

Bring Back Bentham:

“Open Courts,” “Terror Trials,” and Public Sphere(s)

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Abstract

The identification of courts as “open” and “public” institutions is commonplace in national and transnational conventions. But even as those attributes are taken for granted, the privatization of adjudication is underway. This paper explores how—during the last few centuries—public procedures came to be one of the attributes defining certain decision-making institutions as “courts.” The political and theoretical predicates for such practices can be found in the work of Jeremy Bentham, a major proponent of what he termed “publicity,” a practice he commended for various entities from the Panopticon for prisoners to the Parliament and courts for legislators and judges. Bentham argued the utility of publicity in enhancing accuracy, public education, and judicial discipline.

Moving forward in time, I examine various contemporary techniques in several jurisdictions that shift the processes of adjudication toward privatization. Included are the devolving adjudication to less-public government entities such as administrative agencies; outsourcing to private providers; and reconfiguring the processes of courts to render them more oriented toward settlement. For those appreciative of the role courts play in developing and protecting human rights, these new practices are problematic because adjudication can itself be a site offering opportunities to engage in democratic practices.

The odd etiquette entailed in public adjudication under democratic legal regimes imposes obligations on government and disputants to treat each other – before an observant and often times critical public – as equals. Public and private power can be constrained by such performative requirements. When decision making takes place in public, the application of law to fact can engender normative contestation predicated on popular input. This claim of public adjudication’s democratic potential and utilities is, however, not an argument that the judgments provided and the norms developed will necessarily advance a shared view of the public welfare. Hence, while eager to re-engage Bentham, I offer different claims for publicity and less optimism about its consequences.

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I. Privatizing the Public: “Most Oppose Terror Trials in Open Court”

On November 17, 2009, a news service in the United States reported the results of a poll that had asked some 1,200 adults to complete the sentence: “Suspected terrorists should be tried in” The pollsters offered two alternatives to finish the sentence—either that suspected terrorists should be tried in an “open criminal court” or in a “closed military court.”¹ Fifty-four percent preferred the option of a “closed military court.”²

The data slice is thin, but the question asked has both powerful symbolism (making some news headlines) and particular resonance with the subject matter of this Symposium, *Private Power and Human Rights*. The poll provides the possibility that the processes through which a government honors or undermines human rights can be removed from public view. Further, the questions identify one means by which public power is privatized. As encapsulated in the phrase “closed military court,” privatization can take place when the government retains control over its activities but cuts off public oversight. Another form of privatization is the transfer of government-based activities to non-governmental actors, also often screened from public oversight. Both kinds of privatization are now commonplace in courts in many countries around the world.

The burden of my argument—and this paper—is to explain some of the ways in which courts are relevant to human rights discourse and why the poll on “closed military courts” proffered incoherent choices. Courts can be sites in which democratic norms of equal treatment, of popular engagement with legal rulemaking, and of constrained government authority are put into practice. Yet to do so requires that the term “court” retain its meaning, developed through a mixture of practice and political theory, as an open institution -- rendering the phrase “closed military court” an oxymoron. To unpack these arguments entails some history about the connection between openness and adjudicatory processes. That inquiry in turn engages the political philosophy of Jeremy Bentham, who was a major proponent of “publicity,” structuring encounters in many venues to provide the public with knowledge about and enable scrutiny of various actors and institutions—judges and courts, included. Open courts, codification of laws, and a free press were his methods for transferring authority to the public, forming a “tribunal” whose opinions were to influence ruling powers.³

Bentham's work contributed to what contemporary theorists style the public sphere, explicated by Jürgen Habermas, or more aptly “spheres,” pluralized by

Nancy Fraser to insist on the multiplicity of venues and diversity of speakers.⁴ Yet political theorists (in contrast to social scientists⁵) have paid relatively little attention to the role that lower level courts play in providing a venue for popular discourse and legal innovations. In many countries, courts have been both a source and a recipient of equality mandates that make them lively institutions, contributing (often controversially) to social ordering across a range of diverse problems.

Courts' processes are, however, being reconfigured and their decision making privatized. Below, I place the proposition of "closed military courts" in context by sketching how, during the last several decades, adjudicatory practices inside courts have been reconfigured to favor private conciliation. While the dominant example comes from the United States, I offer glimpses of parallel developments in Europe. On both sides of the Atlantic, judges and legislatures have devolved adjudication to administrative agencies and outsourced it to private providers.

Understanding the trajectory of these changes is one purpose of this paper, and another is to examine whether the trends are problematic. Bentham provides the basis for one critique, for he argued that open courts educate the public and discipline the state. My concerns (built on work, forthcoming, with Dennis Curtis⁶) rely on yet other functions of courts, which have evolved as democratic practices of equality have altered adjudication. Political injunctions to provide equality interact with ancient court obligations to "hear the other side" ("*audi alteram partem*"), resulting in opportunities for participatory parity that both enable democratic dialogue among disputants and impose constraints upon them. Further, within democratic systems, the conflicts generated by courts often produce changes in legal norms—demonstrating the power of popular input and the utility of courts to contemporary democracy. But I am less sanguine than Bentham about the functions of information and the outcomes of publicity. Public contestation and democratic iterations do not necessarily insure progressive practices. (The majority of those polled, after all, preferred "closed military courts.") On the other hand, publicity in courts disciplines governments by making visible how they treat both their judges and disputants. Through public processes, one learns whether individuals of all kinds—including "suspected terrorists"—are understood to be persons equally entitled to the forms of procedure offered others to mark their dignity and to accord them respect and fairness.

A. An Ancient Rite, a Modern Democratic Practice

The custom of open adjudicatory processes is longstanding; Roman law conceived of criminal proceedings as “*res publica*”—a public event.⁷ Further, accounts of civil trials during the Roman period describe the public posture of jurists and *advocati*, specially garbed in togas while making distinctive rhetorical presentations to those assembled.⁸

Dispute resolution was so basic to medieval communal life that some argue it was one of the first functions of cities, needing to deal with conflicts so as to facilitate commerce and provide a modicum of peace and security.⁹ Local rulers of various kinds regularly displayed their authority to make and enforce rules through public performances of their adjudicatory powers. But their processes relied on conceptions of judges, litigants, and the public that were very different than those of contemporary courts in democratic polities.

Then, judges were styled loyal servants of the states, subject to kingly (and godly) rule, rather than independent actors entitled to pronounce judgment on the state. Litigants depended on the grace of rulers to be eligible to participate in courts, and not all persons were authorized to bring suits, to testify, to serve as professional or lay judges, or to assert claims for protection of their person and property. In contrast to the modern notion that each person is equal in legal potential and that openness is an *obligation* of the state, subjecting itself to scrutiny, the point of open procedures then was to impress on viewers the *power* of the state. Public executions provided one such vivid exemplar.

Between the seventeenth and twentieth centuries, however, those precepts gave way in many parts of the world to new conceptions of the state, of judges, of citizenship, and of persons. Judges gained a kind of independence unique among government employees. Persons of all colors, genders, ages, and kinds became eligible to participate in the many roles within adjudication, and the entire process became “public” in a robust sense—public ownership and funding, public scrutiny, public participation, public ordering. “Rites” turned into “rights” as rulers lost discretion to close off their courts, to fire their judges, and to preclude all persons from rights-seeking.¹⁰

My focus in this essay is on public access, a right that traces back centuries. One touchstone is the 1676 Fundamental Laws of West New Jersey. That charter, drafted for the English colony on the Eastern seaboard of the United States (land now within the State of New Jersey), provided:

That in all publick courts of justice for tryals of causes . . . any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all and any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner¹¹

Its authors grounded their provisions not in divinity but in equality—opening courts to “any” of the “inhabitants” of the Province.¹² Their principle, coupled with common law rights to confront adverse witnesses and traditions of juries, became engines of open court proceedings in what became the United States.

B. Constitutional Mandates: “All Courts Shall Be Open”

A century after West New Jersey’s Fundamental Laws, early state constitutions turned customs and traditions of open processes into obligations of government. One example comes from the 1792 Delaware Constitution, proclaiming that “all courts shall be open.”¹³ Kentucky and Vermont did the same.¹⁴ The constitutions of the first thirteen states also enshrined jury trial rights for criminal defendants, often in conjunction with rights to confront adverse witnesses.¹⁵ By the middle of the nineteenth century, many other states had followed suit.¹⁶ As of 2008, the words “all courts shall be open” were a part of the constitutions of nineteen states.¹⁷

In contrast to early state constitutions, the federal Constitution of 1789 is less specific—offering no generic right to public or open courts. The term “open court” itself appears once, in an infrequently read provision on treason: “No Person shall be convicted of treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”¹⁸ That edict sits within Article III, devoted to the judiciary, which also set forth well known guarantees that trials of “all Crimes” were to be by juries, presumptively in the state where the crime took place.¹⁹

Soon thereafter, the 1791 Bill of Rights added new protections for individuals. The Sixth Amendment referenced the public when it guaranteed criminal defendants rights to both “a speedy and public trial.”²⁰ Further, the Seventh Amendment “preserved” rights to jury trials for civil litigants when their cases “at law” sought damages in excess of “twenty dollars.”²¹ By the twentieth

century, these guarantees, coupled with common law practices and First Amendment and Due Process rights, were interpreted to protect rights of audience for both civil and criminal trials, as well as third-party access to watch pre-trial evidentiary hearings and to read court records.²²

An example of the strength of the proposition that the United States Constitution requires open courts comes from a brief decision, *Presley v. Georgia*, issued in 2010. There, the United States Supreme Court invalidated a conviction because a trial judge had excluded “a lone courtroom observer” (specifically, the defendant’s uncle, as the trial judge learned at the time) from the courtroom during the “voir dire,” the oral examination of potential jurors.²³ The Supreme Court relied on its prior reading of the First Amendment that the public had a right to be present at pre-trial suppression hearings to conclude that a criminal defendant had a parallel Sixth Amendment right to have that jury selection go forth in public.²⁴

Alternative rulings were, however, available. One could conceptualize the “trial” to include only phases after juries were selected or one could have concluded that the exclusion of a single person, related to the defendant, was not the kind of error necessitating the reversal of a conviction. Yet seven members of the Supreme Court insisted that the voir dire was within the parameters of the “public trial” guaranteed and had to be open to the public. That right was not absolute, but closure could only take place after a trial court considered alternatives, because trial judges were “obligated to take every reasonable measure to accommodate public attendance at criminal trials.”²⁵ Indeed, even when parties did not offer alternatives, the public’s right “to be present” put the burden on the trial court to consider how to keep courtrooms open.²⁶

One doctrinal caveat is in order. The words “public attendance” have gained a literally that might not be intuitive. In the same term in which the Supreme Court insisted that the voir dire be open to the public, the Court declined to permit a limited web broadcasting of a trial challenging the constitutionality of California’s prohibition on same-sex marriage.²⁷ The federal district judge had, as part of a pilot program authorized by the Ninth Circuit, planned to permit spectators in other federal courthouses to observe the trial through a video link.²⁸ In an abrupt decision criticized by the dissent for its interventionist mode, five members of the Supreme Court reversed that ruling. The basis for the holding was, given the trial court’s proposed plan to make the trial accessible to a wider audience through technology, ironic. The majority ruled that the lower courts’ had

not provided sufficient public notice and comment when changing their rules to permit the webcast.²⁹

Returning to the founding of the United States, the injunction for public access embodied *in* the constitutional requirements of “open courts” was not limited *to* courts. Both federal and state constitutions imposed obligations on their legislative branches to enable the public to have first-hand knowledge of government decision making. The federal Constitution mandated that each House “keep a journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy.”³⁰ Several early state constitutions also proclaimed that legislatures should be “open.”³¹ Further, the federal constitution required that a “regular Statement and Account of the Receipts and Expenditures of all public Money” be “published from time to time.”³² The Constitution also keyed states’ obligations to give “Full Faith and Credit” to each others’ “public Acts, Records and judicial Proceedings of every other State.”³³ In addition, the First Amendment right of the people to “petition the government for a redress” created opportunities to forge public spheres of debate, and it has served as one basis for arguments that court documents and proceedings be accessible to the public.³⁴

C. Theorizing Openness: From Unruly Crowds to Bentham’s “Publicity”

How does one account for rise of the norms that subject judges and disputants to public scrutiny? One catalyst for these changes was the very activities of Medieval and Renaissance European rulers who had relied on open spectacles—from public hangings to royal pageants—to reinforce their claims to authority.³⁵ As Michel Foucault has famously analyzed, those who produce spectacles do not control their meanings or effects.³⁶

A much studied illustration of this proposition is the practice of public executions, which would seem to be an excellent vehicle for the display of sovereign authority. In seventeenth-century Amsterdam, the burgomasters staged the ceremony in which death sentences were pronounced in a ground floor room opened to onlookers, able to watch through windows of the Town Hall; executions followed thereafter out front.³⁷ But authorities elsewhere achieved less by way of decorum. In England, executions “lurched chaotically between death and laughter” as crowds generated carnivalesque atmospheres that undermined the “script” of a solemn ritual of state authority.³⁸ As Mikhail Bakhtin put it, the large crowds

produced “the suspension of all hierarchical rank, privilege, norms, and prohibitions.”³⁹ The consequence was a shift in authority; hangings could only take place “with the tacit consent of the crowd.”⁴⁰

Scholars of the English legal system point out that, while executions have drawn historians’ attention, “many more people of all ranks of society . . . came into contact with the legal system through the civil rather than the criminal courts.”⁴¹ Expansion of the private sector, coupled with that of government’s administrative apparatus and the growth in the legal profession,⁴² brought people into court. As diverse audiences participated and watched, they came to develop views about legitimate decision-making—and came to believe that they had a role to play in altering rulers’ prerogatives.

The French and American Revolutions made that plain, offering an array of ideas about democratic governance. Jeremy Bentham, who was formulating his thoughts on public participation in governance as these revolutions were underway, was one of the few of his generation to provide a sustained examination of the role played by openness—“publicity,” as he termed it—in a variety of venues, courts included.⁴³ Given that this Symposium’s framing is the intersection between human rights and private power, the invocation of Jeremy Bentham requires a word of explanation. Objecting to the *French Declaration of the Rights of Man and the Citizen*, Bentham thought such assertions of “natural rights”⁴⁴ to be “nonsense upon stilts.”⁴⁵ As he put it, rather than being born “free and equal,” people were born in “absolute subjection,” with helpless infants, dependent on parents, as exemplary.⁴⁶ As Philip Schofield has explained, for Bentham, natural law or natural rights were claims made by proponents that such rights “ought to exist” and such a moral claim should be put straightforwardly rather than “ambiguously expressed.”⁴⁷ Moreover, because Bentham proposed the Panopticon design for prisons, he is associated with the state’s surveillance of individuals that, as Foucault examined,⁴⁸ subjected individuals to surveillance regimes in which they were to be observed without knowing when or by whom.⁴⁹

But, as detailed below, Bentham also advocated designs for buildings and rules to put judges and legislators before the public eye as well. Through such openness, the public would, he thought, maximize self-interest and thwart the “sinister interest” of the political and legal establishments, collaborating to advance their own concerns rather than those of the “community in general.”⁵⁰ Bentham’s trust in the public prompted him to make a myriad of proposals for parliamentary and legal reforms and to commit (at least in theory) to universal

suffrage.⁵¹ The “‘ultimate end—political salvation,’ could only be achieved by democratic ascendancy,”⁵² and the goal of his many designs was “dependence of rulers on subjects.”⁵³

1. Observing and Cabining Authority: The Dissemination of Knowledge through Codification and Publicity

Jeremy Bentham’s advocacy of publicity relied on various techniques. Famous for his utilitarian calculus,⁵⁴ Bentham had a passion for codification (a word he is credited with inventing⁵⁵) deployed in service of public knowledge.⁵⁶ Illustrative is Bentham’s objection to the common law, never to be “known or settled.”⁵⁷ The unpredictability and lack of specification meant that by going to court, a man was taking a “chance . . . although his right be as clear as the sun at noon-day.”⁵⁸ Bentham’s proposed cure was statutory law; if all the rules were “put into one great book,” then knowledge of the rules would be available to all, rather than in the “clutches of the harpies of the law.”⁵⁹ By replacing the common law with codes, legal parameters would become plain and truly derived from the “consent of the whole.”⁶⁰

Bentham’s zeal for clarity prompted his offers to codify the laws of many countries, including the then-nascent United States. Bentham wrote to President James Madison in 1811 that he would provide a “body of statute law” to liberate the country from “the yoke”⁶¹ of English common law’s various precedents.⁶² In 1816, Madison replied, dryly noting that the War of 1812 had delayed his response. Declining, he wrote: “I find myself constrained to decide, that a compliance with your proposals would not be within the scope of my proper functions.”⁶³ Bentham made similar offers to write codes for several of the states, as well as for Russia, Poland, Geneva, Spain, Portugal, Greece, and Guatemala.⁶⁴

Bentham was particularly attentive to, and appalled by, judicial procedures in English courts. In one essay, he quoted an English judge who had asserted that “No man is so low as not to be within the law’s protection.”⁶⁵ Bentham disagreed; the “truth” was that “[n]inety-nine men out of a hundred are thus low” because they could not take the risk spending so much of their hard earned wages on the chance of winning under the common law.⁶⁶ The system crafted by judges formed “so thick a mist” that one cannot, if “not in the trade,” manage to receive justice.⁶⁷ Bentham charged judges and lawyers (“Judge & Co.”) with creating “artificial rules”⁶⁸ producing a “factitious” system⁶⁹ full of procedural obfuscation at the

expense of their clients and the public.⁷⁰ Civil courts were thus “shops” at which “delay [was] sold by the year as broadcloth [was] sold by the piece.”⁷¹

Bentham sought instead to make procedure as “natural” as possible,⁷² and he devoted the decade from 1803 to 1812 to drafting revised rules.⁷³ He also proposed replacing the term “court” with the word “judicatory” so as to avoid an association of judges with the monarchy.⁷⁴ In lieu of fragmented rules of evidence, made through common law judges, Bentham turned to his favored technique of codification.⁷⁵ In lieu of piecemeal adjudication, Bentham wanted judges to preside over a whole case (through what today is called the “individual” calendar system, as contrasted with the “master” calendar system) so as to dispense justice swiftly. And, in lieu of judgments on the papers, Bentham wanted oral procedures; he proposed that all evidence be taken through “oral interrogation before the judge in public.”⁷⁶

Bentham also called for subsidies for those too poor to participate.⁷⁷ He proposed that an “Equal Justice Fund” be established, supported by using the “fines imposed on wrongdoers,” government funds, and charitable donations.⁷⁸ Bentham wanted not only to subsidize the “costs of legal assistance but also the costs of transporting witnesses” and the production of other evidence.⁷⁹ Bentham proposed that judges be available “every hour on every day of the year,”⁸⁰ and he suggested that courts be on a “budget” for evidence to produce one-day trials and immediate decisions.⁸¹ Bentham’s advocacy of simplifying procedure—in part through legislative control⁸²—aimed to enable public opinion to function as a “direct check” rather than be deflected through the technically abstruse system replete with “jargonization.”⁸³ Publicity, “underwritten by simplicity,” would be the “main security against misdecision and non-decision.”⁸⁴

Bentham’s focus was on trials in courts but he also appreciated aspects of what was then described as “conciliation,” for its resemblance to the more “natural” procedure he favored.⁸⁵ Examples of “conciliation courts” came from several countries, including Denmark and France, but details of their actual practices are not easily found. One model, from France, likely involved witnesses testifying before lay jurists.⁸⁶ Bentham noted that under the Danish procedures, the conciliation courts efficiently resolved a good many claims, heard together.⁸⁷ Further, in his work on the *Principles of Judicial Procedure*, Bentham called for judges to “exercise a conciliative function” to attempt to extinguish “ill-will.”⁸⁸

Yet, as William Twining’s reading of Bentham manuscripts identified, Bentham preferred “rectitude of decision, that is, a strict adherence to justice under

the law,” and thus accorded “only a grudging place to compromise.”⁸⁹ Amalia Kessler has specified various bases for Bentham's “anxiety” about conciliatory approaches. The lack of the formality of oath-taking and the absence of public scrutiny put honesty at risk.⁹⁰ Moreover, the informality of conciliation courts left decision makers free to make personal judgments rather than constrained by legal rules.⁹¹ Thus, a judge charged with compromise could permit “partiality” for one side to provide that party a “partial victory . . . under the pretext of conciliation.”⁹² As a consequence, in some instances, settlements could be “repugnant to” and a “denial of” justice.⁹³

2. The Architecture of Discipline: From “Judge & Co.” to the Panopticon

Bentham's commitment to publicity in trials was fierce: “Without publicity all other checks are insufficient: in comparison with publicity, all other checks are of small account.”⁹⁴ But more needs to be said about how—from his vantage point—“publicity” did its work. Bentham made various kinds of claims about publicity's utilities as he argued for its application to diverse activities.

One function of publicity was truth. Bentham argued that the wider the circle of dissemination of a witness's testimony, the greater the likelihood that a falsehood (“mendacity”) would be ferreted out.⁹⁵ (“Many a known face, and every unknown countenance, presents to him a possible source of detection.”⁹⁶) Moreover, through face-to-face examinations in tribunals readily accessible across the countryside,⁹⁷ judges could apply “substantive law to true facts,” adducing more information at lower costs.⁹⁸

A second product of publicity for Bentham was education. Bentham believed that the public features of adjudication would generate a desirable form of communication between citizen and the state. While not legally obliged to deliver opinions, Bentham thought judges would want their audience to understand the reasons behind their actions. Thus, it would be “natural” for judges to gain “the habit of giving reasons from the bench.”⁹⁹ Providing a stage for such dialogic exchanges, courts were “schools” as well “theatres of justice.”¹⁰⁰

Publicity's third function was disciplinary; “the more strictly we are watched, the better we behave.”¹⁰¹ Bentham proposed that ordinary spectators (whom he termed “auditors”¹⁰²) be permitted to make notes that could be distributed widely. These “minutes” could serve as insurance for the good judge and as a corrective against “misrepresentations” made by “an unrighteous

judge.”¹⁰³ More generally, “notification” of the public¹⁰⁴ imposed oversight as it provided a possibility of reform. Once informed, public opinion could exercise its authority to “enforce the will of the people by means of the moral sanction”—akin to “judges operating under the Common Law.”¹⁰⁵

Bentham’s views on the importance of publicity were not limited to courtrooms, for he believed its benefits—truth, education, interaction, and superintendence—to be useful in diverse settings across a vast swath of social ordering. The “doors of all public establishments ought to be thrown wide open to the body of the curious at large—the great *open committee* of the tribunal of the world.”¹⁰⁶ Bentham’s invocation of door-opening was more than a metaphor; he literally described in detail how to design structures to ensure these activities took place before the public. These many and varied plans used architecture as “a means of securing publicity, while publicity was a means of securing responsibility.”¹⁰⁷

Bentham is (in)famous for promoting the “Panopticon,” a prison that was designed to subject incarcerated inmates to continual observation.¹⁰⁸ Bentham proposed similar configurations for “mental asylums, hospitals, schools, poor-houses, and factories”¹⁰⁹—subsequently prompting the Foucauldian fear of the power that the state could wield over individuals.¹¹⁰ Yet Bentham was not intent on designing buildings facilitating observation of persons only confined in institutions. He also wanted to put lawmakers before the public eye, and he specified several methods of doing so.¹¹¹ One was direct observation: he called for a debating chamber that was “‘nearly circular’ with ‘seats rising amphitheatrically above each other.’”¹¹² A second was to enlarge the “audience” by facilitating the flow of public information to persons not physically present. The proposal noted above—that observers be “auditors” in court, taking notes to be circulated—is one example. For legislatures, Bentham suggested that buildings include a “separate box for the reporters for the public papers.”¹¹³ Third, Bentham wanted to require legislatures to provide information through an “official report of its proceedings, including verbatim accounts of speeches where the subject was considered to be of sufficient importance.”¹¹⁴ While creating such information-forcing methods, Bentham did not want government officials to be the sole source of such accounts. His proposal to build-in designated space for newspaper reporters freed them “to produce unofficial records of the proceedings and thereby ‘prevent negligence and dishonesty on the part of the official reporters.’”¹¹⁵ As for the executive branch, Bentham designed a way to link the ministers of government, physically, through

“boxes and pulleys” to permit “instantaneous intercommunication.”¹¹⁶ He also wanted to have the administrative branch of government compile records of and statistical information about government’s output.¹¹⁷

Bentham’s enthusiasm for openness did not render him insensitive to the burdens of public processes and the need for privacy. He advocated closure in various contexts, such as secret ballots for voting, and listed several specific instances that made closure of trials appropriate. His justifications for privacy included protecting participants from “annoyance,” avoiding unnecessary harm to individuals through “disclosure of facts prejudicial to their honour” or about their “pecuniary circumstances,” and preserving both “public decency” and state secrets.¹¹⁸ Thus, the presumption in favor of public trials should, upon occasion, give way. (Bentham’s list of circumstances for closure, like his arguments for openness, parallel those made in contemporary courts.¹¹⁹) As for other parts of government, Bentham put the executive (or administrative) sphere at an “intermediate” level, noting that secrecy could be appropriate when issues of diplomacy and the military were involved.¹²⁰ Further, Bentham advocated an exception to his principle of publicity for voting; the secret ballot was protection against corruption.¹²¹

The end state of the various sources of information was to inform Bentham’s “Public Opinion Tribunal”¹²² —the general public, informed by knowing the basis for decisions, the process of decision making, and the outcomes, and thus able to assess whether the rules comported with its interests. As Bentham scholars have noted, his commitment to “common sense” and reliance on “*observation, experience, and experiment*” have a good deal in common with John Locke’s attachment to knowledge that was based in empiricism;¹²³ both men were optimistic (or naïve) about the complex relationship between knowledge and judgment.

Given his ambitions, Bentham ought to be read as broadening “the scope of democratic theory” by expanding the means of making elites accountable.¹²⁴ Furthermore, he sought to facilitate participation by the non-elite, as he advocated roles for the audience and subsidies for the poor to use judicial services.¹²⁵ Bentham aimed to produce what Robert Post has called “democratic competence,” which underlies commitments to free speech and a free press.¹²⁶ Thus, while a lively debate about how to categorize Bentham’s philosophy is ongoing, several Bentham scholars identify him as a proponent of democracy.¹²⁷

Bentham's insights were plainly radical when measured against the baseline of the historical context in which he wrote. In marked contrast to the adjudicatory proceedings of Renaissance Europe, when people watching trials were not seen as having the power to sit in judgment of judges or to assess the decency of the state's procedures, Bentham raised the possibility that the state itself could be subjected *to* judgment. Bentham's widely-quoted phrase made that point directly: "Publicity is the very soul of justice It keeps the judge himself, while trying, under trial."¹²⁸

As a consequence, and to borrow from Jonathan Crary, "spectators" moved away from that role's passivity to take up a more active posture as "observers," engaging not only in the carnival of the crowd but also in critique expressive of their developing authority.¹²⁹ By Bentham's era, the responses of observers were gaining weight and relevance. Popular opinion was coming to matter through the elaboration of what has come to be called a "public sphere" that could affect political rulers.

D. Forming Public Opinion through Complementary Institutions: an Uncensored Press and a Subsidized Postal System

While Bentham's attention to courts as places of politically relevant practices makes him especially relevant for this discussion, he was not the only theorist of his century specifically interested in the function of publicity.¹³⁰ For political philosophers, Immanuel Kant's "publicity principle" may be the more salient, with its well-known claim that all "actions relating to the right of other human beings are wrong if their maxim is incompatible with publicity."¹³¹ As David Luban has explained, Kant's formulation required policies to be subjected to public debate as a constraint.¹³² Both Kant and Bentham wrote in the wake of David Hume, regularly cited for the proposition that it is "on opinion only that government is founded."¹³³

Yet "opinion" in Hume's thought can be read as referring to the need of governments to gain public confidence through private exchanges and institutional arrangements balancing or checking different sets of interests so as to maintain equilibrium.¹³⁴ That concept is distinct from the active agency that subsequent writers attributed to public opinion (embodied, for example, in Bentham's Public Opinion Tribunal¹³⁵), and a considerable distance from the "intersubjectivity and mutual understanding" of contemporary theorists such as Jürgen Habermas¹³⁶ and Nancy Fraser.

How does the public, in any of these postures, obtain information? As noted, Bentham's suggestions included permitting note-takers (“auditors”) in court and reporters in the legislature so that the public had sources of knowledge independent of the government.¹³⁷ As he explained, “the distinction between a government that is despotic, and one that is not so” is that “some eventual faculty of effectual resistance, and consequent change of government, is purposely left, or rather given, to the people.”¹³⁸ Another was an unfettered press that would help, Bentham thought, promote the requisite “*instruction, excitation, correspondence.*”¹³⁹ Indeed, Bentham thought the “newspaper was a far more efficient instrument than pamphlets or books” because of the “regularity and constancy of attention” it provided to unfolding events.¹⁴⁰

Bentham’s enthusiasm for an exchange among citizens, via press and post, was shared by others on both sides of the Atlantic. James Madison’s short essay, *Public Opinion*, extolled its virtues as “the real sovereign in every free” government.¹⁴¹ To enhance the “general intercourse of sentiments,” Madison wanted the ready “circulation of newspapers through the entire body of the people.”¹⁴² This exchange could enable the public to monitor their representatives (in a Benthamite fashion) or provide citizens in a fledging polity a means to gain a sense of affiliation with their government (akin to Hume’s aspiration of gaining public confidence).¹⁴³ Thus, scholars of the theories of both Bentham¹⁴⁴ and Madison¹⁴⁵ disagree about the degree to which they hoped to inspire participatory exchanges as contrasted with disciplinary control. Post, press, and courts could be means of engendering cohesion with the “imagined community” of the nation-state,¹⁴⁶ either to debate its norms or to bring into being Madison’s “united public reason,”¹⁴⁷ with the political force to support the government.¹⁴⁸

In the United States, echoes of these various aspirations can be found in some state constitutions express commitments to a free press that sometimes sat—as in Georgia’s 1777 Constitution—next to jury rights (“Freedom of the press and trial by jury to remain inviolate forever”¹⁴⁹). The 1791 Bill of Rights also provided protection for the free press,¹⁵⁰ complementing congressional authority under the 1789 Constitution to “establish Post Offices and Post Roads.”¹⁵¹ Pursuant to its constitutional mandates, Congress enacted the Post Office Act of 1792,¹⁵² which expanded the network of communications (mostly via stage coaches) by giving newspapers “unusually favorable terms, facilitated the rapid growth of the press,” and prohibited government surveillance of posted exchanges.¹⁵³

During the first century of the existence of the United States, federal buildings outside of Washington were relatively rare, and the few that were built were Marine Hospitals and Customs Hospitals.¹⁵⁴ Federal judges often had space tucked inside or took space in other buildings. Similarly, post offices initially camped out in other facilities such as in Baltimore “in the basement of a popular hotel; in Philadelphia, in a corner of the mercantile exchange; in Boston, on the first floor of a dilapidated colonial state house.”¹⁵⁵ One of the early purpose-built post offices was in Washington, D.C. The building was designed—replete with marble, a first among all federal buildings—by Robert Mills, who served as the nation's first semi-official architect.¹⁵⁶ As the number of newspapers distributed through the mail increased—from 1.9 million in 1800 to 39 million in 1840¹⁵⁷—post offices gained a place of honor in the pantheon of federal architecture.¹⁵⁸

Turning for a moment to Europe, a “national network of symbolic communication” was put into place in the eighteenth century.¹⁵⁹ By the early 1700s, a “cross-post system” linked cities and by 1760 most major towns boasted daily mail service. Key to the utility of mail was literacy, evidenced by the fact that in 1630, an estimated 400 books were available while, by the 1790s, some 56,000 were in print.¹⁶⁰ In the contemporary world where internet broadcasts are commonplace, those achievements may be hard to appreciate but, in 1832, Francis Lieber pronounced the postal system “one of the most effective elements of civilization” along with the printing press and the compass.¹⁶¹

E. Developing Public Sphere(s)

The transformations in social, political, and technological orders have been enormous, and post offices and courts were but part of the changes. Technologies (such as the telescope, the microscope, and the camera) made palpable the existence of competing “truths” depending on one’s vantage point. Politics (such as the 1867 England Reform Act) had given “most of the urban working class the vote,”¹⁶² and the emergence of women’s suffrage¹⁶³ admitted more persons, with their varying vantage points, seeking recognition.

Bentham’s optimism about public knowledge gave way to concerns about the need to revitalize the public sphere, elaborated during the second half of the twentieth century by Jürgen Habermas.¹⁶⁴ Habermas credited Bentham with forging “the connection between public opinion and the principle of publicity.”¹⁶⁵ Habermas also read Bentham as seeking a transparency in parliamentary debates so that deliberations there would be continuous with those of the “public in

general.”¹⁶⁶ Habermas likewise credited Kant as identifying publicity as the mechanism for a convergence of politics and morality that could produce rational laws.¹⁶⁷ But Habermas argued that, because only property owners were admitted to the public debate, the public sphere had become a vehicle for “ideology”¹⁶⁸ and could no longer serve as a means for the “dissolution of power.”¹⁶⁹

Law was central to Habermas but unlike Bentham, details of the practices of courts were not.¹⁷⁰ Habermas focused on how law bound “state functions to general norms” that protected capital markets.¹⁷¹ Habermas cited practices in Austria and Prussia as examples of when “public scrutiny of private people coming together as a public” had helped to shape civil codes relating to property.¹⁷² When “legislation . . . had recourse to public opinion,” it could not be “explicitly considered as domination.”¹⁷³ Over time, a variety of “basic rights” (such as voting, free press, and association) protected access to the public sphere.¹⁷⁴ But without “universal access,”¹⁷⁵ which nineteenth-century Europe did not provide, the public sphere could not do its work.

Habermas both admired and critiqued “public opinion,” for he saw it as subject to manufacture through the intertwining forces of the market and the state. Publicity that had once served to enable opposition “to the secret politics of the monarchs” came instead to be used to earn “public prestige” for specially-situated interests.¹⁷⁶ The press became entangled with “public relations” efforts, as advertisements promoted consumerism.¹⁷⁷ The resulting consensus that might exist was superficial, “confusedly enough . . . subsume[d] under the heading ‘public sphere.’”¹⁷⁸ The public sphere thus served as a space for performance of prestige rather than as a forum for “critical debate.”¹⁷⁹

Habermas could draw on many instances of governments deploying publicity in service of their aims. A self-acknowledged example comes from President Theodore Roosevelt who, in his first annual congressional message, explained that “[t]he first essential in determining how to deal with the great industrial combinations is knowledge of the facts—publicity.”¹⁸⁰ He established a “publicity bureau” as a “Department of Congress” to investigate and disseminate data on the administrative work of federal agencies. Soon thereafter, advertising became a favored form of publicity, followed by a “science” of publicity as well as firms marketing themselves as experts in advertising and public relations.¹⁸¹

Habermas sought to interrupt such developments through prescriptions aimed at facilitating public reasoning as members of pluralist polities communicated, discursively, so as to reach a genuine consensus. According to

Habermas, individual private interests themselves were not capable of being “adequately formulated, let alone politically implemented, if those affected have not first engaged in public discussions to clarify which features are relevant in treating typical cases as alike or different”¹⁸² Positive law needed legitimacy derived through a procedure of “presumptively rational opinion- and will-formation.”¹⁸³ Thus, the public sphere needed to be reconstituted, as such discursive space was essential in the current social order. Without gods and monarchs, one needed a vibrant public sphere to establish that the relationship between the “rule of law and democracy” was more than a “historically contingent association.”¹⁸⁴

Borrowing from political theorist Nancy Fraser, I have added an “s” to the term public sphere in the subtitle of this section to underscore that no single “public” exists. Rather, a pluralistic social order, replete with racial, gender, class and ethnic hierarchies, is constituted through a series of spheres in which norms are debated.¹⁸⁵ Moreover, as Fraser has pointed out, the exchanges in these various and sometimes overlapping spheres are not equally participatory; certain voices dominate in stratified societies.¹⁸⁶ Fraser also focused on the disparate capacities of those who need to be heard as she called for “participatory parity” and argued for more structures to enable a “plurality of competing publics” to emerge rather than aspire to the formation of a “single, comprehensive public sphere.”¹⁸⁷ Courts are one site that is responsive in some measure to the inequities that undermine the kinds of “discourses” to which Habermas and Fraser aspire. As analyzed below, the obligations of equal treatment and open proceedings are expressly designed with participatory parity in mind.

F. Reflexivity: Transnational Signatures of Justice

Before turning to these contemporary utilities of adjudication in democratic social orders, a summary of the impact of past and current trends is required. Courts have been restructured during the last four centuries. The status of the judge shifted from loyal servant of the government to an independent actor, insulated from reprisal so as to be able to sit in judgment of the government. Enshrined in national laws (such as the 1701 Act of Settlement in Britain¹⁸⁸ and Massachusetts’s Constitution of 1780¹⁸⁹), this proposition has also become a fixture of transnational obligations. The European Convention on Human Rights of 1950 is illustrative—requiring that tribunals be “independent and impartial.”¹⁹⁰

Obligations of publicity are likewise entrenched in law, with injunctions to governments to protect the freedom of information.¹⁹¹ The 1948 Universal Declaration of Human Rights is one example: “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal” in determining criminal charges.¹⁹² Article 6 of the European Convention on Human Rights of 1950 frames the right more broadly, protecting openness in civil as well as criminal adjudication:

[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly¹⁹³

The 1966 International Covenant on Civil and Political Rights, promulgated by the United Nations, provides another example: “[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”¹⁹⁴

Court rules provide further specificity, with such requirements as having judgments be “pronounced in public” (to borrow from the Rules of Procedure and Evidence from the International Criminal Tribunal for the Territories of the former Yugoslavia¹⁹⁵), as well as published in written form.¹⁹⁶ One of the newest transnational courts, the International Criminal Court, goes further, requiring that decisions on admissibility (of potential cases), jurisdiction, responsibility, sentences, or reparations

shall be pronounced in public and, wherever possible, in the presence of the accused, the Prosecutor, the victims . . . and the representatives of the States which have participated in the proceedings.¹⁹⁷

Of course, such provisions also recognize the legitimacy of closures under specified circumstances.¹⁹⁸ And, while not often directly cited, Bentham’s explanation of publicity’s importance for adjudication (as well as his justifications for exceptions) has been echoed regularly by judges in both the United States and Europe, as they insist on public processes either when enforcing United States

constitutional provisions¹⁹⁹ or the “fundamental guarantee” to a “public hearing” under Article 6 of the European Convention on Human Rights.²⁰⁰

A term from the social theorist Pierre Bourdieu— “reflexivity”²⁰¹—is apt, in that the practices of open courts have become a signature feature that helps to define an institution *as a court*. The seventeenth and eighteenth centuries relied on foot traffic and personal visits; new techniques of dissemination developed thereafter.²⁰² In addition to (in pre-high security eras) the open doors and windows of courtrooms, the expansion of the newspaper business and commercial publishers for court decisions created paths to knowledge about what took place in courts. Requirements of publication became codified, as did practices of judgments be “pronounced in public” in courts around the world.²⁰³ One of the newest transnational courts, the International Criminal Court, specifically details both the various decisions that must be “pronounced in public” (including rulings on admissibility, jurisdiction, responsibility, sentences, or reparations) as well as the membership of the audience (“wherever possible,” readings shall be “in the presence of the accused, the Prosecutor, the victims . . . and the representatives of the States which have participated in the proceedings”).²⁰⁴

Today's technologies have amplified the options. In addition to electronic databases available on the internet²⁰⁵ and “public information officers” (“PIOs”) briefing the press, some jurisdictions televise court proceedings.²⁰⁶ Examples include the Supreme Court of Canada,²⁰⁷ the International Criminal Tribunal for Yugoslavia,²⁰⁸ many states in the United States,²⁰⁹ and an occasional federal appellate court.²¹⁰ Transnational courts often provide that judgments be published in more than one language; the Europe Court of Justice, for example, requires publication in more than twenty languages.²¹¹ The right of public access to courts is synergistic with the obligations to protect judicial independence and to hear both sides. Open processes can make plain that a government must acknowledge the independent power of the judge or, alternatively, can reveal state efforts to try to impose its will on judges. Together with opportunities to be heard, open access and judicial independence have become definitional of courts.

One can link some of these attributes to the past, and focus on the expansion and continuity of rights forged in the eighteenth century. But appreciation for changes is needed, not only in terms of the techniques for publicity but also in reference to new norms for judges and new forms of regulation of judges. The injunction “hear the other side” is ancient,²¹² but its implications have changed. While once the point of “fair process” was to provide

process in accordance with legal rules, over the last century “fairness” came to provide a metric of evaluation, obliging that governments provide a certain quantum of process when people asserted claims of rights.²¹³

Moreover, aspects of precepts of Bentham’s interest in oversight of judges helped to produce calls for judicial “accountability,” a proposition sometimes in tension with the ideology of judicial independence.²¹⁴ Today, publicity is used to facilitate evaluations, as exemplified by a 2008 study that reviewed surveys from several European countries that assessed “the quality of court performance” in providing public services. The measures, aiming to capture “fairness” and “efficiency,”²¹⁵ included reviews of complaints against judges. Accountability is also linked to “transparency,” a word regularly used in reference to courts, often clad in glass, said to embody that prescription.

As noted at the outset, another key difference between contemporary adjudication and earlier versions is who came within its parameters. Seventeenth-century courts did not operate under mandates that “everyone” could come and be heard or participate as witnesses, lawyers, and judges. But twentieth-century democracies came to posit that all persons, equal before the law, were entitled to seek legal redress including, at times, against the government itself. The newness of this precept bears emphasis. Only in the last half century have courts understood themselves to be required to admit women and men of all colors, ethnicities, religions, and other forms of affiliation or identity into all the roles within their halls. (One marker is that “diversity” has become a byword in judicial selection, and many countries now boast of women and men of all colors on the benches of their highest courts.) The influx of new participants has also produced new kinds of rights – from family law to environmental protection. The expansion of access, coupled with market economies reliance on courts, has transformed the volume, content, and nature of the business in courts. The result has been rising dockets and bigger courthouses.

II. Privatizing Adjudication

The very practices of adjudication in democracies that have opened up a world of persons eligible to bring claims to courts pose a profound challenge *for* courts. Around the world, dockets have swelled and, despite Bentham’s advocacy for an Equal Justice Fund, countries have not provided sufficient funding directly to courts or to litigants to enable all those eligible under law to pursue their claims or to support the staffing needs of judiciaries. While constitutional precepts at the

transnational, national, and subnational levels extol courts, recent rulemaking and statutes about courts have diminished the information-forcing, publicity-providing functions of courts. Three of these techniques—reconfiguring court-based procedures to privilege settlement, devolving adjudication to agencies that provide less public access, and outsourcing decisions to private providers—are sketched below.

A. Managerial Conciliation in Courts

A description proffered by a distinguished trial level judge, Brock Hornby, of the federal courts in the United States, captures one set of changes. Relying on visual terms, he wrote that “reality television” should portray a federal trial judge:

In an office setting without the robe, using a computer and court administrative staff to monitor the entire caseload and individual case progress; conferring with lawyers (often by telephone or videoconference) in individual cases to set dates or limits; in that same office at a computer, poring over a particular lawsuit’s facts, submitted electronically as affidavits, documents, depositions, and interrogatory answers; structuring and organizing those facts, rejecting some or many of them; finally, researching the law (at the computer, not a library) and writing (at the computer) explanations of the law for parties and lawyers in light of the sorted facts. For federal civil cases, the black-robed figure up on the bench, presiding publicly over trials and instructing juries, has become an endangered species, replaced by a person in business attire at an office desk surrounded by electronic assistants.²¹⁶

This picture accurately reflects that the mandate of federal judges has shifted. Some sixty years ago, when nationwide rules of civil procedure were promulgated, those rules created a “pre-trial” procedure for judges and lawyers to meet and confer in advance of trial. The innovation aimed to simplify trials; the archival records of the rule drafters do not reflect that judges were supposed to use the occasion to encourage lawyers to settle cases or to seek methods of dispute resolution other than adjudication.²¹⁷ Indeed, when in the 1950s a group of distinguished proceduralists returned from a visit to courts in Germany, they wrote

of their surprise at how the German judge was “constantly descending to the level of the litigants, as an examiner, patient or hectoring, as counselor and adviser, as insistent promoter of settlements.”²¹⁸

But, by the 1980s, that description became apt for judges in the United States, who were reframing their role and the rules that governed their procedures. By the early 1990s, and with enthusiastic support from Congress in provisions endorsing “alternative dispute resolution” (ADR),²¹⁹ what had once been “extra-judicial” procedures have become “judicial” procedures.²²⁰ As Judge Hornby’s description illustrates, federal judges are now multi-taskers, sometimes deployed as managers of lawyers and cases, sometimes acting like super-senior partners to both parties advising on how to proceed, sometimes serving as settlement masters or mediators, and at other times as referral sources, sending disputants either to different personnel within courthouses or to institutions other than courts. That work is one of the many factors contributing to the “vanishing trial,”²²¹ a term describing the fact that, as of 2002, fewer than two of one hundred civil cases filed in the federal courts started a trial.

B. Devolution to Agencies; Outsourcing to Private Providers

The reconfiguration of court-based procedures to focus on settlement is one of three principle techniques that produce the privatization of process, removing adjudicatory decisions from public purview. A second is the delegation of adjudicatory functions to administrative agencies. One way to map that shift is to consider the volume of judges and of cases in the two venues.

As of 2001, Congress had authorized some 1700 judgeships in the federal courts, with about 840 provided for trial judges constitutionally chartered and given life-tenure under Article III. Another 324 slots went to bankruptcy judges and some 470 for magistrate judges, both of whom sit for fixed and renewable terms pursuant to federal statutes. The number of judges working inside federal courthouses is dwarfed by the almost 5,000 judges serving in federal administrative agencies dedicated to dealing with disputes over decisions related to social security, immigration, employment, veterans, and the like.

Comparing the volume of fact-finding activities during 2001 in federal agencies and federal courts provides a snapshot of the shift towards administrative adjudication. That year, some 100,000 evidentiary proceedings—where a person testified, but not necessarily at a trial—took place inside the more than 550 federal courthouses around the United States. In contrast, some 700,000 evidentiary

proceedings took place in four federal agencies with a high-volume of adjudication.²²² But unlike federal courts, in which constitutional precepts insist that doors be open, many federal administrative adjudicatory proceedings are presumptively closed to outsiders. Further, even if one could attend, finding such hearings is difficult as they take place in office buildings that do not easily welcome passersby.²²³

The third mechanism of privatization is the outsourcing of decision-making through enforcement of contracts mandating arbitration in lieu of adjudication. My own 2002 cell phone service agreement provides an example: By unwrapping the phone and activating the service, I waived rights to go to court and became obligated to “arbitrate disputes arising out of or related to” this or “prior agreements.” Even when “applicable law” permitted joining class actions or class arbitrations, I had waived rights to do so. In purported symmetry, this contract stated that both the provider and the consumer were precluded from pursuing any “class action or class arbitration.”²²⁴

The law of the United States once refused to enforce such pro form contracts out of concern that one party had overwhelming bargaining power. Judges also explained that arbitration was too flexible, too lawless, and too informal as contrasted with adjudication, which they praised for its regulatory role in monitoring adherence to national norms.²²⁵ However, beginning in the 1980s, the Supreme Court reversed some of its earlier rulings. It reread federal statutes to permit—rather than to prohibit—enforcement of arbitration contracts when federal statutory rights were at stake, so long as the alternative mechanism provided an “adequate” mechanism to enforce statutory rights.²²⁶ Adequacy did not, however, require the same procedures (such as discovery), and the burden of showing that costs charged to disputants are inappropriately burdensome falls on the party contesting the mandate to use the alternative to court.²²⁷

The explanations proffered by judges developing this case law relied not on the differences between arbitration and adjudication, but on the similarities—both were posited to be simply variations on the dispute resolution theme. In the United States today, consumers and employees alleging that companies have violated federal or state statutes of various kinds (such as truth-in-lending or anti-discrimination laws) can be sent to dispute resolution programs selected by manufacturers and employers. In addition, when parties disagree about how to interpret contractual provisions about whether arbitration is required, the Supreme

Court has ruled that such issues are to be decided, at least initially, by the private arbitrators and not by judges.²²⁸

Yet conflict continues about the propriety of such provisions as well as their scope. One wave of litigation is focused on prohibitions on “class arbitrations”—contracts that purport to preclude aggregation of claims in these alternative fora.²²⁹ Another set of cases challenges arbitration provisions in certain kinds of contracts, such as credit cards, on anti-trust grounds, as evidence of collusion in consumer practices.²³⁰ Lawsuits predicated on state consumer laws also object to the lack of neutrality of arbitration services, with allegations that, in debt collection cases, one provider of services decided “in favor of the business entity and against the consumer 100% of the time.”²³¹ A related federal congressional investigation concluded that in that industry, “consumer arbitrations” were rarely filed by consumers; rather, debt collection agencies relied on contracts requiring arbitration to use such procedures “against consumers.”²³²

Some lawmakers have translated these concerns into constraints on the use of these contracts for certain kinds of transactions. Congress has insulated poultry farmers and car dealers, who are not bound by *ex ante* waivers of rights to arbitrate.²³³ Other legislative proposals call for broadening those protections to civil rights claimants and consumers.²³⁴ European courts have been reluctant to permit enforcement of contracts in which one party has the power to draft, making “unfair terms” in consumer contracts unenforceable.²³⁵ Thus, adjudicatory procedures are themselves in litigation, with ongoing debates about when to permit and when to preclude opportunities to use open courts.

C. Law’s Migration: ADR Across Borders

The narrative of shifting procedural norms is not limited to the United States. Many litigants, judges, lawyers, and law professors are members of transnational organizations that serve as mechanisms for the import and export of norms and practices.²³⁶ During the twentieth century, many such entities promoted adjudication, both within nation-states and beyond. The growth in border-crossing courts is illustrative. In 1946, the International Court of Justice (ICJ) at the Hague became the successor institution to the League of Nations’ court. In the 1950s and 1960s, the ICJ was joined by regional courts in Europe and in the Americas and, in the 1990s, by the International Tribunal for the Law of the Seas (ITLOS), the International Criminal Court, and geographically focused courts dealing with the former Yugoslavia, Rwanda, and Sierra Leone.

More recently, the transnational norm entrepreneurs have developed the market of ADR, embraced by many sectors worldwide. In England and Wales, the “Woolf Reforms” of the 1990s have put into place pre-filing “protocols” that require lawyers to negotiate before filing lawsuits.²³⁷ Refusals to accept settlements and insisting on trials can put litigants at risk of cost sanctions.²³⁸ The impact has transformed the procedure of England and Wales, as well as influenced practices in some other Commonwealth countries such as Australia and Canada.²³⁹

Linda Mulcahy has concluded that as a consequence of such changes and choices in courtroom construction, the “spectator has been marginalized,” undermining the norm of public trials.²⁴⁰ After studying settlement programs in English courts, Simon Roberts similarly found that courthouses have become “increasingly symbolic” spaces; the large buildings are now used to “legitimize the decision-making of the parties themselves.”²⁴¹ Hazel Genn in turn asked “What is Civil Justice For,” as she explored the lack of funding, the declining trial rates, and the pressures to move away from public processes in England.²⁴²

Moving from this example of one country to the European Union, a 2008 Directive on Mediation called for national courts to develop that mode of dispute resolution for cross-border disputes.²⁴³ And, just as many transnational courts exist, many private providers of dispute resolution services are competing intensely for market shares. With reforms of commercial arbitration laws in England making it more attractive,²⁴⁴ new institutions—such as a “JAMS,” an acronym to denote a company providing “Judicial Arbitration & Mediation Services”—are now proffering their services worldwide.²⁴⁵ What do these arbitrations, including when government authorities are disputants, offer? In addition to parties’ abilities to pick their judges and their procedures, they can also decide that the procedures and the outcomes remain outside the public purview.

My purpose is not to homogenize the important distinctions across jurisdictions, courts, and dispute resolution mechanisms, but rather to underscore a trend. The rationales for the shift in doctrine and practice are many, as analytically different concerns (not to be detailed here) support efforts for ADR. What the various reformers share is a failing faith in adjudicatory procedure and the normative premise that parties’ consent, developed through negotiation or mediation, is preferable to outcomes that judges render when issuing public judgments predicated on state-generated regulatory norms.

The twentieth century has been marked by the “triumph” of adjudication as courts became the *sine qua non* of market economies and of governments. The last

decades of that century and the beginning of the twenty-first present another trend, the decline of courts in favor of alternatives whose processes and outcomes are less public and less regulated than those of courts.

III. Adjudication as a Democratic Practice

What then is problematic? A Benthamite response is that the privatization of courts undercuts their accuracy, educative, disciplinary, and legitimating functions. Further, Bentham was skeptical of conciliation because it privatized decision-making, rendering litigants more dependent on judicial preferences than on law. Yet, one could concur or demur on various grounds, both empirical and normative.²⁴⁶ For example, in so far as Bentham argued that publicity enhanced factual accuracy, a good deal of contemporary research instead points to how visual cues can be misread and be misleading.²⁴⁷ Further, evidence provided by “innocence projects,” examining trial records after convictions and freeing those wrongly convicted, document persons sentenced to death based on witnesses who lie in public.

In work related to this essay, Dennis Curtis and I take a somewhat different tack, overlapping in inquiring about public courts as sources of knowledge but interested in different kinds of production. Our argument is not focused on the relationship between openness and truth but instead on how public processes of courts give meaning to democratic aspirations that locate sovereignty in the people, constrain government actors, and insist on the equality of treatment under law.²⁴⁸ While Bentham stressed the protective side of adjudication (policing judges as well as witnesses), we are interested in how the public facets of adjudication engender participatory obligations and enact democratic precepts. On this account, diminution of public adjudication is a loss for democracy because adjudication can itself be a kind of democratic practice. Specifically, normative obligations of judges in both criminal and civil proceedings to hear the other side,²⁴⁹ to welcome “everyone” as an equal, to be independent of the government that employs and deploys them, and to provide public processes enable two kinds of democratic discourses. One is between public observers and “Judge & Co.” (borrowing Bentham’s reference to judges and lawyers but enlarging it to include litigants as well). The other comes from exchanges among the direct participants in an adjudicatory triangle.

Before unpacking these claims, two prefatory comments are in order, one about the meaning of adjudication and the other about democracy. A good deal of

the literature on trials is focused on the criminal docket, with its encounters between individuals and the state seen as politically freighted, as governments are understood to have special obligations towards the accused, as well as victims.²⁵⁰ The question of structuring procedures to legitimate violence against those violating social norms in the criminal context²⁵¹ has sometimes deflected attention from state power that inheres in judgments requiring the transfer of assets, the reconfiguration of families, the legitimacy of the receipt of government benefits, or the regulation of commercial transactions. Thus, our interest is in shaping an understanding of the political import of adjudication—whether denoted criminal or civil, public, administrative, or private.

Further, when democracy is mentioned in relationship to adjudication, the presumed reference is to the jury. The jury is not the focus here, nor is democracy defined only through popular sovereignty principles expressed by electoral processes.²⁵² Rather, we are interested in probing how adjudication affects and is affected by a democratic political framework striving to ensure egalitarian rights and attentive to risks of minority subjugation.

A. The Power of Participatory Observers to Divest Authority from Judges and Litigants

Return to the opening options of a “closed military court” or an “open criminal court” for trials of suspected terrorists, and reflect on the possible role that audiences play in courts. Open courts and published opinions permit individuals who are neither employees of the courts nor disputants to learn, first-hand, about processes and outcomes. Indeed, courts—and the discussions that their processes produce—are one avenue through which private persons come together to form a public,²⁵³ assuming an identity as participants acting within a political and social order. Courts make a contribution by being what could be called “non-denominational” or non-partisan, in that they are one of relatively few communal spaces not organized by political, religious, or social affiliations. Open court proceedings enable people to watch, debate, develop, contest, and materialize the exercise of both public and private power.

This openness changes the power relationships between the participants and their audiences by preventing the state and disputants from controlling the social meaning of conflicts and their resolutions. This point was made decades ago when Hannah Arendt observed in the context of twentieth-century Stalinist Russia that show trials were a crack in totalitarianism, for they demonstrated that a

government felt the need to provide an explanation, however contrived, rather than impose its power without a façade of justification.²⁵⁴ “The very fact that members of the intellectual opposition can have a trial (even though not an open one), can make themselves heard in the courtroom and count on support outside it, do not confess to anything but plead not guilty, demonstrates that we deal here no longer with total domination.”²⁵⁵

A disquieting example of this shift in power comes from the broadcast of the video of the death of Saddam Hussein. Hussein was hanged on December 30, 2006, five days after he lost an appeal of his sentence.²⁵⁶ At first, the media reported that “14 Iraqi officials had attended the hanging” at an unspecified location and that witnesses said Mr. Hussein “was dressed entirely in black and carrying a Koran and that he was compliant as the noose was draped around his neck.”²⁵⁷ But within a day, a “video . . . appeared on the Internet . . . apparently made by a witness with a camera cellphone;” the tape showed the “mocking atmosphere in the execution chamber” and recorded the taunts hurled at Hussein at his death.²⁵⁸ The organized media in different countries debated whether to air that video²⁵⁹ but did not control all of the channels of distribution. Dissemination was decided by others, who posted the video on the web. The disclosures resulted in a torrent of reaction about the timing, fact, and process of the execution.

The uncontrollability of the dissemination of that video has its counterpart in thousands of ordinary actions that take place in low-level tribunals. Once events are accessible to an audience of third parties who are “spectators and auditors” (to borrow Bentham’s categories²⁶⁰), they can put their descriptions and commentary into the public realm. These exchanges are rich, albeit sometimes pain-filled, sources of communicative possibilities. Diverse speakers, some of whom may respond by seeking vengeance and others by offering reasoned discourses, all understand themselves as speaking authoritatively based on what they have witnessed or read. In contrast, without direct access, non-parties must rely on insiders—government officials or disputants—for their information, inevitably filtered through their perspectives. Public procedures teach that conflicts do not belong exclusively to the disputants or to the government, as they give the public a place in which to interpret, own, or disown what has occurred.

Moreover, courts provide a unique service in that they create distinctive opportunities to gain knowledge. Conflicts have many routes into the public sphere. The media (including bloggers) or members of government may initiate investigations. Courts may help uncover relevant information in these arenas (as

we have seen in the litigation related to individuals detained after 9/11). But courts distinguish themselves from either the media or other government-based investigatory mechanisms in an important respect: the attention paid to ordinary disputes.²⁶¹ Courts do not rely on national traumas or scandals or on selling copies of their decisions. Courts do not respond only when something “interesting” is at issue.

What is the utility of having a window into the mundane as well as the dramatic? That is where people live and that is where state control can be both useful and yet overreaching. The dense and tedious repetition of ordinary exchanges is where one finds the enormity of the power of both bureaucratic states and private sector actors. That power is at risk of operating unseen. The redundancy of various claims of right and the processes, allegations, and behaviors that become the predicates to judgments can fuel debate not only about the responses in particular cases but also about what the underlying norms ought to be. So-called “domestic violence” provides one ready example of the role of public processes in reorienting an understanding of what was once cabined as “private” and tolerated as within the familial realm. Civil and criminal litigation about violence against women has helped to shape an understanding of how gender-based violence is a mechanism of subordination and an abuse of power.²⁶²

Public knowledge gathered from open dispute resolution ought not, however, to be presumed to be generative of policies running in any particular direction or of attitudes supportive of judicial rulings. Public awareness can generate new rights, like protection against violence, as well as new limitations, such as “caps” on monetary awards for torts because of a popular view that courts (and specifically juries) over-compensate victims.²⁶³ Moreover, because even a few cases can make a certain problem vivid, social policies may respond in extravagant ways to harms that are less pervasive than perceived.

B. Public Relations in Courts

Bentham presumed what now seems to be a naïve faith in the free-forming public opinion. Post-Habermas commentators (with television shows such as “Mad Men” about advertising agencies in view) are, in contrast, well aware of how “public relations” in courts can aim to manipulate opinion.²⁶⁴ In high-stakes, high-visibility litigation, disputants with resources may hire media consultants who work with lawyers to shape popular views of the merits of the claims. Courts in turn worry about distortion of their work; many now provide “public

information services” or “media alerts” to directly disseminate decisions. Campaigns against judges also rely on publicity to pressure judges (who may, if needing to be reappointed or reelected be vulnerable) to be responsive to opinions in ways that can undermine judicial autonomy. One anti-immigration prosecutor in Arizona, for example, has repeatedly accused the local courts and particular judges of failing to enforce laws related to unlawful entry into the United States.²⁶⁵ As David Luban has thus noted, publicity itself can be used to undercut the legitimacy of the very institution making the knowledge public.²⁶⁶

High-profile cases have galvanized sectors of the public, able to use the attention brought to particular kinds of harms to change governing laws. Criminal sanctions are exemplary here, as public disclosures of particular crimes produce anger. In response, judges and legislatures have imposed enhanced sentences. Illustrative is the press coverage of individuals found to have sexually assaulted children, which has prompted new laws that require individuals who are convicted of a wide array of offenses to register so that their names and photos are broadcast and potential neighbors can be forewarned about their presence upon release from prison.²⁶⁷ Thus, publicity itself has come back into vogue as a form of punishment.

How does one assess such changes? Bentham had argued that expanding the flow of information will enable public opinion to become “more and more enlightened”²⁶⁸ to advance society’s interests. That metric requires some definition of what societal interests are. Experiences since Bentham with public displays make plain that openness does not necessarily trigger reasoned discourses, nor does increased information necessarily “produce an improvement in the quality of opinions held by the people.”²⁶⁹ Further, the harms of false accusations—vivid during the 1950s as individuals were accused of being Communists—are substantial²⁷⁰—rendered all the more powerful through the distribution mechanism of the internet.²⁷¹ Webcasting live trial testimony (as contrasted with appellate arguments) raises yet other problems, for it could turn the act of bearing witness to particular events into being put on display through Youtube.

Law has not ignored the need to impose some degree of regulation on audiences. Legal rules and doctrine insist on decorum inside courtrooms. Further, the need to prevent trials from devolving into carnivals or from engendering sentiment weighted sharply towards one party has resulted, upon rare occasion, in exclusion of the press.²⁷² Other rules aim to cabin efforts by audience members to influence decision makers. An example from the United States was an effort by observers to wear badges depicting a victim of a crime; the issue was whether such

a display had prejudiced a jury.²⁷³ Others report courtroom-packing to convey impressions about a defendant's contributions to segments of a community.²⁷⁴

The development of new methods of producing public events—through web databases and broadcasts—requires new applications for audiences can be both virtual as well as physically present. In jurisdictions that provide for electronic filings that become available on the web, requirements now direct that certain kinds of information (such as social security numbers) be deleted.²⁷⁵ Further, as discussed at the outset, when a trial judge planned to permit a video stream of the trial about the constitutionality of California's prohibition on same-sex marriage, he also limited the sites of observation to a few federal courthouses and retained discretion to exclude certain portions from the webcast.²⁷⁶

In short, to appreciate the political and social utilities of the public dimensions of adjudication is not to ignore the costs and burdens imposed (Bentham listed many²⁷⁷), nor to underestimate the potential for the exploitation of courts. The immediate participants in a dispute may find the exposure to the public disquieting. Even the disclosure of accurate information can be uncomfortable. Moreover, the public dimensions of adjudication may inhibit parties' abilities to find common ground, thereby deepening discord. And, despite Bentham's confidence that public disclosure reveals falsehoods, many court records are subsequently impeached as predicated on lies by witnesses.

Further, one should not romanticize spectatorship. Recall that the 2010 decision by the United States Supreme Court about the exclusion of the public arose from a trial judge asking the "lone courtroom observer" to leave the room.²⁷⁸ Locating judgment in courthouses with windows to the streets and open doors makes publicity possible, but a question remains about how to secure an audience whose members understand themselves as participatory observers, functioning politically as responsible "auditors"²⁷⁹ rather than indifferent viewers or as partisans. Watching state-authorized processes could prompt celebration, action, or dialectic exchanges that develop new norms of diverse kinds, but boredom can also result. Bentham saw this problem of obtaining "an audience for the 'judicial theatre.'"²⁸⁰ He considered whether to have public authorities require attendance as a matter of duty, provide compensation for attendance, or devise some other "factitious means" to bring people into the audience.²⁸¹ Another method was the printed word; Bentham advocated that permission be liberally granted for the publication of information obtained—and for its republication as well.

New technologies such as webcasting reduce the challenges for those seeking to observe court proceedings. However, although virtual capacities make it easier to watch, they also enable snippets of information to be consumed in private, without any semblance of processes signaling civic responsibility. Technology does more; it increases the competition for attention through opening windows into many dramas, resulting in what Jonathan Crary has called a “suspension of perception.”²⁸² Getting and keeping attention in a world rich or overwhelmed with a plethora of visual materials haunts all efforts at constructing shared and sustained experiences of the interactions between “facts and norms” (to borrow from Habermas).

Thus, a host of problems haunt the project of publicity. Viewers may be episodic or distracted, and neither interested in nor able to see full proceedings and to understand and accurately put their knowledge into the public stream of information. Some problems stem from getting an audience and sustaining attention, and others relate to getting attention of the wrong kind. As noted above, high profile cases may create misimpressions about the frequency or depth of particular kinds of harms and may prompt lawmaking that is either overbearing or unresponsive. Litigation develops narratives that—as an empirical matter—affect and sometimes generate public agendas and fuel social movements addressing the intersections of private interests and public rights. (In the United States, debates about abortion, affirmative action, and sexuality provide ready examples.²⁸³) Authority is relocated but whether the results are “enlightened” depends on views about the underlying social norms, before and after the conflicts that public court processes help to spawn.

But while the desirability of the outcomes may vary depending on one's viewpoint, open courts express the democratic promises that rules can change because of popular input. The public and the immediate participants can see that law varies by contexts, decision makers, litigants, and facts, and they gain a chance to argue that the governing rules or their applications are wrong. Through democratic iterations—the backs and forths of courts, legislatures, and the public—norms can be reconfigured. Thus, to insist on courts as vital facets of democratic functioning is also to acknowledge that, like the democratic output of the legislative and executive branches, adjudication does not always yield wise or just results. The argument is that it offers opportunities for democratic norms to be implemented through the millions of exchanges in courts among judges, audiences,

and litigants. Courts are an important component of functioning democracies seeking to demonstrate legitimacy through displaying the quality of governance.²⁸⁴

C. Dignifying Litigants: Information-Forcing through Participatory Parity

Thus far, the discussion has focused on courts as both information-forcing, information-recording, and power-reallocating. Contribution *by* courts to public discourses may not be sufficient to support a commitment *to* courts in the future. The Renaissance town hall and county courthouses were centers of communal life. These were the places where commerce and political life mixed on a small scale, where records (of land ownership and peoples' life passages) were kept, and where rituals were shared. Contrast contemporary conditions—an array of specialized public buildings providing different services, the organized press, televised broadcasts of legislative proceedings, reality TV, and diverse online media, bloggers including. Places other than courts can spark debate, even as courts offer a special contribution through responding to a volume of mundane matters along with high profile disputes.

A distinct facet of what makes courts especially useful in democracies comes from shifting attention from what potential observers may see and do to the interactions among litigants, judges, witnesses, and jurors. This aspect of our argument about the utility of open courts hinges on the view that adjudication is itself a democratic practice—an odd moment in which individuals can oblige others to treat them as equals as they argue in public about their disagreements, misbehavior, wrongdoing, and obligations. Litigation forces dialogue upon the unwilling (including the government) and, momentarily, alters configurations of authority. The social practices, the etiquette, and a myriad of legal rules shape what those who enter courts are empowered to do.²⁸⁵

When cases proceed in public, courts institutionalize democracy's claim to impose constraints on state power. More than that: in criminal trials, the theory of trial is that defendants are enabled, by procedures, to "*contest the common interpretation*" of their actions and to oppose government imposed meanings.²⁸⁶ In many legal traditions, a conviction person has a "right of allocution," a right to speak before being sentenced, that forces the judge to acknowledge the personhood of the defendant and to hear whatever that individual wishes to say.²⁸⁷ Many commentators note that the jury—as well as lay judges more generally—infuse adjudication with democratic participation by qualified citizens who gain

the stature of judge, ad hoc.²⁸⁸ But consider also the democratic constraints imposed on professional jurists. If working in open courts, the government employees we call judges have to account for their own authority by letting others know how and why power is used. (Recall Bentham's admonition: "Publicity is the very soul of justice It keeps the judge himself, while trying, under trial."²⁸⁹)

Courts can be a great leveler in another respect, in that participatory parity²⁹⁰ is an express goal, even when not achieved. "Hear the other side" has been augmented, in many jurisdictions, by obligations to equip "the other side"—sometimes by means of free lawyers for criminal defendants or poor civil litigants or targeted funds for witnesses and transcripts. Moreover, when government officials are parties to litigation, they are forced either as plaintiffs or defendants to comply with court rules, divulging information and responding to questions posed by opponents or the court. In countries requiring disclosures of documents through discovery, government litigants must also produce documents, files, e-mails, and other records.

Courts' processes render instruction on the value accorded to individuals and, on occasion, reveal that courts cannot or do not make good on commitments of equal treatment and respect. For example, during the 1970s and 1980s, as claims of discrimination based on race and gender were brought to courts, some judges responded as though differential treatment was natural. Lawyers and litigants sometimes found that, because of their gender and race, they were subjected to treatment they found demeaning. In response to such concerns, the chief justices of many state courts convened special projects, denominated "fairness" or "gender bias" and "racial bias" task forces, to inquire into areas of law (such as violence against women or sentencing) and practices (such as modes of address or appointments to court committees) to learn about variations by gender, race, and ethnicity.²⁹¹ Statutes, rulemaking, and case law resulted because transcripts, judgments, and public exchanges documented behaviors at odds with the provision of "equal justice under law."²⁹²

This function of courts as potentially egalitarian venues can be seen from attempts to avoid them. After 9/11, the executive branch in the United States repeatedly sought to enact legislation "stripping" courts of jurisdiction over claims that the government had wrongly detained and tortured individuals.²⁹³ The effort to create a separate "tribunal system" for alleged enemy combatants aimed to

control access and information as well as to limit the rights of detainees by augmenting the powers of the state.

IV. The Press, the Post, and Courts: Venerable Eighteenth Century Institutions Vulnerable in the Twenty-First

Bentham, Madison, and their cohort helped to frame three institutions of discourse—the court system, the postal service, and the uncensored press.²⁹⁴ As has become familiar in the last decade, the stability of two -- the postal service and the press—is in question as both are beset by difficulties.

One report characterized the United States Postal Service as in a “death spiral.”²⁹⁵ In 2009, 13,000 fewer post offices existed than had in 1951, with more closings underway.²⁹⁶ As the system continued to lose money (with \$2.8 billion cited as the amount lost in 2008²⁹⁷), some commentators called for the dissolution of the Postal Service as an obsolete institution to be replaced by the internet and private providers.²⁹⁸ Others worried that the Postal Service had already been transformed, favoring “junk mailers and big media over political opinion journals.”²⁹⁹

The contemporary defense of the post office as a public institution rests on arguments akin to those made by Madison and Bentham—that ready communication through public services binds the nation and local communities while servicing the needs of the economy.³⁰⁰ Indeed, in the 1958 Postal Policy Act, the U.S. Congress made such an argument—that its establishment of the post service was “to unite more closely the American people, to promote the general welfare, and to advance the national economy.”³⁰¹ Yet, by the 1970s, Congress had limited the cross-subsidies that made the exchange of newspapers inexpensive,³⁰² lessening the degree to which the public fisc subsidized a universal service that facilitated a wide range of exchanges.³⁰³

A similar narrative of vulnerability envelops the press, with the decline of print media, consolidation of ownership, and diffusion through electronic sources.³⁰⁴ In 1950, when the U.S. population stood at just over 152 million, some 1,700 daily newspapers were supported through customers, resulting in a circulation of almost 54 million paper copies. By 2008, the U.S. population had doubled to 304 million, but the number of papers circulated was down; 1,400 daily newspapers delivered 48 million copies.³⁰⁵ In 2009, more than a hundred newspapers closed, including large presses such as the Seattle Post-Intelligencer.³⁰⁶ Well-known and long-solvent publishers of newspapers filed for

bankruptcy,³⁰⁷ and the revenues of the remaining papers dropped between 2007 and 2009.³⁰⁸

The question is whether the fragility of the press and the post forecasts what awaits courts. Evidence of deep concern about the solvency of courts can be found throughout the state systems. Indeed, in the fall of 2009, the Chief Justice of Massachusetts warned that state courts were at risk of a “slow and painful demise.”³⁰⁹ More than 40,000 people entered the courts of Massachusetts on a daily basis, but funding for the services they sought was scarce.³¹⁰ In her view, one ought not assume that courts were “too big to fail,” and that like other “big” institutions critical to the country, might need “federal assistance for infrastructure support.”³¹¹ Returning to the federal courts for a moment, a pervasive assumption has been that case filings, which grew over the twentieth century, would always be increasing. Yet, with small variations in numbers, federal court filings – aside from bankruptcy petitions – have been more or less flat in the years between 1995 and 2010. Despite the predictions of a 1995 *Long Range Plan of the Federal Courts* that, by 2010, more than 600,000 cases would be before the federal judiciary, the number of civil and criminal cases filed annually has ranged since then from about 325,000 to 375,000.³¹² Of course, many variables affect filing rates, but concerns about filing and trial data have sparked concern from congressional oversight committees. In May of 2010, a Subcommittee on Economic Development, Public Buildings, and Emergency Management of the Committee on Transportation and Infrastructure held hearings to consider curtailing funding for courthouse construction.³¹³

Chief Justice Marshall’s comments and the data on federal adjudication capture concerns that animate this discussion. Courts have a longevity that in addition to their girth (measured in both stone embodiments and dockets) may make them seem invulnerable. Our purposes in going back centuries to trace the movement from the pageantry and spectacle (the “rites”) entailed in Renaissance adjudication to the entitlements (“rights”) of democracies is to underscore the dynamic quality of courts. Just as the hundreds of courthouses built in the last hundred years provide solid testaments to judicial authority, so do many massive structures attest to the importance of the invention of the postal service. Yet various of those buildings have now been tore down or recycled for other uses.

“Bargaining in the shadow of the law” is a phrase often invoked,³¹⁴ but bargaining is increasingly a requirement of the law of conflict resolution. While one might be enthusiastic about the development of institutions offering competition to the state and undermining the hegemony of it, the alternatives to adjudicatory facilities developed thus far have not been accompanied by

transparent processes enabling evaluation of their contributions. Further, their use in many instances has been a mandate of the state, rather than an option proffered. Further, their authority rests on state enforcement.

Thus, the distinctive character of adjudication as a specific kind of social ordering is diminishing. Through case management, judicial efforts at settlement and mandatory ADR in or through courts, devolution to administrative agencies, and enforcement of waivers of rights to trial, the framework of “due process procedure” with its independent judges and open courts, is being replaced by what can fairly be called “contract procedure.”³¹⁵ Despite growing numbers of persons who use the title “judge” and conflicts called “cases,” it is increasingly rare for state-empowered actors to be required to reason in public about their decisions to validate one side of a dispute. In mimetic symmetry, both court-based judges and their counterparts in the private sector now produce private outcomes that are publicly sanctioned. Thus, the efforts to manage increased demands on courts by shifting to alternative dispute resolution represent adjudication’s decline.

Bentham had proposed that the evils of “Judge & Co.” be curtailed with simpler and more public procedures. Observation was a major part of his proposed interventions to curb the excesses. In contrast, contemporary solutions advocated by ADR proponents entail moving away from courts and privatizing procedures. Some of those efforts are defended as responsive to woefully inadequate budgets provided for courts. Yet the proffered solution of privatized processes threatens not only litigants and members of the potential audience but judges as well. As efforts aim to alter juridical modes and reconfigure courts as but one of many places for dispute resolution, as judges embrace management and settlement, as they stop working before the public eye and producing results subject to public scrutiny, judges lose the argument for judicial independence from political oversight as well as for public subsidies. Further, judges may themselves be protected by the public nature of their work and may be more vulnerable to political control if not required to do much of their job in court.³¹⁶

Procedures, laws, and norms have great plasticity. In 1850, fewer than forty federal judges worked at the trial level in the United States, and no building owned by the federal government had the sign “U.S. Courthouse” on its front door. By 2000, more than 1700 trial-level judges worked in more than 550 federal courthouse facilities. In these respects, while adjudication is an ancient practice, its current incarnation — and its theoretical availability to “everyone” — is relatively recent. Yet, practices that seemed unimaginable only decades ago (from the

mundane examples of the new reliance on court-based settlement programs to the stunning assertions by the U.S. government of the legitimacy of according little or no procedural rights to individuals at Guantánamo Bay and the proposal for “closed military courts”) are now parts of the collective landscape. In the 1970s, consumers of goods and services and employees were not required to sign form contracts that imposed bars to bringing claims to court. In that era, those who did file federal lawsuits were not greeted by judges insistent that they explore alternatives to adjudication.

As currently formatted, the ADR procedures cut off the communicative possibilities provided through courts to record, as well as to struggle with, conflicts over meaning, rights, and facts. The new procedures also undermine the discipline to be imposed on decision makers. Various private procedures prize “caucusing”—meeting “ex parte” (to borrow the Latin) rather than enabling each side, as well as the judge—to “hear the other side” (*audi alteram partem*) in front of their opponents. And the public is left utterly out. The pressures and permission for disputants to seek private and often confidential outcomes through procedures impose no discipline or accountability for decision makers (or facilitators), whether they be called judges, military judges, mediators, or arbitrators.

But the point is not to create undue dichotomies between adjudication and its alternatives. Indeed, the reconfiguration of processes in courts to produce private settlements makes plain that court-based procedures are not necessarily public ones. The parallel proposition is that one ought not assume that secrecy is an essential characteristic of ADR. Law can build in a place for the public (“sunshine,” to borrow the term that legislators have used³¹⁷) or wall off proceedings from the public. In some states, the outcomes of settlements in medical malpractice cases must be posted on the web; in others, a litigant must stand up in court to accept a settlement and acknowledge an understanding of its terms.³¹⁸ Whatever the places constituted as authoritative, opportunities exist to engender or to preclude communal exchanges. Or, as Bentham put it: “Considered in itself, a room allotted to the reception of the evidence in question . . . is an instrument rather of privacy than of publicity; since, if performed in the open air . . ., the number of persons capable of taking cognisance of it would bear no fixed limits.”³¹⁹

In sum, the choices of the construction of adjudication are upon us—whether to send “suspected terrorists” to “closed military courts,” and whether to call such institutions “courts” and thereby lend legitimacy to their outcomes. But

“suspected terrorists” are not the only persons who are being subjected to closed procedures authorized by the state. The display of justice is on the wane in some of the venues in which it was once vibrant, and its relocation to other locations has not been accompanied by either rites or rights of audience. If the twentieth century heralded the story of the triumph of an ideology committed to public court processes as central to responsible, democratic, national and transnational governance, the twenty-first century has thus far been marked by the retreat from those premises, literally and metaphorically.

Endnotes

¹ See CBS News.com, Poll: Most Oppose Terror Trials in Open Court, Nov. 17, 2009, http://www.cbsnews.com/htdocs/pdf/poll_issues_111709.pdf (hereinafter CBS Terror Trials Poll).

² CBS Terror Trials Poll. Six percent had no opinion. The pollsters further reported that of the 1167 adults, nationwide, 54 percent of the Democrats favored open trials, while sixty percent of the Republican/Independents favored closed military trials. *Id.* The survey did random dialing and split the sample between land-lines and cell phones. The margin of error was three percent. The poll inquired about a range of issues from the economy to Afghanistan. One question “What should happen to Guantanamo” elicited fifty percent calling for it staying open, as contrasted with 39 percent responding “close it down.” *Id.*

³ This essay’s title suggests that we “bring back Bentham” in relationship to his focus on the utility of “publicity.” A parallel phrasing for an essay related instead to distinguishing forms of “utility” (and particularly “experienced utility,” with its “hedonic quality”) comes from Daniel Kahneman, Peter P. Wakker, & Rakesh Sarin in *Back to Bentham? Explorations of Experienced Utility*, 112 Q. J. ECON. 375 (1997)

⁴ See Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in HABERMAS AND THE PUBLIC SPHERE 109 (Craig Calhoun, ed., 1992) (hereinafter Fraser, *Rethinking the Public Sphere*).

⁵ See, e.g., SUSAN SILBEY & PATRICK EWICK, *THE COMMON PLACE OF LAW: STORIES OF POPULAR LEGAL CONSCIOUSNESS* (1998); E. ALAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

⁶ See JUDITH RESNIK & DENNIS E. CURTIS, *REPRESENTING JUSTICE: FROM CITY-STATES TO DEMOCRATIC COURTROOMS AND GUANTÁNAMO BAY* (forthcoming Yale Press, 2011).

⁷ See BRUCE W. FRIER, *THE RISE OF THE ROMAN JURISTS: STUDIES IN CICERO'S PRO CAECINA* (1985); J.A. CROOK, *LEGAL ADVOCACY IN THE ROMAN WORLD* (1995).

⁸ See Tacitus, *Dialogus de Oratoribus* 39.1-4, reprinted in Bruce W. Frier, *Finding a Place for Law in the High Roman Empire*, in *SPACES OF JUSTICE IN THE ROMAN WORLD* (F. de Angelis & W. Harris, eds., 2009). Adriaan Lanni argues that courts in ancient Athens were important sources and enforcers of informal norms. See Adriaan Lanni, *Social Norms in the Courts of Ancient Athens*, 1 J. LEGAL ANALYSIS 691 (2009). See also LEANNE BABLITZ, *ACTORS AND AUDIENCE IN THE ROMAN COURTROOM* (2007).

⁹ See, e.g., Mario Sbriccoli, *Legislation, Justice and Political Power in Italian Cities, 1200-1400*, in *LEGISLATION AND JUSTICE* 37-55 (Antonio Padoa-Schioppa, ed., 1997). Sbriccoli traced the movement in the thirteenth century towards an inquisitorial posture that displaced private ordering (“vendettas, duels, and private alliances”) with “‘reasons for (public) justice’,” such that justice became “one of the criteria by which the effectiveness of government power was measured.” *Id.* at 49. See also Clive Holmes, *The Legal Instruments of Power and the State in Early Modern England*, in *LEGISLATION AND JUSTICE* at 267-289.

¹⁰ See Judith Resnik and Dennis E. Curtis, *From ‘Rites’ to ‘Rights’ of Audience: The Utilities and Contingencies of the Public’s Role in Court-Based Processes*, in *REPRESENTATIONS OF JUSTICE* (Antoine Masson & Kevin O’Connor, eds., 2008); ANTOINE GARAPON, *BIEN JUGER: ESSAI SUR LE RITUEL JUDICIAIRE* (*JUDGING WELL: AN ESSAY ON JUDICIAL RITUAL*) 267-288 (1997).

¹¹ Charter or Fundamental Laws, of West New Jersey, Agreed Upon, ch. XXIII (1676), reprinted in *SOURCES OF OUR LIBERTIES* 188 (Richard L. Perry ed. 1959), available at http://avalon.law.yale.edu/17th_century/nj05.asp.

¹² The land came under English control some time around the mid-1660s and then transferred from Charles II of England to James, Duke of York to Lord John Berkeley and Sir George Carteret. See Edwin Platt Tanner, *The Province of New Jersey, 1664-1738*, at 2-3 (New York, NY: Columbia University Press, 1908). In 1664, Lord Berkeley and Sir Carteret signed a constitution. See *The Concession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New Jersey, to and With All and Every the Adventurers and All Such as Shall Settle or*

Plant There (1664), http://avalon.law.yale.edu/17th_century/nj02.asp. The constitution specified that the “Governor and Council were to exercise a general supervision over all courts, and the execution of the laws; to direct the manner of laying out the lands; and were not to impose, nor suffer to be imposed, any tax upon the people not authorized by the General Assembly.” FRANKLIN B. HOUGH, II *AMERICAN CONSTITUTIONS: COMPRISING THE CONSTITUTION OF EACH STATE IN THE UNION, AND OF THE UNITED STATES* 31 (Albany, NY: Weed, Parsons & Company, 1872) (hereinafter HOUGH).

During Carteret’s tenure, the Dutch retook possession of the area briefly in 1673, when they regained neighboring New York, and the province was split into East and West in 1674. II HOUGH at 32-33. Following the split, the people of West New Jersey established their own plan of government. The Charter or Fundamental Laws, of West New Jersey, Agreed Upon, was prepared in England and published on March 3, 1676. II HOUGH at 33. The document’s origins may have come from the Quaker settlers of West New Jersey, and some speculate that William Penn may have been an author. See RONALD A. BANASZAK, *FAIR TRIAL RIGHTS OF THE ACCUSED: A DOCUMENTARY HISTORY* 15 (2002). One other note is in order. In proclaiming that “any person or persons, inhabitants of the said Province may freely come into, and attend the said courts,” the Charter may not have meant “any person” in the contemporary sense, given racial and gender hierarchies.

¹³ “All courts shall be open; and every man for an injury done him in his reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense.” DEL. CONST. of 1792, art. I, § 9, *reprinted in* BENJAMIN PERLEY POORE, I *THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES* 278, 279 (Washington, D.C.: Government Printing Office, 1877) (hereinafter POORE). That was Delaware’s second constitution.

¹⁴ See KY. CONST. of 1792, art. XII, *reprinted in* I POORE at 647, 655 (“all courts shall be open”); VT. CONST. of 1777, ch. II, § XXIII, *available at* http://avalon.law.yale.edu/18th_century/vt02.asp (“All courts shall be open, and justice shall be impartially administered, without corruption or unnecessary delay; all their officers shall be paid an adequate, but moderate, compensation for their services; and if any officer shall take greater or other fees than the laws allow him, either directly or indirectly, it shall ever after disqualify him from holding any office in this State.”)

¹⁵ All the original states' constitutions guaranteed jury trials for criminal defendants, as did all states entering after the Union was formed. *See, e.g.*, CONN. CONST. of 1818, art. First, § 9, *available at* <http://www.sots.ct.gov/sots/cwp/view.asp?a=3188&q=392280> (“In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to demand the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his favour; and in all prosecutions by indictment or information, a speedy public trial by an impartial jury.”); MASS. CONST. of 1780, Part the First, art. XII, *available at* http://press-pubs.uchicago.edu/founders/print_documents/v1ch1s6.html (“And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.”); N.C. CONST. of 1776, A Declaration of Rights, art. IX, *available at* http://avalon.law.yale.edu/18th_century/nc07.asp (“That no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court, as heretofore used.”). More of that history is detailed in the United States Supreme Court decision of *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968).

¹⁶ *See, e.g.*, ALA. CONST. of 1819, art. I, § 14, *reprinted in* I POORE at 32, 33 (“All courts shall be open . . .”); CONN. CONST. of 1818, art. I, § 12, *reprinted in* I POORE at 258, 259 (“All courts shall be open . . .”); FLA. CONST. of 1838, art. I, § 9, *reprinted in* I POORE at 317, 317 (“all courts shall be open”); IND. CONST. of 1816, art. I, § 11, *reprinted in* I POORE at 499, 500 (“all courts shall be open”); KAN. CONST. of 1855, art. I, § 16, *reprinted in* I POORE at 580, 582 (“All courts shall be open . . .”); LA. CONST. of 1864, art. 110, *reprinted in* I POORE at 739, 750 (“All courts shall be open . . .”); MISS. CONST. of 1868, art. I, § 28, *reprinted in* I HOUGH at 745, 749 (“All courts shall be open . . .”); NE. CONST. of 1867, art. I, § 9, *reprinted in* I HOUGH at 824, 827 (“All courts shall be open . . .”); N.C. CONST. of 1868, art. I, § 35, *reprinted in* II HOUGH at 110, 115 (“All courts shall be open . . .”); OH. CONST. of 1850-1851, art. I, § 16, *reprinted in* II HOUGH at 152, 157 (“All courts shall be open . . .”); PA. CONST. of 1838, art. IX, ¶ 11, *reprinted in* II HOUGH at 222, 237 (“all courts shall be open”); TENN. CONST. of 1870, art. I, § 17, *reprinted in* II HOUGH at 321, 326 (“all courts shall be open”); TEX. CONST. of 1869, art. I, § 11, *reprinted in* II HOUGH at 356, 360 (“All courts shall be open . . .”). *See generally* II HOUGH at 580-581.

Other nineteenth-century state constitutions provided for public access with somewhat different wording. *See, e.g.*, MO. CONST. of 1865, art. I, ¶ 15, *reprinted in* I HOUGH at 779, 783 (“That courts of justice ought to be open to every person, and certain remedy afforded for every injury to person, property, or character . . .”); OR. CONST. of 1857, art. I, § 10, *reprinted in* II HOUGH at 186, 189 (“No court shall be secret; but justice shall be administered openly and without purchase,

completely and without delay . . .”); S.C. CONST. of 1868, art. I, § 15, reprinted in II HOUGH at 276, 281 (“All courts shall be public, and every person, for any injury that he may receive in his lands, goods, persons or reputation, shall have remedy by due course of law and justice administered without unnecessary delay.”).

¹⁷ See ALA. CONST. art. I, § 13 (“That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.”); ARIZ. CONST. art. VI, § 2 (“The court shall be open at all times, except on nonjudicial days, for the transaction of business.”); CONN. CONST. art. I, § 10 (“All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”); DEL. CONST. art. I, § 9 (“All courts shall be open; and every person for an injury done him or her in his or her reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense.”); FLA. CONST. art. I, § 21 (“The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.”); IND. CONST. art. 1, § 12 (“All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase, completely, and without denial; speedily, and without delay.”); KY. CONST. § 14 (“All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”); LA. CONST. art. I, § 22 (“All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.”); MISS. CONST. art. 3, § 24 (“All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay.”); NE. CONST. art. I, § 13 (“All courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay, except that the Legislature may provide for the enforcement of mediation, binding arbitration agreements, and other forms of dispute resolution which are entered into voluntarily and which are not revocable other than upon such grounds as exist at law or in equity for the revocation of any contract.”); N.C. CONST. art. I, § 18 (“All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.”); N.D. CONST. art. I, § 9

(“All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay.”); OH. CONST. art. I, § 16 (“All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.”); PA. CONST. art. I, § 11 (“All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”); S.D. CONST. art. VI, § 20 (“All courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay.”); TENN. CONST. art. I, § 17 (“That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay.”); TEX. CONST. art. I, § 13 (“All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”); UTAH CONST. art. I, § 11 (“All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.”); WYO. CONST. art. 1, § 8 (“All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay. Suits may be brought against the state in such manner and in such courts as the legislature may by law direct.”).

¹⁸ U.S. CONST. art. III, § 3, cl. 1.

¹⁹ “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury” U.S. CONST. art. III, 2, cl. 3.

²⁰ U.S. CONST. amend. VI. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id. See generally SUSAN N. HERMAN, *THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* (Westport, Conn.: Praeger, 2006). The phrase “speedy public trial, by an impartial jury” can also be found in the Pennsylvania Constitution of 1776, A Declaration of the Rights of the Inhabitants of the Commonwealth or State of Pennsylvania, art. IX, *available at* http://avalon.law.yale.edu/18th_century/pa08.asp.

²¹ U.S. CONST. amend. VII.

²² *See, e.g.*, *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1 (1986); *Waller v. Georgia*, 467 U.S. 39 (1984); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court of L.A. County*, 980 P.2d 337, 20 Cal. 4th 1178 (1999); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 96 (2d Cir. 2004). That case concluded that “docket sheets enjoy a presumption of openness and that the public and the media possess a qualified First Amendment right to inspect them” and explained the utility of such an approach. *Id. See generally* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987).

²³ *Presley v. Georgia*, 130 S. Ct. 721 (2010) (per curiam). The case was decided on summary disposition, without full briefing and oral argument, over a dissent from Justice Thomas, joined by Justice Scalia, objecting to summary disposition of questions they saw as not foreclosed—whether criminal trial voir dire proceedings, like suppression hearings, were required by the Constitution to be open, whether defendants, as contrasted to the public, could insist on that right under the Sixth Amendment, and whether trial courts had the obligation to explore alternatives. The petitioner, Eric Presley, had been convicted of a cocaine trafficking offense; he claimed that “his Sixth and Fourteenth Amendment right to a public trial was violated when the trial court excluded the public from the *voir dire* of prospective jurors.” *Id.* at 722. The trial judge justified the exclusion on the basis of avoiding the observer/uncle from “intermingl[ing] with members of the jury panel.” *Id.* at 722.

²⁴ *Presley*, 130 S. Ct. at 724. The Court noted that the “extent to which . . . First and Sixth Amendment public trial rights are coextensive is an open question.” *Id.* But at least in the context of voir dire proceedings, there was “no legitimate reason . . . to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has. ‘Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.’” *Id.* (quoting *Gannett Co. v. DePasquale*, 443 U.S. 358, 380 (1979)).

²⁵ *Id.* at 724-725. The Court elaborated that, “There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing *voir dire*. But in those cases, the particular interest, and threat to that interest, must ‘be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.’” *Id.* at 725 (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984), and citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 15 (1986)).

²⁶ *Presley*, 130 S. Ct. at 724-725.

²⁷ See *Hollingsworth v. Perry*, 130 S.Ct. 705 (2010) (per curiam). At issue in the trial was the constitutionality of the amendment (enacted through a referendum known as “Proposition 8” (or “Prop. 8”), that had amended the California Constitution to state: “Only marriage between a man and a woman is valid or recognized in California.” See Ca. Const. Art. I, §7.5 (2009). A bench trial began in January 2010, and the presiding district court judge, Vaughn Walker, authorized its “broadcast live via streaming audio and video to a number of federal courthouses around the country.” *Hollingsworth*, 130 S. Ct. at 707. In the summer of 2010, Judge Walker ruled that the state constitutional amendment, by limiting marriage to a woman and a man, violated equal protection and due process rights guaranteed by the United States Constitution. See *Perry v. Schwarzenegger*, No. C 09-2292 VRW, 2010 WL 3170286 (N.D. Cal. Aug. 12, 2010).

²⁸ In 2009, the Chief Judge of the Ninth Circuit, Alex Kozinski, appointed a committee to consider adopting a circuit rule to permit a pilot program of broadcasting, at the discretion of trial judges. The Ninth Circuit Judicial Council announced its authorization to do so in December of 2009, through a “news release” explaining that cases would be selected for participation by the “chief judge of the district court in consultation with the chief circuit judge.” *Hollingsworth*, 130 S. Ct. at 708. See N.D. CAL. CIV. LOC. R. 77-3; Public Information Office, U.S. Courts for the Ninth Circuit, News Release: Federal Courthouses to Offer Remote Viewing of Proposition 8 Trial (Jan. 8, 2010). That rule amended a prior provision that had only permitted broadcasting at a judge’s permission for “ceremonial purposes.” *Hollingsworth* at 710 (citing the earlier rule). As the Supreme Court per curiam explained, the District Court made provisions for the broadcast in a January 7, 2010 order. *Hollingsworth*, 130 S. Ct. at 709. Thereafter, objectors, who had intervened as defendants, sought a writ of mandamus to stop the enforcement of that order. After the appellate court denied the mandamus, and the Chief Judge had approved five federal courts to which the

trial would be broadcast, the Supreme Court granted the stay. *Id.* at 709, and at 715.

²⁹ *Hollingsworth*, 130 S. Ct. at 711. Specifically, the Court granted a stay of the new rule that would have permitted the webcast. The majority held that the Ninth Circuit had changed its rule on broadcasting without the requisite public notice and comment, required by 28 U.S.C. § 2071(b). *Id.* As the majority further explained, a national federal judicial policy opposed broadcasting on the grounds of concerns about “the intimidating effect of cameras on some witnesses and jurors.” *Id.* at 712 (citing Report of the Proceedings of the Judicial Conference of the United States 47 (Sept. 20, 1994)). Thus, a “meaningful comment period was particularly acute.” *Id.* at 711. The majority also questioned whether, even if the rule had been properly promulgated, this “high profile” case was a “good one for a pilot program.” *Id.* at 714.

Justice Breyer, joined by Justices Stevens, Ginsburg, and Sotomayor, dissented. In their view, the case did not “satisfy a single one” of the standards for the grant of a stay. *Id.* at 715. As to whether “appropriate public notice” had been provided as required by statute, the dissenters thought that a confluence of factors sufficient (the Circuit’s Council had approved video broadcasts of appellate court panels since 2007; a study had been launched of district court broadcast provisions; the pilot program was announced through a press release, and “138,574 comments” were sent to the district court). *Id.* at 715-716. Further, the nature of the legal question – “local judicial administration” – was not one on which the Court “normally” granted certiorari, especially without any circuit split. *Id.* at 717. Moreover, the policy issue (cameras in the courtrooms) was not one for the Court, absent its implication of a “*question of law.*” *Id.* at 718 (emphasis in the original). Nor was there evidence of “irreparable harm,” in that more than forty states and some district courts already had discretion to broadcast nonjury civil trials. *Id.* Not only had none of the witnesses objected, most were already public experts or advocates for their positions. *Id.* Finally, the dissenters objected to the failure of the Court to balance the equities so as to take into account the public’s interest in observing trials. *Id.* at 719. See also Emily Bazelon, *Blind Justice: The Supreme Court blacks out the YouTubing of the gay-marriage trial* (Jan. 11, 2010) <http://www.slate.com/id/2241118/> (reporting that the appellate court had noted that since 1991, “more than 130 . . . appellate panels had broadcast their proceedings and that ‘an overwhelming majority’ of 9th Circuit judges ‘have had a positive experience’ with such coverage.”).

³⁰ U.S. CONST. art. I, § 5, cl. 3.

³¹ See, e.g., VT. CONST. of 1777, ch. II, § XII, available at http://avalon.law.yale.edu/18th_century/vt01.asp (“The doors of the house in

which the representatives of the Greene of this State, shall sit, in General Assembly, shall be and remain open for the admission of all persons, who behave decently, except only, when the welfare of this State may require the doors to be shut.”); N.Y. CONST. of 1777, art. XV, *available at* http://avalon.law.yale.edu/18th_century/ny01.asp (“That the doors, both of the senate and assembly, shall at all times be kept open to all persons, except when the welfare of the State shall require their debates to be kept secret. And the journals of all their proceedings shall be kept in the manner heretofore accustomed by the general assembly of the colony of New York; and except such parts as they shall, as aforesaid, respectively determine not to make public be from day to day (if the business of the legislature will permit) published.”)

³² U.S. CONST. art. I, § 9, cl. 7. Enforcement, however, is a problem in that under current law, it is not clear who can bring lawsuits to compel such disclosures. See *United States v. Richardson*, 418 U.S. 166 (1974) (holding that a taxpayer lacked standing to challenge the CIA’s secret budget as unconstitutional under Article I, § 9, clause 7).

³³ U.S. CONST. art. IV, § 1.

³⁴ U.S. CONST. amend. I.

³⁵ See, e.g., R. Malcolm Smuts, *Public Ceremony and Royal Charisma: The English Royal Entry in London, 1485-1642*, in *THE FIRST MODERN SOCIETY: ESSAYS IN ENGLISH HISTORY IN HONOUR OF LAWRENCE STONE* 65-93 (A.L. Beier, David Cannadine & James M. Rosenheim, eds., Cambridge, Eng: Cambridge U. Press, 1989) (hereinafter *THE FIRST MODERN SOCIETY*).

³⁶ See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 32-120 (Alan Sheridan trans., 2d ed. 1995).

³⁷ Katharine Fremantle, *The Open Vierschaar of Amsterdam’s Seventeenth Century Town Hall as a Setting for the City’s Justice*, 77 *OULD HOLLAND* 206, 208 (1962)

³⁸ Thomas W. Laqueur, *Crowds, Carnival and the State in English Executions, 1604-1868* (hereinafter Laqueur), in *THE FIRST MODERN SOCIETY* 305, 309-311. Laqueur examined graphic prints displaying the carnival-like atmosphere, suggesting that “from the audience’s perspective, executions were a species of festive comedy or light entertainment” with a theatricality that came to be parodied. *Id.* at 323-325. See also SAMUEL Y. EDGERTON, JR., *PICTURES AND PUNISHMENT: ART AND CRIMINAL PROSECUTION DURING THE FLORENTINE RENAISSANCE* (1985).

³⁹ MIKHAIL BAKHTIN, *RABELAIS AND HIS WORLD* 10 (Helene Iswolsky trans., 1984).

⁴⁰ Laqueur at 352. Public executions stopped in England in the late 1960s, and by 1965, the United Kingdom effectively abolished capital punishment itself. See Murder (Abolition of Death Penalty) Act 1965, c.71 (Eng.). Yet, as Foucault pointed out, the authority had already shifted its sites of operation. Governments cut out the crowds by incarcerating individuals in prisons removed from the public eye. FOUCAULT, *DISCIPLINE AND PUNISH* at 7-8.

⁴¹ C. W. Brooks, *Interpersonal Conflict and Social Tension: Civil Litigation in England, 1640-1830*, in *THE FIRST MODERN SOCIETY* 357. Brooks also noted that eighteenth century rates of civil litigation were lower than in some prior eras. *Id.* at 396-397. English history also included a brief period, in the 1760s, when both litigants and spectators had to pay fees to enter the galleries of the Old Bailey, London's criminal court. See John Brewer, *The Wilkites and the Law, 1763-74: A Study of Radical Notions of Governance*, in *AN UNGOVERNABLE PEOPLE: THE ENGLISH AND THEIR LAW IN SEVENTEENTH AND EIGHTEENTH CENTURIES* 128, 150 (John Brewer & John Styles, eds., New Brunswick, NJ: Rutgers U. Press, 1980); Simon Devereaux, *The City and the Sessions Paper: "Public Justice" in London, 1770-1800*, 35 *J. BRITISH STUDIES* 466, 486 (1996). Another form of limited access was that not all that materials submitted were included in the records kept. *Id.* at 488.

⁴² By way of illustration, between 1560 and 1640, "the number of lawyers ('barristers') qualified before the central courts increased fourfold." Holmes, *The Legal Instruments of Power and the State*, in *LEGISLATION AND JUSTICE* at 269, 273.

⁴³ See JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* (1827) (hereinafter BENTHAM, *RATIONALE*), in 6 *THE WORKS OF JEREMY BENTHAM* 351 ("Of Publicity and Privacy, as Applied to Judicature in General, and to the of the Evidence in Particular") (John Bowring, ed., Edinburgh, Scot.: William Tait, 1843) (hereinafter BOWRING/*WORKS*). William Twining, a scholar at University College London who worked on Bentham, noted that Bentham devoted more than 2,500 manuscript pages to the *Rationale* and that the discussion of publicity was likely written around 1812. WILLIAM TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* 29 (London, Eng: Weidenfeld & Nicolson, 1985).

Quotations to "Bentham" come primarily from a few of the volumes of the "*Works of Jeremy Bentham*" published in the nineteenth century by John Bowring, who served as Bentham's literary executor and who put several volumes into print after Bentham's death in 1832. For facsimiles of the *Works*, available at

http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php&title=192. Special thanks are due to Philip Schofield, Director of the Bentham Project at University College London (UCL), Faculty of Laws, for guidance in identifying the relevant texts and with the assistance of Kate Barber, providing a database of searchable transcriptions of files by Bentham relating to his *Scotch Reform* (1808) and collected by Anthony Draper.

New editions of Bentham's work are underway to take into account "the collection of 60,000 manuscript folios deposited in the UCL Library." See UCL Faculty of Laws: The Bentham Project, The Greatest Happiness of the Greatest Number, http://www.ucl.ac.uk/Bentham-Project/site_images/Leaflets/Publicity.pdf. As of 2006, twenty-six new volumes of the Collected Works of Jeremy Bentham were in print, and "forty or so more" were needed "to finish the job." PHILIP SCHOFIELD, *UTILITY AND DEMOCRACY: THE POLITICAL THOUGHT OF JEREMY BENTHAM* vi (New York, NY: Oxford U. Press, 2006) (hereinafter SCHOFIELD, *UTILITY AND DEMOCRACY*).

Because variations exist between original manuscripts and what has been published, the study of Bentham is "necessarily more provisional than that of many other past thinkers." See SCHOFIELD, *UTILITY AND DEMOCRACY* at vi. Disparities are also detailed by Anthony J. Draper, "*Corruptions in the Administration of Justice*": *Bentham's Critique of Civil Procedure, 1806-1811*, 7 J. OF BENTHAM STUDIES (2004), http://www.ucl.ac.uk/Bentham-Project/journal/jnl_2004.htm (hereinafter Draper, *Corruptions*; page numbers are from web printout). Draper described the "published work" as bearing "few similarities to the surviving manuscript." Draper, *Corruptions* at 3. See also Stephen G. Engelmann, "*Indirect Legislation*": *Bentham's Liberal Government*, 35 POLITY 369, 370 n.4 (2003).

⁴⁴ SCHOFIELD, *UTILITY AND DEMOCRACY* at 59-77.

⁴⁵ The attack was written in 1795 in an essay that is also known as "Anarchical Fallacies." See Philip Schofield, *Jeremy Bentham's "Nonsense Upon Stilts,"* 15 UTILITAS 1, 10 (2003). Bentham did not oppose moral guidance but resisted the claim that such precepts had binding force. *Id.* at 7. See also Schofield, *Jeremy Bentham: Historical Importance and Contemporary Relevance* at 51-55.

⁴⁶ Schofield, *Jeremy Bentham's "Nonsense Upon Stilts,"* at 13 (quoting Bentham).

⁴⁷ *Id.* at 26 (emphasis in original).

⁴⁸ See FOUCAULT, *DISCIPLINE AND PUNISH* at 200-210. See also Dilip Parameshwar Gaonkar with Robert J. McCarthy, Jr., *Panopticism and Publicity*:

Bentham's Quest for Transparency, 6 PUBLIC CULTURE 547, 558-568 (1994) (hereinafter Gaonkar).

⁴⁹ “Unverifiable” was the term proffered by Foucault to capture the power that visibility of the Benthamite kind imposed through imposing a “state of conscious and permanent visibility” that “automizes and disindividualizes power.” See FOUCAULT, DISCIPLINE AND PUNISH at 201-202.

⁵⁰ SCHOFIELD, UTILITY AND DEMOCRACY at 135.

⁵¹ SCHOFIELD, UTILITY AND DEMOCRACY at 150-152, 155. Bentham noted a condition—showing that females and males had distinct interests. Nicola Lacey interpreted Bentham to have embraced women’s suffrage on utilitarian grounds and concluded however that, if he were to insist on women’s suffrage, other proposals for reform would be dismissed, and thus also excluded women’s suffrage from his agenda on “utilitarian grounds.” Nicola Lacey, *Bentham as Proto-Feminist? Or an Ahistorical Fantasy on ‘Anarchical Fallacies,’* 51 CURRENT LEGAL PROBLEMS 441, 444 (1998) (hereinafter Lacey). Yet he “perceived far more clearly than most of his (male) contemporaries the irrationalities and injustices which characterized women’s social position in the late eighteenth century.” *Id.* at 466.

⁵² SCHOFIELD, UTILITY AND DEMOCRACY at 152.

⁵³ SCHOFIELD, UTILITY AND DEMOCRACY at 348.

⁵⁴ “Of the substantive branch of the law, the only defensible object or end in view is the maximization of the happiness of the greatest number of the members of the community in question. Of the adjective branch of the law [procedure], the only defensible object, or say end in view, is the maximization of the execution and effect given to the substantive branch of the law.” JEREMY BENTHAM, PRINCIPLES OF JUDICIAL PROCEDURE WITH THE OUTLINES OF A PROCEDURE CODE (hereinafter BENTHAM, PRINCIPLES OF JUDICIAL PROCEDURE), in 2 BOWRING/WORKS at 6.

⁵⁵ SCHOFIELD, UTILITY AND DEMOCRACY at 304; see also Margery Fry, *Bentham and English Penal Reform*, in JEREMY BENTHAM AND THE LAW 38 (George W. Keeton & Georg Schwarzenberger, eds., 1948) (1998).

⁵⁶ SCHOFIELD, UTILITY AND DEMOCRACY at 304. See also THE COLLECTED WORKS OF JEREMY BENTHAM: ‘LEGISLATOR OF THE WORLD’: WRITINGS ON CODIFICATION, LAW, AND EDUCATION (Philip Schofield & Jonathan Harris, eds.,

Oxford, Eng: Oxford U. Press, 1998) (hereinafter BENTHAM: LEGISLATOR OF THE WORLD).

⁵⁷ JEREMY BENTHAM, LAW AS IT IS, in 5 BOWRING/WORKS at 236-237.

⁵⁸ BENTHAM, LAW AS IT IS, in 5 BOWRING/WORKS at 233. Bentham's critique continued that judges made the common law just "as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it." *Id.* at 235. Common law judges treated men the same by not telling them "beforehand what it is" that should not be done but instead lie in wait until he had done something he ought not, and then "hang him for it." *Id.*

⁵⁹ BENTHAM, LAW AS IT IS, in 5 BOWRING/WORKS at 236-237.

⁶⁰ BENTHAM, LAW AS IT IS, in 5 BOWRING/WORKS at 235.

⁶¹ Bentham's correspondence with Madison can be found in JEREMY BENTHAM, PAPERS RELATIVE TO CODIFICATION AND PUBLIC INSTRUCTION: INCLUDING CORRESPONDENCE WITH THE RUSSIAN EMPEROR, AND DIVERS CONSTITUTED AUTHORITIES OF THE AMERICAN UNITED STATES, in 4 BOWRING/WORKS 451, at 453. Another compilation, including exchanges from state governors and others, are reproduced in BENTHAM: LEGISLATOR OF THE WORLD at 5-43, 52-59, 68-81.

⁶² See Chilton Williamson, *Bentham Looks at America*, 70 POLITICAL SCIENCE QUARTERLY 543, 544-545 (1955).

⁶³ Jeremy Bentham, *Papers Relative to Codification and Public Instruction: Including Correspondence with the Russian Emperor, and Divers Constituted Authorities of the American United States*, in 4 BOWRING/WORKS at 467. As Schofield and Harris dryly noted, "it was extremely unlikely that the Americans would be prepared to accept a code of law from an unknown English lawyer." BENTHAM/LEGISLATOR OF THE WORLD at xiii. Bentham did get responses from the Governor of New Hampshire and from a Virginia lawyer—indicating that Bentham's request to have his offer circulated widely had resulted in some press distribution.

⁶⁴ Editorial Introduction to BENTHAM: LEGISLATOR OF THE WORLD at xii-xxx. Bentham offered his services, for example, to Alexander I of Russia in 1814. FREDERICK ROSEN, JEREMY BENTHAM AND REPRESENTATIVE DEMOCRACY: A STUDY OF THE CONSTITUTIONAL CODE 3 (1983).

⁶⁵ Hence, the essay was titled *Truth v. Ashurst*. Sir Ashurst was the name of the “Pusine Judge of the King’s Bench.” In the table of contents of its Bowring publication, it has a subtitle: “or, Law as it is, contrasted with what it is said to be.” First published in 1823, it is reprinted in 5 BOWRING/WORKS at 231-237. Bentham’s introductory note to the 1823 publication mentioned that he had written the manuscript version soon after he had read “a charge, delivered the 19th of November 1792, to a Middlesex Grand Jury” by Ashurst. *Id.* at 232.

⁶⁶ BENTHAM, LAW AS IT IS, in 5 BOWRING/WORKS at 233-234.

⁶⁷ BENTHAM, LAW AS IT IS, in 5 BOWRING/WORKS at 233-234.

⁶⁸ Draper, *Corruptions* at 7.

⁶⁹ TWINING at 52.

⁷⁰ See TWINING at 28, 41-42, 76-79. Twining explained that Bentham was not arguing corruption but that the “single class or corporation” comprised of judges and lawyers had shaped a self-serving regime. *Id.* at 76. Draper reports that “[i]n every section of Scotch Reform, both published and unpublished, Bentham never tires of stating his absolute disability to conceive of any selflessness in the actions of lawyers.” Draper, *Corruptions* at 5. Bentham—fond of coining new words—offered the term “litiscontestation” to “signify indiscriminately the course of operation gone through on the occasion of a suit at law.” JEREMY BENTHAM, CONSTITUTIONAL CODE (hereinafter BENTHAM, CONSTITUTIONAL CODE) at ch. 23, section 1, art. 2, in 9 BOWRING/WORKS at 589. (Thanks to Philip Schofield for pointing us to this term and to Adam Grogg for a review of Bentham’s writings to understand its deployment.)

Bentham’s distrust of professional jurists was matched by his dislike of religious authority. See Philip Schofield, *Jeremy Bentham: Historical Importance and Contemporary Relevance*, in JEREMÍAS BENTHAM: EL JOVEN Y EL VIEJO RADICAL, SU PRESENCIA EN EL ROSARIO 51, 73-75 (Bogotá, Colombia: Universidad Colegio Mayor de Nuestra Señora del Rosario, 2002) (hereinafter Schofield, *Jeremy Bentham: Historical Importance and Contemporary Relevance*). And according to H. L. A. Hart, Bentham was skeptical enough of government officials in general to compare them to criminals:

Bentham came indeed to view governments, “the ruling few,” as potential criminals perennially tempted to pursue their personal interests at the expense of the public. This was the standing conflict between the sinister interest of the ruling few and the interest of the subject many. Rulers therefore were to be regarded like potential robbers whom it was necessary always to suspect and always to subject to the control of the public. So he

fashioned the slogans “minimise confidence” and “maximise control”, and claimed that the appropriate form of control in constitutional law was to place the power of appointment and dismissal of government in the hands of the people.

H. L. A. Hart, *Bentham and the United States of America*, 19 J. OF LAW & ECON. 547, 558-59 (1976).

⁷¹ Quoted in Draper, *Corruptions* at 5.

⁷² See JEREMY BENTHAM, SCOTCH REFORM: CONSIDERED WITH REFERENCE TO THE PLAN, PROPOSED IN THE LATE PARLIAMENT, FOR THE REGULATION OF THE COURTS, AND THE ADMINISTRATION OF JUSTICE IN SCOTLAND (1808) (hereinafter BENTHAM, SCOTCH REFORM), at Letter I, in 5 BOWRING/WORKS at 7-14. The distinctions between “natural procedure” and “technical procedure” were juxtaposed through a layout of dual columns.

⁷³ TWINING at 23.

⁷⁴ ROSEN at 149.

⁷⁵ TWINING at 3.

⁷⁶ TWINING at 31.

⁷⁷ ROSEN at 153-155.

⁷⁸ SCHOFIELD, UTILITY AND DEMOCRACY at 310; ROSEN at 153-154.

⁷⁹ ROSEN at 153-154.

⁸⁰ See Thomas P. Peardon, *Bentham’s Ideal Republic*, 17 CANADIAN J. ECON. & POL. SCIENCE 184, 196 (1951). Rosen described Bentham’s goal as having all persons, on foot, be able to reach a local judicial officer and return home without having to pay to find a place to sleep over night. ROSEN at 149. To lessen expense, Bentham also built in a system of “referees” or “arbitration” overseen by judges. Id. at 151.

⁸¹ See Draper, *Corruptions* at 11.

⁸² Draper, *Corruptions* at 8-9. See also SCHOFIELD, UTILITY AND DEMOCRACY at 308-312.

⁸³ BENTHAM, SCOTCH REFORM, in 5 BOWRING/WORKS at 23. *See also* TWINING at 78, 80.

⁸⁴ TWINING at 48.

⁸⁵ *See* Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 THEORETICAL INQUIRIES IN LAW 423 (2009).

⁸⁶ Kessler at 435.

⁸⁷ Kessler at 436-37 (drawing on correspondence of Bentham).

⁸⁸ BENTHAM, PRINCIPLES OF JUDICIAL PROCEDURE, in 2 BOWRING/WORKS at 47.

⁸⁹ TWINING at 94-95. Specifically, Bentham recorded his admiration for Denmark's "Reconciliation Courts." *See* BENTHAM, PRINCIPLES OF JUDICIAL PROCEDURE, in 2 BOWRING/WORKS at 46-47. Bentham described how parties, under those courts (or "judicatories"), met to deal with all their conflicting claims, as contrasted with more "technical" systems in which different forms of action (contract, tort) had to be dealt with separately. (Bentham was, more generally, enthusiastic about what today would be called liberal joinder of parties and claims, enabling all rights arising from given events to be dealt with in one forum at the same time.) Bentham recounted that, in Denmark's Reconciliation courts, "from two-thirds to three-fourths" of suits using its procedures were "struck out"—concluded in some fashion that took them off the docket. *Id.* at 47. Bentham also noted that the success came despite "disadvantages" — that Denmark's Reconciliation court had "no power . . . to give execution and effect to its own decisions." *Id.* at 47. Bentham argued that, were the mechanism deployed in England and provision made for the judiciary to enforce judgments, it would be all the better.

Bentham's description leaves ambiguous what Danish "Reconciliation Courts" did. His point about the lack of enforcement suggests that these courts entered some form of judgment. As he described, "the damage, in whatever shape, from every wrong on each side, will operate as a set-off to every other; an account, as complete as may be, will be taken of what is due on each side; and a balance struck, and payment . . . made accordingly." *Id.* Thus reconciliation or conciliation may not parallel contemporary "settlements", in which parties agree to an outcome in lieu of a third party rendering a decision.

⁹⁰ Kessler at 438.

⁹¹ Kessler at 438.

⁹² Kessler at 441 (quoting Bentham’s *De L’organizzazione giudicaria, et de la Codification* in the edition of Bentham put out by Étienne Dumont, his French editor). Kessler also described the interest in England and the United States in the “European Model of Conciliation Courts” (id at. 443-451) and argued that the rejection of that model in the United States reflected a commitment to less deferential attitudes towards authority, expressed through the embrace of adversarial procedure.

⁹³ BENTHAM, SCOTCH REFORM, IN 5 BOWRING/WORKS AT 35. Further, “what has taken place is oppression: oppression in the shape of extortion:- of extortion of which the power of Judge and Co has in every case been the instrument: and in the profit of which they have in many, and perhaps in most instances, received their share: only that in this case the extortion has not extended to the whole but has left a part untouched.” In yet unpublished manuscripts relating to *Scotch Reform*, Bentham criticized court-enforced settlements: “Thus is that under the technical system, almost always, the word compromise is an euphemism: misconception is as often the result of it. The supposition is that justice is done to each; and that each remains self-assured that what he has received is justice. The truth is—that what has taken place is oppression: oppression in the shape of extortion:—of extortion of which the power of Judge and Co has in every case been the instrument: and in the profit of which they have in many, and perhaps in most instances, received their share: only that in this case the extortion has not extended to the whole but has left a part untouched. A compromise it is, if a compromise it must be called - such as that which has place between the passenger and the highwayman when the purse is yielded without a struggle. . . . [T]he purse is pocketed by the highwayman, the passenger goes off with his life.” Draper/Scotch Reform manuscript database, No. 092-154, June 7, 1807, “Superseded? Scotch Reform 2, Letter V., Litigation Prevent. & Promot., Plff. mala fide.”

⁹⁴ BENTHAM, RATIONALE, in 6 BOWRING/WORKS at 355.

⁹⁵ BENTHAM, RATIONALE, in 6 BOWRING/WORKS at 355. As Twining quoted Bentham, “Falsehood—corrupt and wilful falsehood—mendacity, in a word—the common instrument of all *wrong*” was the “irreconcilable enemy of justice.” TWINING at 90 (emphasis in original).

⁹⁶ BENTHAM, RATIONALE, in 6 BOWRING/WORKS at 355 (quoting himself from an earlier volume).

⁹⁷ TWINING at 48-51.

⁹⁸ Here we borrow Twining's summary of Bentham's thesis in the *Rationale of Judicial Evidence*. TWINING at 27-28.

⁹⁹ BENTHAM, RATIONALE, in 6 BOWRING/WORKS at 357.

¹⁰⁰ BENTHAM, RATIONALE, in 6 BOWRING/WORKS at 354. This imagery has currency in both France and the United States. See KATHERINE FISCHER TAYLOR, IN THE THEATER OF CRIMINAL JUSTICE: THE PALAIS DE JUSTICE IN SECOND EMPIRE PARIS (1993); Milner S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81 (1975). Nancy Fraser and Jürgen Habermas, discussed *infra* text surrounding nn. 163-187, also employ the theater metaphor. See Fraser, *Rethinking the Public Sphere*, at 110-111 (describing Habermas's public sphere as a "theater in modern societies in which political participation is enacted through the medium of talk. It is the space in which citizens deliberate about their common affairs, and hence an institutionalized arena of discursive interaction. This arena is conceptually distinct from the state; it is a site for the production and circulation of discourses that can in principle be critical of the state.").

¹⁰¹ See UCL FACULTY OF LAWS, BENTHAM PROJECT, THE MORE STRICTLY WE ARE WATCHED THE BETTER WE BEHAVE (2007), available at http://www.ucl.ac.uk/Bentham-Project/site_images/Leaflets/Panopticon%20Bentham%20DL%20UPDATED.pdf. The quote comes from POOR LAWS: VOLUME I at 277 (Michael Quinn, ed., 2001). The website and the project's pamphlet also provide a copy of Bentham's emblem, which included an "all seeing eye, framed by the words Mercy, Justice, Vigilance."

¹⁰² BENTHAM, RATIONALE, in 6 BOWRING/WORKS at 356.

¹⁰³ BENTHAM, RATIONALE, in 6 BOWRING/WORKS at 355. See also BENTHAM, CONSTITUTIONAL CODE, in 9 BOWRING/WORKS at 158 (writing of "Public Opinion": "To the pernicious exercise of the power of government it is the only check; to the beneficial, an indispensable supplement. Able rulers lead it; prudent rulers lead or follow it; foolish rulers disregard it."). Here, Bentham also linked publicity with his utilitarian philosophy, continuing that,

Even at the present stage in the career of civilization, [publicity's] dictates coincide, on most points, with those of the *greatest happiness principle*; on some, however, it still deviates from them: but, as its deviations have all along been less and less numerous, and less wide, sooner or later they will

cease to be discernible; aberration will vanish, coincidence will be complete.

Id.

¹⁰⁴ SCHOFIELD, *UTILITY AND DEMOCRACY* at 261.

¹⁰⁵ SCHOFIELD, *UTILITY AND DEMOCRACY* at 263.

¹⁰⁶ JEREMY BENTHAM, *PANOPTICON; OR, THE INSPECTION-HOUSE*, in 4 *BOWRING/WORKS* 37, at 46.

¹⁰⁷ SCHOFIELD, *UTILITY AND DEMOCRACY* at 259.

¹⁰⁸ JEREMY BENTHAM, *PANOPTICON; OR, THE INSPECTION-HOUSE*, in 4 *BOWRING/WORKS* at 46. *See also* SCHOFIELD, *UTILITY AND DEMOCRACY* at 255-256. “The activities of the inmates would be open to constant scrutiny from the prison governor or inspector, and the activities of both to the scrutiny of the public at large, who would be encouraged to visit the panopticon.” *Id.* at 255.

¹⁰⁹ SCHOFIELD, *UTILITY AND DEMOCRACY* at 256.

¹¹⁰ The Panopticon was not built in Bentham’s lifetime, but some high-security prisons, called “supermax,” impose a form of surveillance, with lights on twenty-four hours a day, beyond what Bentham had sketched. The United States Supreme Court has not prohibited such oversight as violative of constitutional protections but has imposed a very modest procedural limitation on placement in such facilities. *See Wilkinson v. Austin*, 545 U.S. 209 (2005).

¹¹¹ Some scholars contend that the rejection of the Panopticon design by the British government contributed to Bentham’s faith in democratic, public processes. *See, e.g.,* Chilton Williamson, *Bentham Looks at America*, 70 *POL. SCI. Q.* 543, 546 (1955) (writing that ‘Bentham was disillusioned when the British government “rejected his Panopticon scheme for scientific, cheap prison reform and convict rehabilitation. Beyond this point, Bentham placed his trust in reform of representation and of suffrage as the only effective means of creating an electorate with the power to set Britain on the highroad to Benthamite Utopianism.”(footnotes omitted)); Peardon at 184 (arguing that, after repeatedly failing to “persuade the rulers of England to accept his legal reforms and especially his Panopticon scheme for a model prison,” Bentham’s “early confidence that ‘the people in power . . . only wanted to know what was good in order to embrace it’ gave way to a conviction that fundamental constitutional changes were prerequisite to other improvements.” (footnote omitted)).

¹¹² SCHOFIELD, *UTILITY AND DEMOCRACY* at 258 (quoting JEREMY BENTHAM, *POLITICAL TACTICS* 44-45 (Michael James & C. Pease Watkin, eds., Oxford, Eng.: Oxford U. Press, 1999)).

¹¹³ *Id.*

¹¹⁴ SCHOFIELD, *UTILITY AND DEMOCRACY* at 258.

¹¹⁵ *Id.* (quoting JEREMY BENTHAM, *POLITICAL TACTICS* 40 (Michael James & C. Pease Watkin, eds., 1999)).

¹¹⁶ SCHOFIELD, *UTILITY AND DEMOCRACY* at 254-255.

¹¹⁷ ROSEN at 116-126.

¹¹⁸ Specifically, exceptions permitted expelling those who disturbed a proceeding and closing proceedings for the preservation of “peace and good order,” to “protect the judge, the parties, and all other persons present, against annoyance,” to “preserve the tranquility and reputation of individuals and families from unnecessary vexation by disclosure of facts prejudicial to their honour, or liable to be productive of uneasiness or disagreements among themselves,” to avoid “unnecessary disclosure of . . . pecuniary circumstances,” “to preserve public decency from violation” and to protect “secrets of state.” BENTHAM, *RATIONALE*, in 6 *BOWRING/WORKS* at 360. As these brief excerpts make plain, the parameters for closure were somewhat “vague.” *TWINING* at 99.

¹¹⁹ For example, the European Convention on Human Rights provides that:

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

European Convention at art. 6(1). Examples of debates about closure in the context of national security can be found in *Botmeh and Alami v. United Kingdom*, 46 EHRH 659 (2008).

¹²⁰ SCHOFIELD, *UTILITY AND DEMOCRACY* at 270. *See also* ROSEN at 112-115. Bentham also saw trade-offs in terms of the expenses involved. *Id.* at 113.

¹²¹ SCHOFIELD, *UTILITY AND DEMOCRACY* at 270.

¹²² ROSEN at 26-27. Bentham invoked the image as a vehicle of reform but did not specify fully how it would be formed or cohere. *Id.* at 38-40. *See* Fred Cutler, *Jeremy Bentham and the Public Opinion Tribunal*, 63 *PUBLIC OPINION QUARTERLY* 321, 321 (1999)

¹²³ TWINING at 52 (emphasis in original).

¹²⁴ ROSEN at 13-14.

¹²⁵ ROSEN at 153-155.

¹²⁶ Post thus explored the propriety of some forms of regulation under the First Amendment in the United States as he parsed the distinct values of “democratic legitimation” and “democratic competence.” *See* ROBERT POST, *KNOWING WHAT WE TALK ABOUT: EXPERTISE, DEMOCRACY AND THE FIRST AMENDMENT*, chs. 1-2 (2009).

¹²⁷ SCHOFIELD, *UTILITY AND DEMOCRACY* at 147-155; ROSEN at 11-14, 41-54, 221-237. *See also* H.L.A. Hart, *Bentham and the United States of America*, 19 *J. LAW & ECON.* 547 (1976). One commentator described the debate about how to read Bentham as about whether he himself was “an authoritarian or a democratic radical.” Jennifer Pitts, *Legislator of the World? A Rereading of Bentham on Colonies*, 31 *POL. THEORY* 200, 201 (2003). Nicola Lacey concluded that, when Bentham “finally made up his mind on the question of parliamentary democracy . . . [he] became one of its most passionate and eloquent advocates.” Lacey at 444.

¹²⁸ JEREMY BENTHAM, *DRAUGHT FOR THE ORGANIZATION OF JUDICIAL ESTABLISHMENTS, COMPARED WITH THAT OF THE NATIONAL ASSEMBLY, WITH A COMMENTARY ON THE SAME*, in 4 *BOWRING/WORKS* at 316; BENTHAM, *RATIONALE*, in 6 *BOWRING/WORKS* at 355; *see also* NEIL ANDREWS, *ENGLISH CIVIL PROCEDURE: FUNDAMENTALS OF THE NEW CIVIL JUSTICE SYSTEM* 79 (Oxford, Eng: Oxford U. Press, 2003).

¹²⁹ *See* JONATHAN CRARY, *TECHNIQUES OF THE OBSERVER: ON VISION AND MODERNITY IN THE NINETEENTH CENTURY* 1-25 (1998).

¹³⁰ Bentham has, however, been praised for being “one of the first persons to see the supreme importance of the problem of information in government” in terms of efficiency, accountability, and responsibility. Peardon at 203.

Later theorists also described the importance of publicity. John Rawls, for example, posited that agreements reached about justice should be accompanied by “publicity,” by which Rawls meant that “citizens have a knowledge of the principles that others follow.” JOHN RAWLS, *A THEORY OF JUSTICE* 16, 275 (1971). According to Rawls, courts were also required to perform in public. Adjudication had to be “fair and open”—enabling the public to see that the judges were “independent and impartial.” *Id.* at 239.

¹³¹ The quote is from David Luban’s translation of this statement from the second appendix of Kant’s *Perpetual Peace*, written in 1795; Luban argued that he had captured the German wording more precisely than had others. *See* David Luban, *The Publicity Principle*, in *THE THEORY OF INSTITUTIONAL DESIGN* 154, 155 n.1. (Robert Goodin, ed., 1998) (hereinafter Luban, *Publicity*).

¹³² Luban, *Publicity* at 156. Distinctions between Bentham’s publicity right and that of Kant are explored in Slavko Splichal, *Bentham, Kant, and the Right to Communicate*, 15 *CRITICAL REVIEW* 285 (2003). *See also* Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 *DUKE L.J.* 383, 385 (1999).

¹³³ DAVID HUME, *OF THE FIRST PRINCIPLES OF GOVERNMENT*, in *I ESSAYS, MORAL, POLITICAL, AND LITERARY* 110 (T.H. Green and T.H. Grose, eds., 1898).

¹³⁴ *See* Daniel Gordon, *Philosophy, Sociology, and Gender in the Enlightenment Conception of Public Opinion*, 17 *FRENCH HISTORICAL STUDIES* 882, 885-889, 891 (1992). Gordon argued that Hume’s interest in public opinion focused on how to manage it. “Anglo-American liberalism . . . imagin[ed] institutions that played off human wills against each other without removing their differences—yet in such a way that the good of the community as a whole merged.” *Id.* at 891.

¹³⁵ For example, the Public Opinion Tribunal needed to gather information on the government which, in turn, needed to make clear—through publicity and by individual officials’ responsibility for their actions—what it had decided. *See* Peardon at 140-142.

¹³⁶ Gordon at 889. Gordon argued that the French concern was to “acknowledge the new authority of ‘the public’ . . . while avoiding the conflicts and instabilities of a politics of contestation.” *Id.* at 890 (citing Keith Michael Baker, *INVENTING*

THE FRENCH REVOLUTION, ch. 8 (Cambridge, Eng: Cambridge U. Press, 1990) (“Public Opinion as Political Invention”).

¹³⁷ BENTHAM, RATIONALE, in 6 BOWRING/WORKS at 570. A word on the practice in London’s criminal courts is in order. Until 1775, the publisher of trial records (called the Sessions Paper) in London’s criminal court (The Old Bailey) “paid the lord mayor of London a fee for the privilege of publishing a nominally ‘official’ account of trial” Devereaux at 468. From 1778, the “City insisted that the Sessions Paper should provide a ‘true, fair and perfect narrative’ for all trials.” *Id.* Devereaux sought to understand why the City took that view, as well as why the level of detail provided expanded. *Id.* at 482-483. He concluded that criminal justice policies had resulted in too large a prison population, and the Sessions Paper served to provide records that helped the “chief sentencing officer at the Old Bailey” and the Council decide which felons to pardon. *Id.* at 471, 472-475, 483-84.

While Devereaux thought that the City made the change to establish an authoritative source of information, he also noted that detailed information might not only legitimate judicial authority but also “jeopardize” it by showing people how to evade punishment through the manipulation of evidence. *Id.* at 491-492. Further, given the costs of lengthy details and the publisher’s interests in sales, Devereaux urged skepticism about the completeness of the Sessions Paper. *Id.* at 503. Yet their publication, he argued, undercut the claim that punishment was as deeply privatized as Foucault had argued, for publication of the Paper created another form of public dissemination. *Id.* at 503.

¹³⁸ JEREMY BENTHAM, ON THE LIBERTY OF THE PRESS, AND PUBLIC DISCUSSION (hereinafter BENTHAM, ON THE LIBERTY OF THE PRESS), in 2 BOWRING/WORKS 277.

¹³⁹ SCHOFIELD, UTILITY AND DEMOCRACY at 251 (quoting BENTHAM, ON THE LIBERTY OF THE PRESS) (emphasis in the original); see also SLAVKO SPLICHAL, PRINCIPLES OF PUBLICITY AND PRESS FREEDOM (2002).

¹⁴⁰ SCHOFIELD, UTILITY AND DEMOCRACY at 268. David Zaret located the development of pamphletting and the press earlier. See DAVID ZARET, ORIGINS OF DEMOCRATIC CULTURE: PRINTING, PETITIONS, AND THE PUBLIC SPHERE IN EARLY-MODERN ENGLAND (Princeton, NJ: Princeton U. Press, 2000).

¹⁴¹ James Madison, *Public Opinion*, NATIONAL GAZETTE, Dec. 19, 1791, reprinted in 14 PAPERS OF JAMES MADISON 170 (Robert A. Rutland & Thomas A. Mason, eds., Charlottesville, VA: University Press of Virginia, 1983), available at

<http://press-pubs.uchicago.edu/founders/documents/v1ch2s26.html> (hereinafter Madison, *Public Opinion*). The entire essay is a few short paragraphs.

¹⁴² Madison, *Public Opinion* (emphasis in original).

¹⁴³ RICHARD R. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE 60-61 (Cambridge, MA: Harvard U. Press, 1995) (hereinafter JOHN, SPREADING THE NEWS). John also read Madison as failing to appreciate the political force that public opinion could have and the role to be played by communications outside government channels. *Id.* at 29.

¹⁴⁴ See, e.g., Gaonkar at 555-558.

¹⁴⁵ Compare Colleen A. Sheehan, *Madison v. Hamilton: The Battle over Republicanism and the Role of Public Opinion*, 98 AM. POL. SCI. REV. 405 (2004), with Alan Gibson, *Veneration and Vigilance: James Madison and Public Opinion, 1785-1800*, 67 REV. OF POLITICS 5 (2005). See also Albrecht Koschnik, *The Democratic Societies of Philadelphia and the Limits of the American Public Sphere, circa 1793-1795*, 58 WILLIAM & MARY Q. 615 (2001).

¹⁴⁶ See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (New York, NY: Verso, 2006).

¹⁴⁷ Sheehan at 416.

¹⁴⁸ Madison's *Public Opinion* essay argued that there were cases "where the public opinion must be obeyed by the government; so there are cases, where not being fixed, it may be influenced by the government." Madison added: "This distinction, if kept in view, would prevent or decide many debates on the respect due from the government to the sentiments of the people." Further,

[t]he larger a country, the less easy for its real opinion to be ascertained, and the less difficult to be counterfeited; when ascertained or presumed, the more respectable it is in the eyes of individuals. This is favorable to the authority of government. For the same reason, the more extensive a country, the more insignificant is each individual in his own eyes. This may be unfavorable to liberty.

See Madison, *Public Opinion*.

¹⁴⁹ GA. CONST. of 1777, art. LXI, available at http://avalon.law.yale.edu/18th_century/ga02.asp.

¹⁵⁰ *See, e.g.*, U.S. CONST. amend. I.

¹⁵¹ U.S. CONST. art. I, § 8, cl. 7. *See also* N.C. CONST. of 1776, Declaration of Rights, art. XV, *available at* http://avalon.law.yale.edu/18th_century/nc07.asp (“That the freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained.”); PA. CONST. of 1776, Declaration of Rights, art. XII, *see* http://avalon.law.yale.edu/18th_century/pa08.asp (“That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.”).

¹⁵² Act of Feb. 20, 1792, ch. 7, 1 Stat. 232. The Second Continental Congress had established the Post Office Department in 1775, and Benjamin Franklin served as its first Postmaster General. *See* THE UNITED STATES POSTAL SERVICE: AN AMERICAN HISTORY 1775-2006, at 6, *available at* <http://www.usps.com/cpim/ftp/pubs/pub100.pdf>.

¹⁵³ JOHN, SPREADING THE NEWS at 31. The prohibition on opening letters was sometimes ignored. *Id.* at 43.

¹⁵⁴ *See* ANTOINETTE J. LEE, ARCHITECTS TO THE NATION: THE RISE AND DECLINE OF THE SUPERVISING ARCHITECT’S OFFICE (2000).

¹⁵⁵ John, Spreading the News at 112-113.

¹⁵⁶ *Id.* at 113.

¹⁵⁷ *Id.* at 38. The exchange was subsidized by “letter writers, of whom the vast majority were merchants.” *Id.* at 39. The government monopoly on the post was strengthened in 1845. *Id.* at 254. John also noted the impact of the postal system before the Civil War, when abolitionists relied on “mass mailing.” *Id.* at 260. The mails in turn enabled the expansion of the stagecoach network, which helped clubs and associations to connect with each other as they spread across the federation. *See* Theda Skocpol, The Tocqueville Problem: Civic Engagement in American Democracy, 21 SOC. SCI. HISTORY 455, 460-461 (1997).

¹⁵⁸ JOHN, SPREADING THE NEWS at 112-113.

¹⁵⁹ *See* TIM BLANNING, THE PURSUIT OF GLORY: EUROPE 1648-1815, at 24-38 (2007).

¹⁶⁰ *Id.* at 479.

¹⁶¹ JOHN, SPREADING THE NEWS at 8 (quoting FRANCIS LIEBER, 10 ENCYCLOPAEDIA AMERICANA 289 (Philadelphia, PA: Carey & Lea, 1832)). Francis Lieber is famous in the United States for his “Lieber Code,” rules for warfare promulgated by President Abraham Lincoln as General Orders No. 100 on April 24, 1863. See ADJUTANT GENERAL’S OFFICE, GENERAL ORDERS NO. 100: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (Washington, D.C.: Government Printing Office, 1863), available at http://avalon.law.yale.edu/19th_century/lieber.asp. See also Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671 (2007).

¹⁶² Laqueur at 354.

¹⁶³ See John Markoff, *Margins, Centers, and Democracy: The Paradigmatic History of Women’s Suffrage*, 29 SIGNS 85 (2003).

¹⁶⁴ See HABERMAS, STRUCTURAL TRANSFORMATION. See generally HABERMAS AND THE PUBLIC SPHERE; LUKE GOODE, JÜRGEN HABERMAS: DEMOCRACY AND THE PUBLIC SPHERE (London, Eng: Pluto Press, 2005). Habermas’s historical account focused on how eighteenth-century cultures of philosophy, literature, and the arts have shaped a sense of a readership/ spectatorship authorized to provide a “self-interpretation of the public in the political realm”—with views independent of those formulated through the church or government. HABERMAS, STRUCTURAL TRANSFORMATION at 55, 36-37. Zaret disputed the historical account by arguing that the origins of the “public sphere” predated the eighteenth century. ZARET at 32.

¹⁶⁵ HABERMAS, STRUCTURAL TRANSFORMATION at 99. Habermas defined “public” in terms of “openness,” writing that, “We call events and occasions ‘public’ when they are open to all, in contrast to closed or exclusive affairs” *Id.* at 1. Habermas’s definition spanned his analysis of different eras. In his conception of ancient Greece, “Only in the light of the public sphere did that which existed become revealed, did everything become visible to all.” *Id.* at 4. In describing the modern bourgeois public sphere, Habermas writes, “The public sphere of civil society stood or fell with the principle of universal access. A public sphere from which specific groups would be *eo ipso* excluded was less than merely incomplete; it was not a public sphere at all.” *Id.* at 85.

¹⁶⁶ HABERMAS, STRUCTURAL TRANSFORMATION at 100.

¹⁶⁷ HABERMAS, STRUCTURAL TRANSFORMATION at 102-104, 117-118.

¹⁶⁸ HABERMAS, STRUCTURAL TRANSFORMATION at 117. Habermas there cites Hegel's concept.

¹⁶⁹ HABERMAS, STRUCTURAL TRANSFORMATION at 135-136.

¹⁷⁰ The shaping of democratic rule of law through discourse theory is the central burden of Habermas's *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, as it also seeks to span the "gap between sociological theories of law and philosophical theories of justice." JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY xl (Cambridge, MA: The MIT Press, 1998). Habermas devoted a chapter to the "Indeterminacy of Law and the Rationality of Adjudication," *id.* at 194-237, and further noted the role played by evidentiary procedures as constraints on the range of argument available, *id.* at 234-237. In addition, he was interested in the legitimacy of constitutional adjudication, *id.* at 238-286, and theories of judicial articulation of constitutional rights. Even as Habermas spoke of the infrastructure for spectatorship—"assemblies, performances, presentations, and so on," *id.* at 361 (emphasis in original)—Habermas did not return to trials as part of his discussion of "Civil Society and the Political Public Sphere." *Id.* at 329. The lack of this focus could stem from a tradition in political theory of treating courts and politics separately and, perhaps, because German civil inquisitorial law traditions put the processes of evidence taking in the hands of judges who would proceed in a series of discrete intervals—thus making the impressions of the observer, so acute for Bentham in the common law, seem more remote for Habermas.

¹⁷¹ HABERMAS, STRUCTURAL TRANSFORMATION at 79.

¹⁷² HABERMAS, STRUCTURAL TRANSFORMATION at 76. *See also id.* at 25-26 (arguing that as state authority was institutionalized, the public sphere "cast[] itself loose as a forum in which the private people, come together to form a public, readied themselves to compel public authority to legitimate itself before public opinion. The *publicium* developed into the public, the subjectum into the [reasoning] subject, the receiver of regulations from above into the ruling authorities' adversary."); *id.* at 19 (quoting Hannah Arendt as understanding a similar causal connection: "Hannah Arendt refers to this *private sphere of society that has become publicly relevant* when she characterizes the modern (in contrast to the ancient) relationship of the public sphere to the private in terms of the rise of the 'social'"); HABERMAS, FACTS AND NORMS at 124-131.

¹⁷³ HABERMAS, STRUCTURAL TRANSFORMATION at 82.

¹⁷⁴ HABERMAS, STRUCTURAL TRANSFORMATION at 83.

¹⁷⁵ HABERMAS, STRUCTURAL TRANSFORMATION at 85.

¹⁷⁶ HABERMAS, STRUCTURAL TRANSFORMATION at 201.

¹⁷⁷ HABERMAS, STRUCTURAL TRANSFORMATION at 181-195.

¹⁷⁸ HABERMAS, STRUCTURAL TRANSFORMATION at 4. Habermas argued that deployment of the press “to serve the interests of the state administration” could be found in the sixteenth century. *Id.* at 20-24.

¹⁷⁹ HABERMAS, STRUCTURAL TRANSFORMATION at 201.

¹⁸⁰ Theodore Roosevelt, First Annual Message to Congress, Dec. 3, 1901, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29542>.

¹⁸¹ See generally Adam Sheingate, *Progressive Publicity and the Origins of Political Consulting*, in BUILDING A BUSINESS OF POLITICS: THE ORIGINS AND DEVELOPMENT OF POLITICAL CONSULTING IN THE UNITED STATES (forthcoming 2010), available at <http://users.polisci.wisc.edu/apw/archives/sheingate.pdf>.

¹⁸² HABERMAS, FACTS AND NORMS at 450.

¹⁸³ HABERMAS, FACTS AND NORMS at 457.

¹⁸⁴ HABERMAS, FACTS AND NORMS at 449.

¹⁸⁵ See Fraser, *Rethinking the Public Sphere* at 123, 128.

¹⁸⁶ See Fraser, *Rethinking the Public Sphere* at 124.

¹⁸⁷ Fraser, *Rethinking the Public Sphere* at 117.

¹⁸⁸ The 1701 Act of Settlement provided that English judges served “during good behavior” and could only be swept from office upon a vote of both Houses of Parliament. Act of Settlement, 1701, 12 & 13 Will. 3, c. 2 (Eng.) (“ . . . judges commissions be made quam diu se bene gesserint, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them . . .”).

¹⁸⁹ “The right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit.” MASS. CONST. of 1780, part The First, art. XXIX, reprinted in I HOUGH at 626. John Adams was the primary drafter. *Id.* at 616. New Hampshire used similar terms, by calling for “impartial” judges while Massachusetts specified that they be “free, impartial, and independent.” N.H. CONST. OF 1784, part 1, art. XXXV, reprinted in SUSAN E. MARSHALL, *THE NEW HAMPSHIRE STATE CONSTITUTION* 227, 232 (Westport, CT: Praeger, 2004). The United States Constitution of 1789 followed with its requirements that judges who were commissioned through presidential nomination and senatorial confirmation to “hold their Offices during good Behavior,” with salaries protected from diminution as well. U.S. CONST. art. 3, § 1, cl. 2

Early constitutions also afforded judges another form of protection—separation of powers, often credited to Montesquieu whose *The Spirit of Laws* was first published in 1748. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* (Thomas Nugent trans., New York, NY: Colonial Press, 1900) (1748). Montesquieu warned, “Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.” *Id.* at bk. 11, ch. 6 (p. 152).

¹⁹⁰ European Convention at art. 6(1). Article 5 also provides:

Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

Id. at art. 5.

¹⁹¹ See John M. Ackerman & Irma E. Sandoval-Bellesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85 (2006).

¹⁹² Universal Declaration of Human Rights, G.A. Res. 217A(III), at art. 10, U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 (1948).

¹⁹³ European Convention at art. 6(1). The case law of the European Court of Human Rights has found that the right to a hearing often entails rights to oral hearings if individuals’ “civil rights and obligations” are at issue. See *König v. Germany*, App. No. 6232/73, 2 Eur. H.R. Rep. 170 (ser. A) paras. 88-89 (1978). A large body of law parses questions of when these rights are engaged and what forms of hearings

suffice. *See, e.g.*, Riepan v. Austria, App. No. 35115/97, ECHR 2000-XII, para. 9-41; Göç v. Turkey, App. No. 36590/97, 2002 Eur. Ct. H.R. 589, para. 51.

¹⁹⁴ International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. Doc. 1/6316.

¹⁹⁵ The full text reads: “The judgement shall be pronounced in public, on a date of which notice shall have been given to the parties and counsel and at which they shall be entitled to be present . . .” International Criminal Tribunal for the Former Territories of Yugoslavia, *Rules of Procedure and Evidence*, Rule 98 ter (A), U.N. Doc. No. IT/32/Rev. 42 (Nov. 4, 2008), available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev42_en.pdf.

¹⁹⁶ *See, e.g.*, ICJ Rules art. 94(2), 95 (specifying that ICJ judgments “shall be read at a public sitting of the Court and shall become binding on the parties on the day of the reading”); Statute of the Inter-American Court on Human Rights, art. 24(3), OEA/Ser.L/V.III.3 doc. 13 corr. 1 at 16 (1980), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 133 (1992). “The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof.” Further, all decisions must be published “along with judges’ individual votes and opinions and with such other data . . . that the Court may deem appropriate.” *Id.* Other systems make reading judgments optional. *See, e.g.*, European Court of Human Rights, Rules of Court, Rule 77(2) (Dec. 2008), available at <http://www.echr.coe.int/NR/ronlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf> (hereinafter ECtHR Rules).

¹⁹⁷ International Criminal Court, Rules of Procedure and Evidence, Rule 144(1), ICC-ASP/1/3, Sept. 3-10, 2002 (hereinafter ICC Rules).

¹⁹⁸ *See, e.g.*, European Convention at art. 6(1).

¹⁹⁹ *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Press-Enterprise Co. v. Superior Ct. of California, 464 US 501 (1984).

²⁰⁰ *See, e.g.*, Schuler-Zraggen v. Switzerland, 16 EHRR 405, para. 58 (1993); Fischer v. Austria, 20 EHRR 349 (1995). Criticism of the theoretical framing of the public trial as a “right” and arguments that it both imposes burdens and has no necessary effect on fairness can be found in Joseph Jaconelli, *Rights Theories and Public Trial*, 14 J. APPLIED PHILOSOPHY 169 (1997). In contrast, Benedict Kingsbury celebrated the “publicness” of law and its proceedings. *See* Benedict Kingsbury, *International Law as Inter-Public Law*, in MORAL UNIVERSALISM AND

PLURALISM, 49 NOMOS 167 (Henry S. Richardson & Melissa S. Williams, eds., 2009).

²⁰¹ See PIERRE BOURDIEU & LÖIC J. D. WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY 36-46, 235-236 (1992); Pierre Bourdieu, *Participant Objectivation*, 9 J. OF THE ROYAL ANTHROPOLOGICAL INSTITUTE 281 (2003); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 838 (Richard Terdiman trans., 1987).

²⁰² See generally Peter W. Martin, *Online Access to Court Records—From Documents to Data, Particulars to Patterns*, 53 VILL. L. REV. 855 (2008). The availability of information in different forms did not necessarily produce more transparency. See Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481 (2009).

²⁰³ See, e.g., International Court of Justice, Rules of Court, art. 94(2), available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0> (specifying that ICJ judgments “shall be read at a public sitting of the Court and shall become binding on the parties on the day of the reading”); Statute of the Inter-American Court on Human Rights, art. 24(3), OEA/Ser.L/V.III.3 doc. 13 corr. 1 at 16 (1980), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 133 (1992) (providing that the “decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof,” and that all decisions must be published “along with judges' individual votes and opinions and with such other data . . . that the Court may deem appropriate”); International Criminal Tribunal for the Former Territories of Yugoslavia, Rules of Procedure and Evidence, Rule 98 ter (A), U.N. Doc. No. IT/32/Rev. 42 (Nov. 4, 2008), available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev42_en.pdf (hereinafter ICTY rules) (requiring that the “judgement shall be pronounced in public, on a date of which notice shall have been given to the parties and counsel and at which they shall be entitled to be present . . .”). A few courts make the reading judgments optional. See, e.g., ECtHR Rules, Rule 77(2). Our thanks to Kate Desormeau, YLS 2008, to Emily Teplin, YLS 2007, and to Laurie Ball, YLS 2010, for research on public proceedings in various venues, including transnational courts.

²⁰⁴ ICC Rules at Rule 144(1).

²⁰⁵ That form has become commonplace in courts with the resources to do so. See, e.g., International Court of Justice, List of All Cases, <http://www.icj->

cij.org/docket/index.php?p1=3&p2=2; European Court of Human Rights, Case-Law, <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>.

²⁰⁶ Details and concerns about the impact of such technologies can be found in Linda Mulcahy, *The Unbearable Lightness of Being? Shifts Towards the Virtual Trial*, 35 J. OF L. & SOC. 464 (2008).

²⁰⁷ In Canada, Supreme Court—but not lower court—proceedings are televised. As to the method, most “courtroom proceedings are webcast live and are later televised by the Canadian Parliamentary Affairs Channel (CPAC).” See Supreme Court of Canada, Frequently Asked Questions, <http://www.scc-csc.gc.ca/faq/faq/index-eng.asp#f7>. The question of a media “right” to electronic access is explored in A. Wayne MacKay, *Framing the Issues for Cameras in the Courtrooms: Redefining Judicial Dignity and Decorum*, 19 DALHOUSIE L.J. 139 (1996).

²⁰⁸ Transmission is provided via a web link, enabling the public, including people in the former territories, to see the proceedings; the languages offered include French, English and Serbo-Croatian. When witnesses or proceedings raise security problems, the screened images and witnesses’ voices may be scrambled. See ICTY Rules at 75“(B)(i)(c) (Measures for the Protection of Victims and Witnesses”). Further, when needed for reasons of “public morality,” “safety, security, or non-disclosure of the identity of a victim or witness . . .,” or “the protection of the interests of justice,” the Trial Chamber may go into closed sessions exclude the press from proceedings, but only if it “make[s] public the reasons for its order.” *Id.* at Rule 79 (“Closed Sessions”).

²⁰⁹ As of 2001, thirty-six U.S. states had permanent rules approving cameras (still and video) in trial and appellate courts. See NATIONAL CENTER FOR STATE COURTS, CAMERAS IN THE COURTS: SUMMARY OF STATE COURT RULES (2002), available at http://www.ncsconline.org/WC/Publications/KIS_CameraPub.pdf. By 2009, that number was 42 states providing judges with discretion to broadcast non jury civil trials. See *Hollingsworth v. Perry*, 130 S. Ct. 705, 718 (2010) (Breyer, J., dissenting).

²¹⁰ See Robert L. Brown, *Just a Matter of Time? Video Cameras at the United States Supreme Court and the State Supreme Courts*, 9 J. APP. PRAC. & PROCESS 1 (2007). As noted, in 2009, the Ninth Circuit authorized the use of cameras in certain cases, at the discretion of the district court but that rule was stayed by the Supreme Court. See *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010), discussed supra notes 27-29

²¹¹ Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991, art. 30, *available at* http://curia.europa.eu/jcms/jcms/Jo2_8352/enreglement-de-procedure-de-la-cour-de-justice.

²¹² The words “Audi & Alteram partem” are, for example, inscribed on the Town Hall of Amsterdam. See KATHARINE FREMANTLE, *THE BAROQUE TOWN HALL OF AMSTERDAM* 76 (1959).

²¹³ See generally Ian Langford, *Fair Trial: History of an Idea*, 8 J. HUM. RTS. 37 (2009). See also *Caritativo v. California*, 357 U.S. 549, 558 (1958) (Frankfurter, J., dissenting) (“*Audi alteram partem*—hear the other side!—a demand made insistently through the centuries, is now a command, spoken with the voice of the Due Process Clause of the Fourteenth Amendment, against state governments, and every branch of them . . . whenever any individual, however lowly and unfortunate, asserts a legal claim.”).

²¹⁴ See FRANCESCO CONTINI & RICHARD MOHR, *JUDICIAL EVALUATION: TRADITIONS, INNOVATIONS AND PROPOSALS FOR MEASURING THE QUALITY OF COURT PERFORMANCE* 49-65 (Saarbrücken, Ger: Verlag, 2008). The authors reviewed quantitative data on evaluations of judges in different countries within Europe, and they argued the need to move beyond a debate that emphasized the tension between judicial accountability and independence so as to focus on how confidence in courts enables them to exercise authority. *Id.* at 6-10.

²¹⁵ Contini and Mohr, for example, looked at various efforts to evaluate and control judges. Complaints were one method; of some thousand filed about judges in France and Spain, the majority involved delays and almost none resulted in sanctions against judges. *Id.* at 29. Similarly, a comparison of nine European countries in 2004 showed that fewer than twenty-five judges received sanctions in any one country during that year. *Id.* at 30. In terms of using managerial techniques such as linking pay to output, a Spanish court ruled that approach illegal. *Id.* at 44-45. Another method was surveys of attitudes toward judges. *Id.* at 72-74. Contini and Mohr called for more comprehensive, interactive, and cooperative methods to enhance communications. *Id.* at 94-103.

²¹⁶ D. Brock Hornby, *The Business of the US District Courts*, 10 GREEN BAG 2D 453, 462 (2007).

²¹⁷ See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 934-43 (2000); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 378-80 (1982).

²¹⁸ Benjamin Kaplan, Arthur T. von Mehren, & Rudolph Schaefer, *Phases of German Civil Procedure* (pt. 2), 71 HARV. L. REV. 1443, 1472 (1958). Admiration for German civil procedure can be found in a good deal of U.S.-based literature. See, e.g., John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

²¹⁹ See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-82 (2006)); Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. § 651 (2006)).

²²⁰ See generally David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 So. Calif. L. Rev. 65 (1981). Through legislation entitled Civil Justice Reform Act, passed in the early 1990s, Congress encouraged more case management. The efficacy of such efforts has been questioned in studies by RAND's Institute for Civil Justice exploring whether time and money was saved. See JAMES S. KAKALIK, TERENCE DUNWORTH, LAURAL A. HILL, DANIEL F. MCCAFFREY, MARIAN OSHIRO, NICHOLAS M. PACE, MARY E. VAIANA, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996).

²²¹ See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783 (2004). The changes in Rule 16 of the Federal Rules of Civil Procedure, governing the pretrial procedures, are discussed in Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982), and Judith Resnik, *Trial as Error, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).

²²² Details and discussion can be found in Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783, 798-811 (2004).

²²³ For an analysis of the Supreme Court's jurisprudence assessing the constitutionality of the delegation of adjudication to agencies, see CATHERINE M. DONNELLY, DELEGATION OF GOVERNMENTAL POWER TO PRIVATE PARTIES: A COMPARATIVE PERSPECTIVE 120-21 (2007).

²²⁴ An example can be found on the websites of many providers. See, e.g., Verizon Wireless, Customer Agreement, http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/custo

merAgreement.jsp (last visited Dec. 7, 2009). One such agreement is republished in Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1134-39 (2006).

²²⁵ See, e.g., *Wilko v. Swan*, 346 U.S. 427, 438 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). See generally Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. DISP. RESOL. 211, 246-53 (1995).

²²⁶ See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 640 (1985); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985). Further, a five person majority concluded that a union's agreement to arbitrate claims against management bound individual employees even though the employees did not sign the contract personally. See *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009).

²²⁷ See *Green Tree Financial Corporation-Alabama v. Randolph*, 531 U.S. 79, 89-92 (2000).

²²⁸ See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Preston v. Ferrer*, 128 S. Ct. 978 (2008). In a 2010 decision, a five-person majority held that a challenge to the enforceability of the entire agreement (which the Ninth Circuit had held unconscionable because of the lack of meaningful consent) goes to the arbitrator for decision. See *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010).

²²⁹ See Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000). In 2010, the Supreme Court held that arbitrations did not have the authority to permit class-based arbitrations if not expressly provided for by contract. See *Stolt-Nielsen, S.A. v. Animal Feeds International Corp.*, 130 S. Ct. 1758 (2010). The Supreme Court has granted certiorari in *AT&T Mobility v. Concepcion* to decide whether the FAA preempts state law finding unconscionable an arbitration contract that prohibits class arbitrations. See *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *cert. granted sub nom.* *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322, (2010) Judge Bea, writing for the Ninth Circuit, had held that California law made the contract unenforceable and that the FAA neither expressly nor implicitly preempted California unconscionability law.

²³⁰ See Jay Miller, *J.P. Morgan Drops Card-Dispute Arbitration Rule*, WALL ST. J., Nov. 22, 2009, available at <http://online.wsj.com/article/SB10001424052748704888404574547991052980108.html>. The law firm bringing

this case issued a press release in November of 2009, explaining the proposed settlement of a class action in which JP Morgan Chase would agree to “drop its cardholder arbitration clause” for several years. *See* Press Release, Berger & Montague, P.C., Case Accusing Chase, Others of Conspiring on Arbitration Clauses is Partially Settled, Nov. 20, 2009, available at <http://www.prnewswire.com/news-releases/case-accusing-chase-others-of-conspiring-on-arbitration-clauses-is-partially-settled-70633057.html>; *Ross v. Bank of America*, 524 F.3d 217 (2d Cir. 2008). A district judge had initially dismissed the case on the grounds that the litigants lacked standing. *See* Memorandum and Order, *Ross v. Bank of America*, No. 05-Civ-7116 (S.D.N.Y. Sept. 20, 2006). The Court of Appeals for the Second Circuit reversed. *See* *Ross v. Bank of America*, 524 F.3d 217, 223 (2d Cir. 2008). The appellate court held that the cardholders' alleged injury was not speculative but constituted a harm to the market that could affect choice in terms.

²³¹ Complaint for Injunctive Relief and Civil Penalties for Violations of Business and Professions Code Section 17200 at 2, *The People of the State of California v. National Arbitration Forum, Inc, et al.*, No. CGC-08-473569 (Cal. Sup. Ct. Aug. 22, 2008). Dennis Herrera, the City Attorney for the City and County of San Francisco, filed the case alleging that the National Arbitration Forum (NAF), a prominent arbitration provider for credit card companies and debt collection agencies, “is actually in the business of operating an arbitration mill, churning out arbitration awards in favor of debt collectors and against California consumers, often without regard to whether consumers actually owe the money sought by the debt collectors.” *Id.* “NAF’s arbitration process,” the Complaint continued, “is the antithesis of fair.” *Id.* After the Minnesota Attorney General filed a lawsuit with similar allegations, press reports stated that the litigation was settled with an agreement that NAF stop arbitrating business claims brought against consumers. *See* Chris Herring, “In Settlement, Arbitration Company Agrees To Largely Step Aside,” *WALL ST. J. LAW BLOG*, July 20, 2009, <http://blogs.wsj.com/law/2009/07/20/in-settlement-arbitration-company-agrees-to-largely-step-aside/>.

²³² *See* Staff Report, Arbitration Abuse: An Examination of Claims Files of the National Arbitration Forum; Domestic Policy Subcommittee, Majority Staff Oversight and Government Reform Committee, U.S. House of Representatives, July 21, 2009 at 7, available at <http://oversight.house.gov/images/stories/documents/20090721154944.pdf>.

²³³ “Any livestock or poultry contract that contains a provision requiring use of arbitration . . . shall contain a provision that allows a producer or grower, prior to entering the contract to decline to be bound by the arbitration provision.” *See* Food Conservation and Energy Act of 2008, sec. 210 (Production Contracts,

Arbitration), Pub. L. No. 110-246, June 18, 2008). “[W]henver a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy, . . . arbitration may be used . . . only if after such controversy arises all parties to such controversy consent in writing,” and further, written explanations must be provided by the arbitrators if they are used to settle disputes. *See* Motor Vehicle Franchise Contract Dispute Resolution Process, Pub. L. No. 107-273, § 11028, 116 Stat. 1835 (2002) (codified at 15 U.S.C. § 1226 (2006)).

²³⁴ *See* Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. The issue is also before the European Court of Justice. At issue is mandatory mediation required by Italian law for legal disputes between consumers and telecommunication companies. Advocate General Kolkott opined that:

[A] mandatory dispute resolution procedure without which judicial proceedings may not be brought does not constitute a disproportionate infringement upon the right to effective judicial protection. Provisions such as those at issue in the main proceedings constitute a minor infringement upon the right to enforcement by the courts that is outweighed by the opportunity to end the dispute quickly and inexpensively.

Case C-317/08 & 320/08, *Rosalba Alassini v. Italy*, Opinion of Advocate General Kolkott (Nov. 19, 2009). Earlier ECJ law had taken a view that such contracts were problematic, given unequal bargaining power.

²³⁵ *See* Case C-40/08, *Asturcom Telecomunicaciones Sl v. Nogueira*, 2009 ECJ EUR-Lex LEXIS 898 (Oct. 6, 2009)(relating to a reference under Article 234 from Spain).

²³⁶ *See generally* Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Points of Entry*, 115 YALE L. J. 1564 (2006); Judith Resnik, Joshua Civin, & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008).

²³⁷ *See* LORD WOOLF, ACCESS TO JUSTICE, FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (London, Eng: HMSO, 1996). *But see* CATHERINE M. DONNELLY, DELEGATION OF GOVERNMENTAL POWER TO PRIVATE PARTIES: A COMPARATIVE PERSPECTIVE 66 (2007) (noting that “[m]andatory private arbitration schemes have not been adopted in England in the way they have been” in the United States).

²³⁸ See generally HAZEL GENN, *JUDGING CIVIL JUSTICE: THE HAMLYN LECTURES 2008* (Cambridge: Cambridge University Press, 2010) (hereinafter GENN, *JUDGING CIVIL JUSTICE*).

²³⁹ See generally Neil Andrews, *English Civil Justice and the Managerial Judge: Reflections for a Comparative Audience*, in *COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES* 97-111 (Janet Walker & Oscar G. Chase, eds., 2010).

²⁴⁰ *Architexts of Justice: The Politics of Courtroom Design*, 16 *Social & Legal Studies* 383 (2007).

²⁴¹ Simon Roberts, ‘Listing Concentrates the Mind’: the English Civil Court as an Arena for Structured Negotiation, 20 *Oxford J. Legal Studies* 1, 23 (2009).

²⁴² GENN, *JUDGING CIVIL JUSTICE*.

²⁴³ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, art.1, 2008 O.J. (L 136) 3.

²⁴⁴ See Arbitration Act 1996, c. 23 (U.K.).

²⁴⁵ See Press Release, JAMS, *JAMS Announces First International ADR Center to Provide More Effective Arbitration and Mediation Worldwide* (May 20, 2009), available at <http://www.jamsadr.com/jams-international-adr-center/>; JAMS International Practice, <http://www.jamsadr.com/international-practice/>.

²⁴⁶ See, e.g., *The Public Character of Trial*, in 3 *THE TRIAL ON TRIAL: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL* 259 (Antony Duff, Lindsay Farmer, Sandra Marshall, & Victor Tadros, eds., 2007); Judith Resnik, *Due Process: A Public Dimension*, 39 *U. FLORIDA L. REV.* 405 (1987).

²⁴⁷ Mark Spottswood, *Live Hearings and Paper Trials*, Northwestern U. School of Law Legal Research Paper, (Aug. 4, 2010), available at [ssrn id 1566512.pdf](http://ssrn.com/abstract=1566512)

²⁴⁸ Another theorist of adjudication, well known to audiences in the United States, is Lon Fuller, whose admiration rested on the role of adjudication as a “device which gives formal and institutional expression to the influence of reasoned argument in human affairs.” Its “burden of rationality” drew him to it, as well as prompted his concerns that courts were ill-suited to deal with what he termed “polycentric” problems. See Lon Fuller, *The Forms and Limits of Adjudication*, 92

HARV. L. REV. 353 (1978) (published posthumously). Our focus entails an interest in the obligations of the judge to explain actions but has a broader aim, to understand the roles of all the actors, audience included, in the exchanges.

²⁴⁹ A 1799 English decision explained that “*audi alteram partem* [was] one of the first principles of justice.” *The King v. G. Gaskin*, (1799) 101 Eng. Rep. 1349, 1350. The ruling, by Chief Justice Lord Kenyon, dealt with a mandamus against a rector to restore a person to the office of parish clerk. At issue was whether the person removed had been given an opportunity to answer the charges against him. Kelly cited the English decision of *Boswel’s Case*, 6 Co. Rep. 48b, 52 77 Eng. Rep. 326, 3331 (K.B. 1606), as the first to cite the precept in English law. See John M. Kelly, *Audi alteram partem*, 9 NATURAL LAW FORUM 103, 107 (1964).

A mid-twentieth century account of English administrative decision-making detailed the lineage of the phrase:

That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca’s *Medea*, enshrined in the Scriptures, embodied in Germanic proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden.

Stanley Alexander de Smith, *The Right to a Hearing in English Administrative Law*, 68 HARV. L. REV. 569, 570-571 (1955).

²⁵⁰ Criminal trials are the focus of the volumes on *The Trial on Trial*, noted above. The three published have distinct foci, forecast in their subheadings—with volume 1 called *Truth and Due Process*, volume 2 *Judgment and Calling to Account*, and volume 3 *Towards a Normative Theory of the Criminal Trial* (Antony Duff, Lindsay Farmer, Sandra Marshall, & Victor Tadros, eds., Oxford, Eng., and Portland, OR: Hart Publishing, 2004, 2006, 2007).

²⁵¹ See, e.g., Emiliios Christodoulidis, *The Objection that Cannot be Heard: Communication and Legitimacy in the Courtroom*, in 1 THE TRIAL ON TRIAL: TRUTH AND DUE PROCESS at 179-202.

²⁵² Nonetheless, it is worth noting that the civil jury trial is also in steep decline. See generally Joseph F. Anderson, Jr., U.S. District Judge for the District of South Carolina, *Where Have You Gone Spot Mazingo? A Trial Judge’s Lament Over the Demise of the Civil Jury Trial*, South Carolina Bar Seminar on “A Look Back: Lessons and Legacies from the Trenches” (Nov. 20, 2009).

²⁵³ See generally Craig Calhoun, *Introduction* to HABERMAS AND THE PUBLIC SPHERE 1–48.

²⁵⁴ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (New York, NY: Houghton Mifflin Harcourt, 1973) (1951) (hereinafter ARENDT).

²⁵⁵ ARENDT at xxxvii.

²⁵⁶ During the course of the trial, three defense lawyers were killed and two judges were dismissed. See John F. Burns, James Glanz, Sabrina Tavernise, & Marc Santora, *In Days Before Hanging, a Push for Revenge and a Push Back from the U.S.*, N.Y. TIMES, Jan. 7, 2007, at A12.

²⁵⁷ Marc Santora, James Glanz, & Sabrina Tavernise, *Saddam Hussein Hanged in Baghdad; Swift End to Drama; Troops on Alert*, N.Y. TIMES, Dec. 30, 2006, at A1.

²⁵⁸ John F Burns & Marc Santora, *U.S. Questioned Iraq on the Rush to Hang Hussein*, N.Y. TIMES, Jan. 1, 2007, at A1.

²⁵⁹ Bill Carter, *Graphic Video of Execution Presents Hard Choices for U.S. Media*, N.Y. TIMES, Jan. 1, 2007, at A7 (noting that Fox News and CNN both ran the video, and that Fox had followed Al Jazeera in doing so).

²⁶⁰ BENTHAM, RATIONALE in 6 BOWRING/WORKS at 356.

²⁶¹ A preliminary review of data on local news coverage on courts in the United States reported that the topics included in televised discussions were the filings of different kinds of cases, many involving negligence and many on intentional torts. In contrast, resolutions were less frequently covered. See Herbert M. Kritzer & Robert E. Dreschel, *Reporting Civil Litigation on Local Television News* (William Mitchell Legal Studies Research Paper No. 96, Version 2a, Sept. 25, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133510.

²⁶² See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1995). Efforts to address some of the injuries were enacted, at a federal level in the United States, in the Violence Against Women Act of 1994, P.L. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered section of 8, 18, 28, 42 U.S.C.). See generally Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001).

²⁶³ See Nancy S. Marder, *The Medical Malpractice Debate: The Jury as Scapegoat*, 38 LOYOLA L.A. L. REV. 1267 (2005).

²⁶⁴ HABERMAS, STRUCTURAL TRANSFORMATION at 193.

²⁶⁵ See Press Release, Maricopa County Attorney, County Attorney Demands Repeal of Court Orders Undermining Proposition 100, Directives Violated State Initiatives, April 2, 2007; see also Dennis Welch, *County Courts Refuse to Check Immigration Status*, THE TRIBUNE (Mesa, Ariz.), April 3, 2007, available at 2007 WLNR 6389982; Andrew Thomas, *Prop 100 Hearings Show Continued Judicial Opposition*, ILLEGAL IMMIGRATION JOURNAL, May 17, 2007, <http://www.illegalimmigrationjournal.com/spotlight/andy.cfm?id=26>.

²⁶⁶ All “actions relating to the right of other human beings are wrong if publicizing their maxim would lead to self-frustration by undercutting the legitimacy of the public institutions authorizing those actions.” Luban, *Publicity* at 192.

²⁶⁷ See, e.g., *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1 (2003) (upholding the constitutionality of state laws requiring such registration and publication).

²⁶⁸ SCHOFIELD, UTILITY AND DEMOCRACY at 267.

²⁶⁹ Bentham thought it would. See SCHOFIELD, UTILITY AND DEMOCRACY at 267.

²⁷⁰ See Maure L. Goldschmidt, *Publicity, Privacy and Secrecy*, 7 POL. RESEARCH Q. 401 (1954).

²⁷¹ The utility of internet databases depends on how materials are formatted and whether charges are imposed for access. See LoPucki, *Court-System Transparency* at 55; see also John Markoff, *A Quest to Get More Court Rulings Online, and Free*, N.Y. TIMES, August 20, 2007, at C6.

²⁷² See *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

²⁷³ See *Carey v. Musladin*, 549 U.S. 70 (2006).

²⁷⁴ See Pamela H. Bucy, Courtroom Conduct by Spectators, (U. of Alabama Public Law Research Paper No. 1371765, Apr. 1, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371765.

²⁷⁵ See, e.g., Report of the New York State Commission on Public Access to Court Records (Abrams Commission) Feb. 25, 2004, http://www.courts.state.ny.us/ip/publicaccess/Report_PublicAccess_CourtRecords.pdf.

²⁷⁶ *Hollingsworth v. Perry*, 130 S.Ct. at 705, 709 (2010). See notes 27-29 supra. See also News Release, Federal Courthouses to Offer Remote Viewing of Proposition 8 Trial (Jan. 8, 2010), http://www.ca9.uscourts.gov/datastore/general/d2020/01/08/Prop.8_.

²⁷⁷ As noted earlier, Bentham analyzed various justifications for privacy that would, upon occasion, require that the presumption in favor of public trials give way. See BENTHAM, RATIONALE, in 6 BOWRING/WORKS at 355.

²⁷⁸ *Presley v. Georgia*, 130 S. Ct. 721, 722 (2010).

²⁷⁹ BENTHAM, RATIONALE, in 6 BOWRING/WORKS at 356.

²⁸⁰ SCHOFIELD, UTILITY AND DEMOCRACY at 310.

²⁸¹ BENTHAM, RATIONALE, in 6 BOWRING/WORKS at 354.

²⁸² See generally JONATHAN CRARY, *SUSPENSIONS OF PERCEPTION: ATTENTION, SPECTACLE, AND MODERN CULTURE* (Cambridge, MA: The MIT Press, 1999).

²⁸³ See, e.g., Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

²⁸⁴ Various political theorists have moved from a focus on elections to examining sources of legitimacy such as public confidence, the quality of government, impartiality, non-self-dealing by decision-makers, and decision-making through the aggregation of interests present. See, e.g., Bo Rothstein & Jan Teorell, *What is Quality of Government?: A Theory of Impartial Political Institutions*, 21 GOVERNANCE: AN INT'L J. OF POL'Y AND ADMIN. 165 (2008); BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* (2004); Jane Mansbridge, *The Descriptive Political Representation of Gender: An Anti-Essentialist Argument*, in HAS LIBERALISM FAILED WOMEN?: ASSURING EQUAL REPRESENTATION IN EUROPE AND THE UNITED STATES 19 (Jytte Klausen & Charles S. Maier, eds., 2001).

²⁸⁵ This understanding of law as a social practice can be seen in the work of Robert M. Cover. See Robert M. Cover, *1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 YALE J.L. & HUMAN. 17 (2005).

²⁸⁶ Mirrelle Hildebrandt, *Trial and 'Fair Trial': From Peer to Subject to Citizen*, in 2 THE TRIAL ON TRIAL: JUDGMENT AND CALLING TO ACCOUNT 15, 25 (emphasis in original). See also Paul Roberts, *Theorising Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication*, in 2 THE TRIAL ON TRIAL: JUDGMENT AND CALLING TO ACCOUNT at 37-64; Daniel Markovits, *Adversary Advocacy and the Authority of Adjudication*, 75 FORDHAM L. REV. 1367 (2006).

²⁸⁷ See, e.g., U.S. FED. RULE CRIM. P. 32(i)(4)(A)(ii) (before “imposing sentence, the court must . . . address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence”). See generally Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocation*, 75 FORDHAM L. REV. 2641, 2673 (2007); Caren Myers, *Encouraging Allocation at Capital Sentencing: A Proposal for Use Immunity*, 97 COLUMBIA L. REV. 787 (1997). Some make the point that victims ought also be permitted to speak. See Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocation, Defendant Allocation, and the Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 431, 433 (2008) (“Being afforded the right to participate in the solemn rite of a trial signals to the speaker that what she has to say is valued. She has been called to participate in one of the weightiest of our community rituals because her presence and observations are deemed an important part of the legal process.”).

²⁸⁸ See, e.g., Tatjana Hörnle, *Democratic Accountability and Lay Participation in Criminal Trials*, in 2 THE TRIAL ON TRIAL: JUDGMENT AND CALLING TO ACCOUNT at 135-153.

²⁸⁹ JEREMY BENTHAM, DRAUGHT FOR THE ORGANIZATION OF JUDICIAL ESTABLISHMENTS, COMPARED WITH THAT OF THE NATIONAL ASSEMBLY, WITH A COMMENTARY ON THE SAME, in 4 BOWRING/WORKS at 316; BENTHAM, RATIONALE, in 6 BOWRING/WORKS at 355; see also NEIL ANDREWS, ENGLISH CIVIL PROCEDURE: FUNDAMENTALS OF THE NEW CIVIL JUSTICE SYSTEM 79 (Oxford, Eng: Oxford U. Press, 2003).

²⁹⁰ Fraser argued that such parity was requisite to the proper functioning of Habermasian public spheres. Fraser, *Rethinking the Public Sphere* at 118.

²⁹¹ See, e.g., Judith Resnik, *Asking Questions about Gender in Courts*, 21 SIGNS: J. WOMEN CULTURE AND SOC'Y 952 (1996).

²⁹² These are the words inscribed on the front of the facade of the Supreme Court of the United States.

²⁹³ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10, 18, 28, and 42 U.S.C. (2006)). The statute's limitations on access, through habeas corpus, to courts were struck as unconstitutional. See *Boumediene v. Bush*, 553 U.S. 723 (2008). See generally Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUMBIA L. REV. 579 (2010).

²⁹⁴ Other examples include public libraries, parks, and police. See, e.g., Robert Darnton, *Google & the Future of Books*, N.Y. REVIEW OF BOOKS, Feb. 12, 2009, at 9, available at <http://www.nybooks.com/articles/22281>.

²⁹⁵ Carolyn Lochhead, *Death Spiral on Main Street*, THE AMERICAN ENTERPRISE, July/August 2001, at 26.

²⁹⁶ *What Needs to be Done?: Hearing Before the Subcomm. Fed. Workforce, Postal Service, and the District of Columbia*, 111th Cong. (March 25, 2009), available at http://oversight.house.gov/index.php?option=com_content&task=view&id=3865&Itemid=27 (Testimony of Dale Goff, President, National Association of Postmasters of the United States, available at http://www.napus.org/govrelations/testimony_pdfs/325Statement.pdf). While mail volume peaked at 213 billion pieces in 2006, it had declined to 180 billion in 2009, a “staggering decline of 15 percent.” *Id.* (Testimony of Carolyn Gallagher, Chair, Board of Governors, U.S. Postal Service, available at http://www.usps.com/communications/newsroom/testimony/2009/pr09_bog0325.htm).

²⁹⁷ See Press Release, United States Postal Service, Economy-Driven Mail Volume Decline Contributes to Postal Service \$2.8 Billion Year-End Loss (Nov. 13, 2008), available at http://www.usps.com/communications/newsroom/2008/pr08_118.htm; see also *Restoring the Financial Stability of the U.S. Postal Service: What Needs to be Done?: Hearing Before the Subcomm. Fed. Workforce, Postal Service, and the District of Columbia*, 111th Cong. (March 25, 2009), available at http://oversight.house.gov/index.php?option=com_content&task=view&id=3865&Itemid=27.

²⁹⁸ Discussion of this viewpoint can be found in JOHN T. TIERNEY, THE U.S. POSTAL SERVICE: STATUS AND PROSPECTS OF A PUBLIC ENTERPRISE 212-218 (Dover, MA: Auburn House Publishing Company, 1988).

²⁹⁹ Richard R. John, *Mail Matters*, THE NATION, Feb. 23, 2009, at 23.

³⁰⁰ *U.S. Postal Service: 101: Hearing Before the Subcomm. on Federal Workforce, Postal Service, and the District of Columbia of the House Comm. on Oversight and Government Reform*, 110th Cong. 232 (Apr. 17, 2007) (Testimony of Charles W. Mapa, President, National League of Postmasters). His focus was on the harm to rural communities. *See also* OREN BEN-DOR, *CONSTITUTIONAL LIMITS AND THE PUBLIC SPHERE* 193-198, 237-238 (Oxford, Eng: Hart Publishing, 2000).

³⁰¹ Postal Policy Act of 1958, Pub. L. No. 85-426, 72 Stat. 134, 134.

³⁰² *See* Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (codified at 39 U.S.C. (2006)).

³⁰³ Richard B. Kielbowicz, *Preserving Universal Postal Service as a Communication Safety Net: A Policy History and Proposal*, 30 SETON HALL LEGIS. J. 383 (2006); Richard R. John, *Post Office*, in 2 *ENCYCLOPEDIA OF THE NEW AMERICAN NATION: THE EMERGENCE OF THE UNITED STATES, 1754-1829*, at 576 (Paul Finkelman, ed., Farmington Hills, MI: Charles Scribner's Sons, 2006).

³⁰⁴ *See* C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY* (Cambridge, N.Y: Cambridge U. Press, 2007).

³⁰⁵ *See* Newspaper Association of America, Total Paid Circulation, <http://www.naa.org/TrendsandNumbers/Total-Paid-Circulation.aspx>. Population figures come from the U.S. Census Bureau, *available at* <http://www.census.gov/prod/www/abs/statab.html>.

³⁰⁶ *See* David Westphal, *News Media in Crisis*, <http://fundingthenews.org/?p=13>, in GEOFFREY COWAN & DAVID WESTPHAL, *PUBLIC POLICY & FUNDING THE NEWS* (USC Annenberg Center on Communication Leadership & Policy, <http://fundingthenews.org/>) (hereinafter COWAN & WESTPHAL); *see also* Preethi Dumpala, *The Year the Newspaper Died*, BUSINESS INSIDER, Jul. 4, 2009, <http://www.businessinsider.com/the-death-of-the-american-newspaper-2009-7> (reporting that, between January and July 2009, 105 newspapers have closed).

³⁰⁷ *See* Shira Ovide, *Tribune Co. Files for Chapter 11 Protection*, WALL ST. J., Dec. 9, 2008, at B1; Shira Ovide, *More Newspapers File for Chapter 11*, WALL ST. J., Feb. 23, 2009, at B2 (reporting that, between December 2008 and February 2009, four newspaper owners filed for bankruptcy).

³⁰⁸ Westphal, *News Media in Crisis*, <http://fundingthenews.org/?p=13>, in COWAN & WESTPHAL.

³⁰⁹ Margaret H. Marshall, *At the Tipping Point: State Courts and the Balance of Power*, The Benjamin N. Cardozo Lecture, Bar Association of the City of New York, Nov. 10, 2009 (hereinafter Marshall, *Tipping Point*).

³¹⁰ See Margaret H. Marshall, *Testimony before House Ways and Means Budget*, (March 1, 2010), at <http://www.mass.gov/courts/fy2011-marshall-testimony.pdf>.

³¹¹ Marshall, *Tipping Point* at 12 -13.

³¹² See Administrative Office of the United States Courts, *Implementation of the Long Range for the Federal Courts*, Status Report at 1-18 (April 2008); JUDICIAL CONFERENCE OF THE UNITED STATES, *LONG RANGE PLAN FOR THE FEDERAL COURTS* (1995), reprinted at 146 Federal Rules of Decision 49 (1996).

³¹³ See *Eliminating Waste and Managing Space in the Federal Courthouses: GAO Recommendations on Courthouse Construction, Courtroom Sharing, and Enforcing Congressionally Authorized Limits on Size and Cost*, Hearing Before the Subcomm. on Econ. Dev., Pub. Bldgs., & Emergency Mgmt. of the H. Comm. on Transp. and Infrastructure, 111th Cong. (2010).

³¹⁴ See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 950 (1979).

³¹⁵ See Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005).

³¹⁶ See Eduardo Oteiza, *Civil Procedure Reforms in Latin America: Tension between Mediation and Conflict Resolution*, in COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES 403-422 (Janet Walker & Oscar G. Chase, eds., Markham, Can.: LexisNexis, 2010).

³¹⁷ See Fla. Stat. Ann. 69.081 (West 2009) (the “Sunshine in Litigation Act”).

³¹⁸ See, e.g., Conn. Gen. Stat. 19a-17a (2008) (requiring that, “upon entry of any medical malpractice award or upon entering a settlement of a malpractice claim” against those licensed under other provisions, the entity making payment or the party are to notify the Department of Public Health of “the terms of the award or settlement” as well as providing a copy and the complaint and answer); Fla. Stat. Ann. § 456.041(4) (2008) (requiring reporting of medical claims that exceed \$100,000). Efforts to block New Jersey’s statute providing for public disclosure of the dates and amounts of malpractice judgments were refused in *Medical Society of New Jersey v. Mottola*, 320 F. Supp. 2d 254 (D.N.J. 2004).

³¹⁹ *See* BENTHAM, RATIONALE, in 6 BOWRING/WORKS at 354.