pro Bono Arbitrators" that "parties are eligible

detailed disclosures of assets, income, and liabilities and does not indicate the availability of full waivers. Notably, the AAA reports that it has given waivers when requests are made[190] but that it does not track the numbers or kinds of waivers, deductions, or deferrals given.[191] Holding California aside, publicly accessible analogues to court-based "in forma pauperis" fee waivers are not available in arbitration.[192]

Fourth, the problem of learning about the use of arbitration is mirrored by the problems of learning about the use of ADR in general. To the extent public records exist, individual consumer arbitrations are rare. Most state and federal courts do not require data collection on other forms of ADR used under their aegis. In contrast, as my opening charts reflect, federal and state courts regularly publish data on filed cases.

Fifth, aside from the arbitration mandates, when lawyers can work in courts, many are functioning as parts of aggregated cases of various forms. For example, reliance on MDLs has grown, enabling cost sharing characterized by cross-plaintiff subsidies providing an infusion of resources for individual litigants and their lawyers. Those arrangements result in a host of dispositions, many of which provide comprehensive resolutions. The utilities of doing so are debated, but even with hostility to class actions, market pressures have and will continue to produce lawyers and judges and private dispute resolvers bundling parties and claims. And like ADR and mandated arbitration, much of the decision making goes unseen and relatively unregulated.

As a consequence, the vitality of courts, both state and federal, has been put into question, as has the relevance of constitutional doctrine calling for "open courts" and "rights to remedies." The public is excluded in most pretrial and ADR processes based in courts, has a hard time finding agency-based adjudication, and is generally precluded from attending the arbitrations mandated by federal law. Professionals (be they judges, lawyers, or other dispute resolvers), as well as repeat player litigants,

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for a waiver or deferral of the administration fee if their annual gross income falls below 200% of the federal poverty guidelines." *Administrative Fee Waivers and Pro Bono Arbitrators*, AM. ARB. ASS'N, https://www.adr.org/aaa/ShowPDF%3Bjsessionid%3DR295PCqYD5MkNKhQqm9H7jhSMwYh2NnsYFSbG6yrMhgmGVB299lc!1082660915%3Fdoc%3DADRSTG_004098 (last visited Mar. 25, 2017) [http://perma.cc/X8BM-YP9H]. There, the AAA explains that, for its hardship affidavit "additional information . . . may be considered," including "past income, assets . . . and income prospects," and that the decision is discretionary. *Id.*; *see also* CFPB 2015 ARBITRATION STUDY, *supra* note 142, at 11 n.51 and accompanying text (reporting that "the consumer can apply for a hardship waiver of otherwise applicable administrative fees," but not citing to the form itself).

190. *See* Resnik, *Diffusing Disputes*, *supra* note 2, at 2913–14 (citing materials provided by AAA staff).

191. In its research, the CFPB reported it had identified twenty-two consumer requests for fee waivers, and twenty-three "California" fee waiver requests, in its review of the 1,847 disputes that the AAA administered that the CFPB studied. The CFPB reported that it had not recorded the results of the request, based on the "limited data" CFPB 2015 ARBITRATION STUDY, *supra* note 142, at 77.

192. *See, e.g.*, 28 U.S.C. § 1915 (2012). The federal court filing fee, as of 2015, was $350. *See* 28 U.S.C. § 1914(a).

function with minimal or no oversight from the public, as almost all court- and non-court-based dispute resolution proceedings now occur behind closed doors.

In sum, dispute diffusion is underregulated, with its many facets and few obligations imposed to provide information. Private ordering may well create good outcomes and good process, but the public cannot learn what it does, because we cannot find all the many providers, watch what they do, or know of their decisions. In contrast, courts have to name who their judges are, and these individuals gain their positions through public processes; their caseloads and budgets are open to the public.

State and federal courts, as well as administrative agencies, are centrally important venues, even as they are deeply flawed.[193] Here, as elsewhere, I need to reiterate that I am not arguing that courts are ideal. More than that, barriers to entry—with lawyers' fees high on the list—pose obstacles to their use. As Gillian Hadfield put it: "The vast majority of ordinary Americans lack any real access to the legal system for resolving their claims and the claims made against them."[194] Further, courts themselves can be exploitative, as Peter Holland recounted in his essay on "junk justice." He examined 4,400 lawsuits filed by debt buyers in Maryland courts; unrepresented debtors regularly defaulted on amounts owed (averaging about $3,000), and those decisions were made without trials, lawyers, or much judicial oversight.[195]

A recent spate of litigation related to court-user fees and fines for those with limited resources has exposed injuries imposed by courts, producing "endless debt cycles and the imprisonment of some for the failure to pay."[196] Now famously, the Department of Justice in 2015 exposed the failures of the municipal court in Ferguson, Missouri;[197] rather than "administering justice or protecting the rights of the accused," the local court's goal was "maximizing revenue" through "constitutionally deficient" procedures that had a racially biased impact.[198]

But what I have just detailed as courts' failures are also tributes to courts, obliged to function in public and therefore as a resource for being able to

193. More of the problems are detailed in Resnik, *Revising Our "Common Intellectual Heritage," supra* note 13.

194. Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, 143 DAEDALUS 83, 83 (2014).

195. *See* Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 186–87 (2014). Ninety-eight percent of the defaulting debtors lacked counsel. *Id.* at 179, 208.

196. ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR SOC. JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 13–26 (2010), http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf [http://perma.cc/J3AR-KRU2].

197. *See* CIVIL RIGHTS DIV., U.S. DEPT. OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 42–62 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [http://perma.cc/9EKY-NS43]; *see also* Consent Decree, United States v. City of Ferguson, No. 4:16-cv-000180-CDP (E.D. Mo. Apr. 19, 2016).

198. CIVIL RIGHTS DIV., *supra* note 197, at 42, 68–69.

uncover how they sometimes fail. State and federal judiciaries are required to maintain records and to permit public observation—opening paths to correct injustices, if popular will to do so exists.[199] The structure of courts has the potential to provide egalitarian redistribution of authority and the possibility of public oversight of legal authority. Public access permits windows into knowing whether fair treatment is accorded regardless of status. Public processes enable judges to demonstrate their independence. Oversight permits the policing of judges, tasked with vindicating public rights, to ensure the loyalty to those norms. As I write, we are being given a lesson in the value of independent judges, protected from the wrath of public and private actors and obliged to treat disputants in an equal and dignified manner. These are the hallmarks of legitimate dispute resolution. And through all such public activity, debates can take place about what the legal norms and what the fair procedures to apply should be.

Long ago, Jeremy Bentham railed against "Judge[s] & Co.," by whom he meant lawyers who had through the common law created an opaque and self-serving system that benefited themselves.[200] The hope is that the democratic practices of the last two centuries have shifted the utility calculus of judges and lawyers. The richness and depth of the contributions to the colloquium interrogate whether paths to reviving public adjudication can be paved. The question is whether lawyers will be part of a social movement, infusing the alternative regimes that now dominate the landscape of civil litigation with an ethos of public obligation to redress the inequalities in our body politic.

199. *See id.* at 97–98.

200. Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 4, 21 (2011); *see also* 7 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 226–311 (John Bowring ed., 1843).