



Dædalus

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The Invention of Courts

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Gillian K. Hadfield

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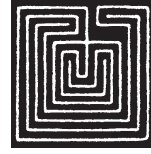
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William Clift's late twentieth-century photograph, *Reflection, Old St. Louis County Courthouse, St. Louis, Missouri*, forecasts many of the themes of this volume. Shown at the center is the domed Old St. Louis County Courthouse, where Dred and Harriet Scott sought to secure their freedom. Although a Missouri jury had ordered the Scotts free in 1850, the Missouri Supreme Court reversed the decision. The Scotts sought relief from the U.S. Supreme Court, but in 1857, the Court held that, as slaves, the Scotts had no juridical personhood and therefore could not be heard in court to challenge that ruling.

The Old St. Louis County Courthouse was also the site of Virginia Minor's efforts to be recognized as an eligible voter. In 1872, Minor argued that the Privileges and Immunities Clause of the recently enacted Fourteenth Amendment required the state of Missouri to permit women to vote in its elections. But in its 1875 ruling, *Minor v. Happersett*, the U.S. Supreme Court concluded that, although Minor was a citizen, as a woman she had no federal right to suffrage.

The Old St. Louis County Courthouse thus stands as a testament to injustices promulgated in the name of the law. The choice of this image makes plain that this volume entails no romance of courts as intrinsically just. Rather, the essays explore the challenges that courts face, as well as what they can offer by way of opportunities to generate debates about the meaning of justice. Such conflicts, in tandem with decades of efforts by social movements to

end slavery and enfranchise women and men, produced the Civil War, amendments to the U.S. Constitution, and eventually the concept that all persons are equal rights holders before the law – thereby undoing the rulings in the *Scott* and *Minor* cases.

In the 1930s, as caseloads grew and federal dollars helped to fund new buildings to buffer the effects of the Depression, the Old St. Louis County Courthouse was abandoned in favor of a new Civil Courts Building. Rescued from potential demolition in 1940, the Old Courthouse was renovated and gained its status as a national monument. No longer a functioning courthouse, the building now welcomes tourists and instructs them on the court's most famous cases.

Two other buildings are central to the photograph. The large commercial structure reflecting the Old Courthouse was known in the 1970s as the Equitable Building. The office tower, once owned by the Equitable Life Insurance Company, houses businesses – law firms and banks – that reflect the courts' nexus to the economy. The other building, located behind the Courthouse and seen through the reflection, was once the regional headquarters of the American Arbitration Association, an organization that has become a central competitor of courts. The flat glass of the International Style skyscraper lends the appearance of a courthouse subsumed by the corporate structures that it faces.

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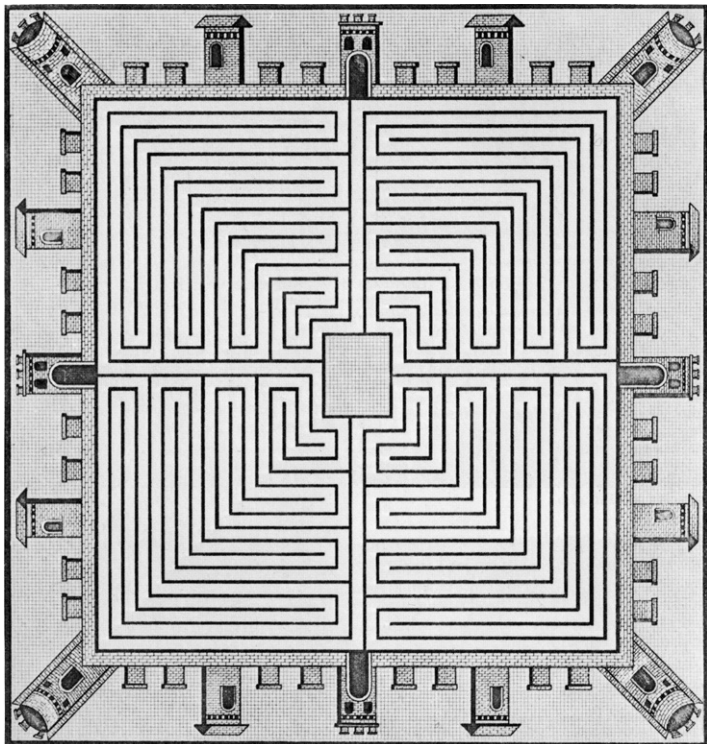
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Dædalus

Journal of the American Academy of Arts & Sciences



Nineteenth-century depiction of a Roman mosaic labyrinth, now lost, found in Villa di Diomede, Pompeii

Dædalus was founded in 1955 and established as a quarterly in 1958. The journal's namesake was renowned in ancient Greece as an inventor, scientist, and unriddler of riddles. Its emblem, a maze seen from above, symbolizes the aspiration of its founders to "lift each of us above his cell in the labyrinth of learning in order that he may see the entire structure as if from above, where each separate part loses its comfortable separateness."

The American Academy of Arts & Sciences, like its journal, brings together distinguished individuals from every field of human endeavor. It was chartered in 1780 as a forum "to cultivate every art and science which may tend to advance the interest, honour, dignity, and happiness of a free, independent, and virtuous people." Now in its third century, the Academy, with its nearly five thousand elected members, continues to provide intellectual leadership to meet the critical challenges facing our world.

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Reinventing Courts as Democratic Institutions

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*Commentary, "Reflection, Old St. Louis County
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"Crack, Jury Chairs, Warren County Courthouse,
Warrenton, Missouri"*

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Introduction: The Invention of Courts

Linda Greenhouse

LINDA GREENHOUSE, a Fellow of the American Academy since 1994 and a member of the Academy's Council, is the Joseph Goldstein Lecturer in Law at Yale Law School. She covered the Supreme Court for *The New York Times* from 1978–2008 and continues to write a biweekly column on law as a contributing columnist for *The New York Times* website. Her publications include *The U.S. Supreme Court: A Very Short Introduction* (2012), *Before Roe v. Wade: Voices That Shaped the Abortion Debate Before the Supreme Court's Ruling* (with Reva B. Siegel, 2010), and *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* (2005).

This volume is both prequel and sequel. In 2008, *Dædalus* published an issue entitled “On Judicial Independence,” exploring from a variety of perspectives the definition of that term, as well as age-old and newly emergent threats to the ability of judges to do their work without undue constraint.

Six years later, we both carry that story forward and shift the analytical frame to consider courts themselves: their past and ongoing evolution, and the work that a democracy can reasonably expect them to do. To write about courts is to write about political theory, about lawyering, about fiscal priorities, and about social welfare, as well as about courts' dependence on and independence from the body politic. The subject evokes a great variety of conversations, from the highly theoretical to the nitty gritty of service delivery for human needs in all their manifestations. Discussions of courts, at least in the United States, bring lawyers rapidly into view, along with criminal defendants, civil litigants, administrative agencies, budgets, public financing, and popular opinion.

Courts exist in our imagination and in bricks and mortar, in the stories we tell ourselves about the society we hope to be and in our acknowledgment that in our aspiration for “justice for all,” we too often fall short. Our egalitarian ambitions for courts have grown over the years, perhaps outstripping our will to provide the means to fulfill our promises. Across a shifting landscape, we assign courts an astonishing range of tasks while lacking consensus on whether

alternative mechanisms could do some jobs more efficiently, less expensively, and better than adjudication. What “better” means in this context is the subject of debate and a current source of tension, as co-guest editor Judith Resnik’s essay demonstrates.

To explore these themes, Judith Resnik and I invited a cross-disciplinary group of scholars and judges to contribute the essays in this volume. The issue’s title, “The Invention of Courts,” is perhaps mystifying. Haven’t courts always existed? Modern society surely did not invent courts; they appear in the ancient world, in classical texts including the Bible. Yet as Resnik explains in her essay, courts as we know them today are very much a social and political construct of the modern age. Embodying a progressive vision of the relationship between citizen and state, courts themselves became a site of democracy: a reinvention. The volume opens with her exploration of the roots of that transformation and the current pressures that threaten to transform courts yet again, now from public forums to private agents.

Threaded throughout the essays that follow are concerns that the current system is not responsive to the needs of those it aims to serve. These issues are at the center of the commentary by two distinguished judges, Chief Judge Jonathan Lippman of New York State and Chief Judge Robert Katzmann of the United States Court of Appeals for the Second Circuit. From the perspectives of the state and federal judiciaries, Lippman and Katzmann describe the steps they have taken to address disturbing gaps in access to the legal system for criminal and civil litigants, as well as for immigrants facing deportation. Both judges aim to expand the resources for the provision of lawyers, essential to enabling claimants to receive a fair hearing.

A half century ago, the Supreme Court’s landmark decision in *Gideon v. Wainwright*

(1963) established that an indigent person charged with a serious crime was entitled to a court-appointed lawyer. Carol Steiker, noting *Gideon*’s long-ago triumph, analyzes the reasons for *Gideon*’s contemporary failure: specifically, the extent to which, in an era of large numbers of criminal prosecutions and mass incarceration, reality has fallen far short of the guarantee of legal representation. Steiker identifies the key factors – the lack of independence of and resources for public defender offices, the unwillingness of the Supreme Court to invalidate convictions of defendants who had patently inadequate counsel, and the plea-bargaining mill – that must be addressed if a way forward can be found.

Jonathan Simon looks at the challenges posed to the criminal justice system by the interrelationship of procedure, court processes, and substantive rules of law. His focus is the distinctive turn that American criminal procedure has taken from its English roots, and how legislatively made criminal law has enhanced the power of prosecutors. Simon joins Steiker in describing how the failure of adequate funding for defense lawyers undermines the adversary system.

We turn next to the civil side of the justice system – to the question of how to equip multiple litigants with legal services through group-based litigation. Deborah R. Hensler addresses this topic, examining the challenges that widespread injuries – mass torts – pose to the civil justice system. What are the tradeoffs to be made between an individual’s “day in court” and group-based lawsuits? Can new rules and practices be shaped to achieve both efficiency and fairness, and how are either of these concepts defined?

Resources – of litigants and of courts – are also the subject of the two essays that follow. Lawyers are too expensive for most Americans, meaning that more than 95 percent of the people in domestic disputes,

in landlord-tenant conflicts, and in consumer-credit cases go unrepresented. Can costs be lowered? What alternatives can be found? Gillian K. Hadfield offers a transnational look at English innovations in the structure of legal services, new arrangements that challenge the basic American assumption that lawyers provide the only means of representation in court. Hadfield argues that by requiring lawyer-only representation, courts themselves have become the sources of barriers to legal counsel; and her aim is to lower those barriers so that professionally trained non-lawyers, along with new technologies, can help address the access needs that now go unfilled.

Of course, courts themselves need resources. Given recent budget reductions in many arenas, state and federal judiciaries have had to cut back on services. Michael J. Graetz details the impact of the funding crisis that besets state courts and that threatens not only their functions but also their independence. To ensure adequate and stable financing, he offers an innovative strategy: establishing trust funds for courts.

But courts not only need funding, they also need judges in a position to grasp the full dimension of the claims they are being asked to resolve. As Frederick Schauer explains in his essay “Our Informationally Disabled Courts,” courts generally rely on information (or “inputs”) from the parties in cases. Schauer examines the structural deficits in the adversarial system, in the U.S. rules of evidence, and in the limits of appellate records that prevent judges from acquiring the knowledge they need to do their work well.

How much do we know about what courts themselves do? Trials (“a day in court”) are the focus of the essay by Marc Galanter and Angela Frozena. Galanter and Frozena pull together detailed data that will surprise many readers, documenting

the disappearance of the trial from federal courts, though trials remain anachronistically vivid in the public’s imagination and the media’s portrayals of judging.

Data are less plentiful about the state systems that account for more than 90 percent of the country’s judicial business and that, in practice, have a broader impact than do federal courts on the lives of most Americans. In his essay, Stephen C. Yeazell provides a history of the development of funding, at state and federal levels, for research on courts, while also explaining the sources of data gaps. Given that methods of collection vary state by state (what he calls “data federalism”), comparisons across jurisdictions and knowledge of trends over time are extremely limited. Yeazell details the dimensions and consequences of our collective ignorance about the state courts and shows why refocusing attention on those venues is critical to our understanding of the whole of the U.S. justice system.

Despite the information gaps, courts loom large in American public culture. Susan Silbey provides a detailed analysis of public opinion about courts. Noting that Americans see courts as at once “godlike” and “game-like,” Silbey argues (using recent social science research) that this ability to hold both images simultaneously – one aspirational and the other pragmatic – is what sustains public support for the judicial enterprise.

In his provocative essay, Jamal Greene offers a different angle on courts in the public imagination. He analyzes what he terms the “anti-canon” – certain cases that are consistently dismissed in public discourse as aberrational – including the notorious Supreme Court decisions of *Dred Scott* (1857) and *Plessy v. Ferguson* (1896). Greene argues that this categorization of an anti-canon of bad cases has blinded us to the inconvenient fact that these decisions were the product of the dominant

*The
Invention
of Courts* political culture of their time. Their implications need to be faced, rather than written off as rogue actions divorced from their context.

Finally, we asked Kate O'Regan, who served a fifteen-year term (1994 – 2009) as one of the first judges on South Africa's post-apartheid Constitutional Court, to offer her reflections. Here was a court that was indeed invented, in the full view of an astonished world. O'Regan writes powerfully of an institution born not only as a court but as a symbol of the hopes we hold for all courts.

Reinventing Courts as Democratic Institutions

Judith Resnik

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

JUDITH RESNIK, a Fellow of the American Academy since 2001, is the Arthur Liman Professor of Law at Yale Law School. Her publications include *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (with Dennis Curtis, 2011), *Federal Courts Stories* (edited with Vicki C. Jackson, 2010), and *Migrations and Mobilities: Citizenship, Borders, and Gender* (edited with Seyla Benhabib, 2009).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

– The 1776 Delaware Declaration of Rights⁸

All courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered, without sale, denial, or delay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

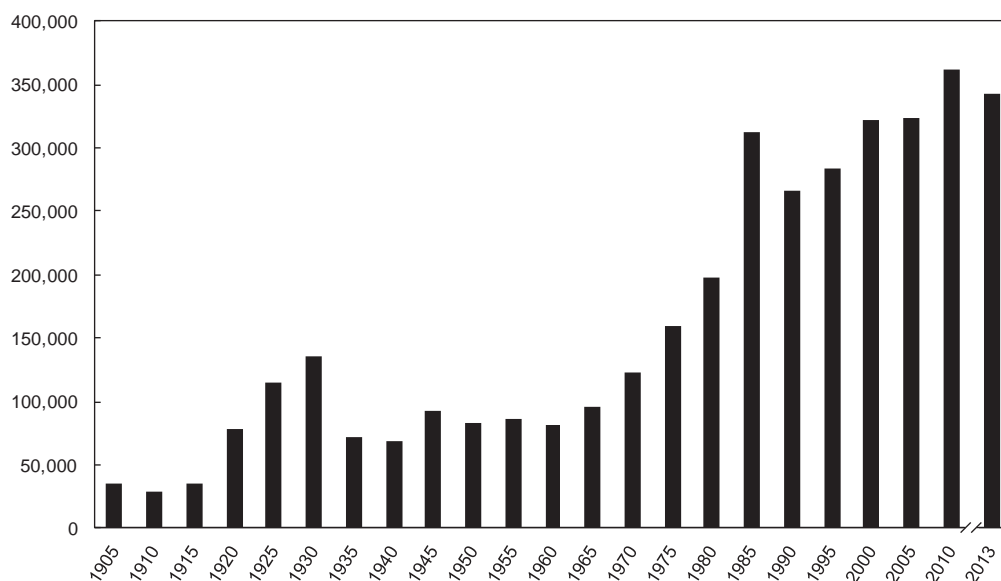
been built to provide chambers for 650 life-tenured trial judgeships and some 160 appellate judgeships, as well as for 700 statutorily created magistrate and bankruptcy judges and thousands of staff. Those judges had jurisdiction over a wide array of matters; between 1960 and 1990, Congress created more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

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

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

Figure 1

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



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

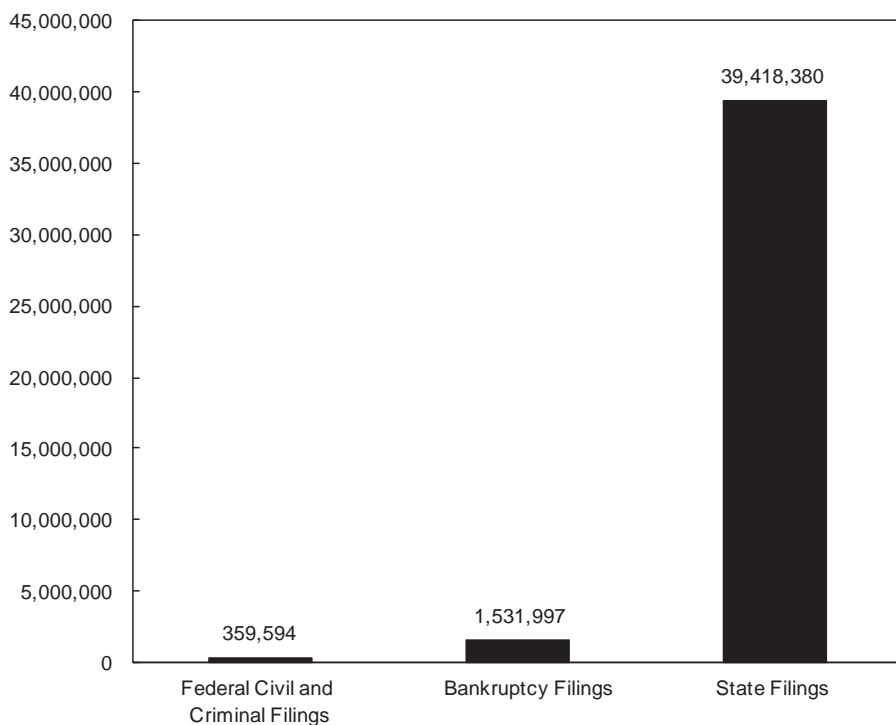
State courts provide vastly more services and do so with fewer resources (measured by judges' salaries, caseloads, and support staff) than the federal bench does. State legislatures allocate between 0.5 and 3 percent of their budgets to courts,³⁸ and most state judiciaries report serious shortfalls.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

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

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

Figure 2

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



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

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

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

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

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

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

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

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

Judith
Resnik

Your Cellular Service Agreement

Please read carefully
before filing in a safe place.

YOUR CELLULAR SERVICE AGREEMENT

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

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

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

INDEPENDENT ARBITRATION

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

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

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

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

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

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

concluded that class action waivers were “unconscionable” because in “a consumer contract of adhesion [when] disputes involve small amounts of damages . . . the waiver becomes in practice the exemption of the party ‘from responsibility for its own fraud.’”⁵² But in 2011, in *AT&T v. Concepcion*, a bare majority of the United States Supreme Court displaced state law and held that a 1925 federal statute, authorizing enforcement of contract clauses requiring arbitration, was to be interpreted to apply to these materials. Therefore, federal law preempted state laws by requiring consumers to use the arbitration program selected by the cell-phone service and to proceed exclusively by way of single-file

(“bilateral”) arbitrations.⁵³ In the same year, in *Wal-Mart v. Dukes*, the Court imposed stringent requirements on class actions; for those individuals not otherwise precluded by arbitration mandates, the Court limited their ability to pool resources by litigating in the aggregate.⁵⁴

With the devolution of adjudication to agencies, the outsourcing to private providers, and the reconfiguration of court-based processes toward settlement in both civil and criminal cases, the occasions for public observation of and involvement in adjudication are diminishing. In the federal courts of the United States, trial rates have dropped over the last few decades and continue to do so. In 2001, trials began in

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

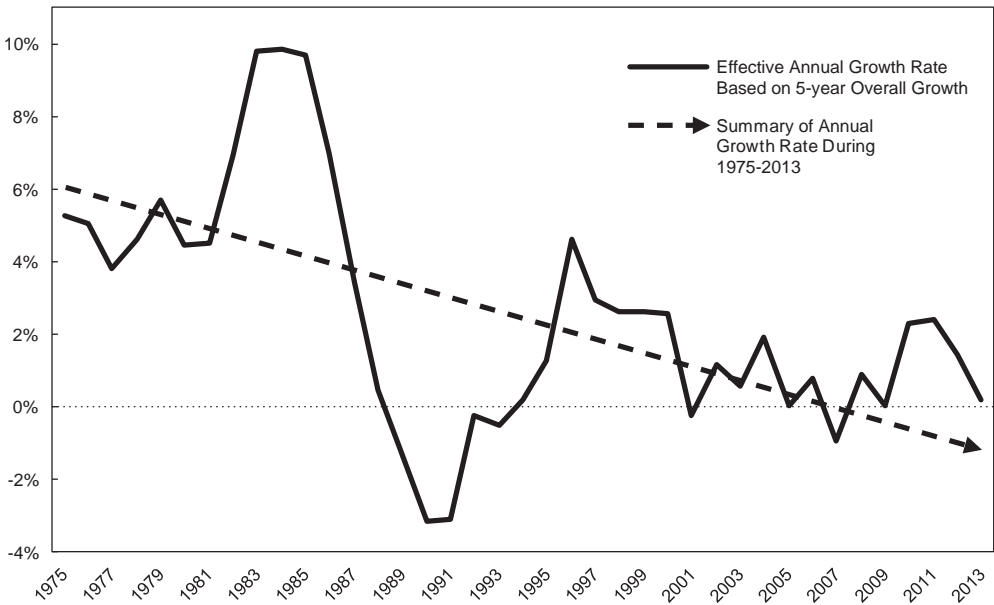
The parallel on the criminal side is the dominance of plea bargaining: in 2012, 97 percent of the indictments against criminal defendants in federal court ended with pleas.⁵⁵ This phenomenon is now encoded in the moniker of the “vanishing trial.”⁵⁶

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ENDNOTES

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

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

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

⁶ See, for example Judith Resnik, “Procedure as Contract,” *Notre Dame Law Review* 80 (2) (2004): 593; Judith Resnik, “Managerial Judges,” *Harvard Law Review* 96 (1982): 374; William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge, Mass.: Belknap/Harvard University Press, 2011); and George Fisher, *Plea Bargaining’s Triumph: A History of Plea Bargaining in America* (Stanford, Calif.: Stanford University Press, 2004).

⁷ See generally Robert C. Post, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State* (New Haven, Conn.: Yale University Press, 2012).

⁸ Delaware Declaration of Rights, sec. 12 (1776). A parallel clause remains.

⁹ The current Alabama constitution, ratified in 1901, has an almost identical clause. See Alabama Constitution, sec. 13.

¹⁰ “Charter or Fundamental Laws of West New Jersey, Agreed Upon,” chap. XXIII (1676), in *Sources of Our Liberties*, ed. Richard L. Perry (Chicago: American Bar Foundation, 1959), 188.

¹¹ See Jeremy Bentham, “Constitutional Code (1843),” in *The Works of Jeremy Bentham*, vol. 9, ed. John Bowring (Edinburgh, Scot.: William Tait, 1843), 41; Frederick Rosen, *Jeremy Bentham and Representative Democracy: A Study of the Constitutional Code* (Oxford: Clarendon Press, 1983), 26–27; and Anthony J. Draper, “‘Corruptions in the Administration of Justice’: Bentham’s Critique of Civil Procedure, 1806–1811,” *Journal of Bentham Studies* 7 (2004): 1.

¹² Jeremy Bentham, “Bentham’s Draught For The Organization of Judicial Establishments, Compared with That of the National Assembly, with a Commentary on the Same,” in *The Works of Jeremy Bentham*, vol. 4, ed. John Bowring (Edinburgh, Scot.: William Tait, 1843), 316.

¹³ See Jeremy Bentham, “Rationale of Judicial Evidence (1827),” in *The Works of Jeremy Bentham*, vol. 6, ed. John Bowring (Edinburgh, Scot.: William Tait, 1843), 355. And see generally Judith Resnik, “Bring Back Bentham: ‘Open Courts,’ ‘Terror Trials,’ and Public Sphere(s),” *Law & Ethics of Human Rights* 5 (2011): 2; and Frederick Schauer, “Transparency in Three Dimensions,” *University of Illinois Law Review* 2011 (4) (2011): 1339.

¹⁴ *The Works of Jeremy Bentham*, vol. 6, 356.

¹⁵ See Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger (Cambridge, Mass.: MIT Press, 1991); and Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: Polity Press, 1996), 97–98.

¹⁶ See, for example, Connecticut Constitution, art. I, sec. 12 (1818).

¹⁷ *Scott v. Sandford*, 60 U.S. 393, 407 (1857); see also Lea VanderVelde, *Mrs. Dred Scott* (Oxford; New York: Oxford University Press, 2009), 232–319.

¹⁸ See generally Judith Resnik, “Asking About Gender in Courts,” *Signs* 21 (4) (1996): 952.

¹⁹ International Covenant on Civil and Political Rights, art. 14, Dec. 19, 1966, G.A. Res. 2200A (XXI), U.N. Doc. 1/6316. See generally *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*, ed. Simon Shetreet and Christopher Forsyth (Leiden, Netherlands; Boston: Martinus Nijhoff, 2011).

²⁰ Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Belknap Press, 2011), 2.

²¹ Jeremy Bentham, “A Protest Against Law-Taxes: Showing the Peculiar Mischievousness of All Such Impositions as Add to the Expense of Appeal to Justice,” in *The Works of Jeremy Bentham*, vol. 2, ed. John Bowring (Edinburgh, Scot.: William Tait, 1843), 573, 582.

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²³ Rosen, *Jeremy Bentham and Representative Democracy*, 153–154.

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

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

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

⁶⁶ Ibid. ; and *Delaware Coalition for Open Government, Inc. v. Strine*, 733 F.3d 510 (3d Cir. 2013), petition for certiorari was denied under the name *Strine v. Delaware Coalition for Open Government, Inc.*, 134 S. Ct. 1551 (2014). Judith Resnik

⁶⁷ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon, 1977), 8 – 11.

⁶⁸ See Draper, ““Corruptions in the Administration of Justice.””

⁶⁹ See Michelman, “The Supreme Court and Litigation Access Fees.”

⁷⁰ Jerry L. Mashaw, “The Supreme Court’s Due Process Calculus for Administrative Adjudication in *Mathews v. Eldridge*: Three Factors in Search of a Theory of Value,” *University of Chicago Law Review* 44 (1) (1976): 44.

⁷¹ See, for example, *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970); and *Brady v. Maryland*, 373 U.S. 83 (1963).

⁷² Resnik and Curtis, *Representing Justice*.

State Courts: Enabling Access

Jonathan Lippman

Abstract: In New York, millions of civil litigants each year fight for the necessities of life without the aid of a lawyer because they are unable to afford one. While the state courts strive to provide access to justice for all constituents, this ideal becomes a promise unfulfilled due to the lack of available civil legal services for low-income populations. In this essay, I discuss access to justice in the state courts from the perspective of my role as Chief Judge of the State of New York. I examine the enormity of the unmet need in New York and around the country and discuss the measures I have taken as head of the New York State court system to address the crisis. These efforts have resulted in a substantial increase in state funding for civil legal services, the establishment of the Task Force to Expand Access to Civil Legal Services in New York, annual hearings in each of New York's four Judicial Departments, and the development of programs designed to spur the legal community (including law students) to greater involvement in pro bono work.

JONATHAN LIPPMAN is the Chief Judge of the State of New York and Chief Judge of the Court of Appeals. His previous positions include Presiding Justice of the New York State Supreme Court, Appellate Division, First Department; prior to that, he was the longest-tenured Chief Administrative Judge in New York State's history. He has championed statewide initiatives on access to justice, funding for civil legal services for the poor, human trafficking courts, wrongful convictions, foreclosures, pro bono service, and juvenile justice.

Our courthouses lie at the very heart of our communities, in every sense. In the words of U.S. Supreme Court Justice Lewis Powell, "For much of our history, the courthouse has served not just as a local center of the law and government but as a meeting ground, cultural hub, and social gathering place."¹ The courthouse, above all other public spaces, embodies our most deeply held common values: our commitment to fairness, due process, and equal justice for all. In this way, the courts are the institutions that protect our individual rights and liberties and preserve the rule of law.

Access to justice is fundamental to all democratic societies, and it is a bedrock principle of our nation. The World Justice Project describes it as

the ability of all people to seek and obtain effective remedies through accessible, affordable, impartial, efficient, effective, and culturally competent institutions of justice. Well-functioning dispute resolution systems enable people to protect their rights against infringement by others, including powerful parties and the state.²

That principle is ingrained in the Constitution of the United States, and delivering equal justice to all

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who come before the courts (from the very rich to the very poor) is at the very heart of our federal and state judicial systems. But what is really happening behind our courthouse doors? Are we living up to the guarantee of access to justice embedded in our nation's laws and founding principles?

Most individuals would be surprised – if not shocked and appalled – to learn how poorly the United States compares to other countries in providing access to civil justice. When the American Bar Association established the World Justice Project to assess and advance the “rule of law” throughout the world, the Project created an index to measure each country's performance across several dimensions. The United States, as expected, performed well in most dimensions, with the notable exception of the civil justice category, where (as of 2012 – 2013) it was ranked as 22nd out of 97 surveyed countries; 12th out of the 16 countries in Western Europe and North America; and 19th out of 29 high-income countries (among the high-income countries that scored higher are Singapore, Japan, the Republic of Korea, Estonia, and Hong Kong). When ranked by the civil justice sub-factor of whether people can access and afford civil justice, the United States was 28th out of 29 high-income countries, ahead only of the United Arab Emirates.³

When people on such a grand scale are unable to obtain the legal advice and representation necessary to solve their civil legal problems, our system of justice has broken down. In criminal cases in the United States, the Supreme Court has long recognized a constitutional right to counsel.⁴ However, although the government must supply an attorney to criminal defendants who cannot afford one, no such right exists in civil matters. Yet the issues at stake in civil cases involving the necessities of life – such as adequate housing, family stability, personal safety free from domestic

violence, access to health care and education, and subsistence income and benefits – can be every bit as critical to an individual's existence and well-being as the very loss of liberty itself.⁵

One of the most difficult contemporary challenges to fulfilling the nation's promise of equal access to justice in the state courts today is the lack of resources to provide free legal counsel to civil litigants who cannot afford to hire an attorney. The difference between the level of free legal assistance available and the level necessary to meet the needs of low-income Americans is often referred to as the “justice gap.” Our efforts to try to close that justice gap in New York – and enable access to justice for all – are the focus of my essay.

For those who are poor or low-income, finding the funds to hire an attorney can be nearly impossible, although some free help does exist. Nonprofit organizations, such as the Legal Aid Society, provide free legal assistance to those who may be defending a civil lawsuit brought against them or who need to begin a civil case to enforce their rights. They are referred to as “civil legal services providers.” The client must meet the organization's income eligibility requirement, which is usually stated as a percentage of the federal poverty level, generally ranging from 125 to 200 percent of that level. For example, an eligibility limit of 200 percent of the 2013 poverty level of \$23,550 per year for a family of four would be \$47,100.⁶ Families of four with higher incomes would be ineligible for free services. Furthermore, because these legal service organizations themselves have limited resources, eligibility does not guarantee a free lawyer. They are able to serve only a portion of otherwise eligible clients: one out of two in many parts of New York State and one out of eight or nine in New York City. The justice gap, therefore, far exceeds these organizations' capacity to fill it.

The problem of the justice gap is most acute in the state courts, where 98 percent of the litigation commenced in the United States is brought. They are, in many ways, the emergency rooms for society's worst ailments. All types of personal crises become matters on a court docket, especially in an economic climate like that of the United States since the global financial crisis. Following the downturn in 2007, a noticeably larger share of the New York State courts' four million new case filings per year reflected crises resulting from economic issues, and many involved the people who endure the worst consequences of a weak economy: poor and low-income individuals. Filings skyrocketed in matters involving home foreclosures, consumer debts, family violence and custody disputes, and matrimonial conflict.

Meanwhile, the numbers of people appearing in court without an attorney continued to grow. At last count, that number exceeded 2.3 million per year, including 98 percent of tenants in eviction cases, 99 percent of borrowers in consumer credit cases within New York City, 95 percent of parents in child support matters,⁷ and 46 percent of homeowners in foreclosure cases.⁸ Sadly, many of these matters involve the most vulnerable members of society – the elderly, single parents, children, the disabled and mentally ill, abuse victims – in cases that are potentially devastating to them and their families.

Regrettably, the same economic downturn that has caused more people to end up in court also shrank the resources of providers of free civil legal services. The nonprofit organizations I previously described depend heavily on an unstable combination of federal, state, local, and private grants: uncertain and unpredictable revenue streams subject to the vagaries of politics, the condition of the economy, or both.

The federal Legal Services Corporation (LSC), created by Congress in 1974, is the

nation's largest funder of civil legal services providers. LSC is headed by a bipartisan board of directors whose eleven members are appointed by the President and confirmed by the Senate. When the LSC was proposed to Congress, the need for neighborhood law offices was poignantly described:

Here each day the old, the unemployed, the underprivileged, and the largely forgotten people of our Nation may seek help. Perhaps it is an eviction, a marital conflict, repossession of a car, or misunderstanding over a welfare check – each problem may have a legal solution. These are small claims in the Nation's eye, but they loom large in the hearts and lives of poor Americans.⁹

Currently, LSC awards civil legal assistance grants to more than 130 nonprofit legal aid programs with more than 800 offices nationwide. Those numbers represent only a portion of the legal programs in the United States, and only a small number of those programs are in New York State. In 2012, LSC grants helped nearly two million people. However, as a federal agency, its funding is determined by Congress and is therefore dependent on the federal budget and the political winds of the day. Funding for LSC has recently been cut deeply and it is vulnerable to further cuts by a deficit-occupied Congress.

Another major source of funding for civil legal services comes from Interest on Lawyer Trust Accounts programs, usually referred to as IOLTA programs (IOLA in New York). These programs pool the interest earned on accounts for client funds held in trust by lawyers. That interest income is used primarily to provide civil legal aid to the poor and support improvements to the justice system. Revenue for these programs, therefore, is entirely dependent on interest rates. With interest rates at an all-time low, IOLTA revenues have dropped dramatically. In New York, revenues are

less than a quarter of what they were just a few short years ago, dropping from \$36 million to \$8 million. This has had a drastic impact on the civil legal service providers who depend on these programs for their very survival.

Why should we as a society be concerned about dwindling resources for free legal services in civil cases involving the essentials of life? From a practical standpoint, when vast numbers of individuals come to court without an attorney, it affects the entire court system, including other litigants who do have legal representation. Indeed, represented parties and their lawyers repeatedly communicate that they much prefer it when the other parties in a case have lawyers. Cases with unrepresented parties take longer to settle and litigate, which results in delays for litigants in other cases, a clogged court docket, and, ultimately, an increase in the court system's overall costs.

More important, judges have reported the numerous ways in which the lack of counsel leads to a lack of justice: judges are sometimes unable to ascertain the facts of the case because the unrepresented party cannot properly present evidence, unrepresented litigants sometimes fail to present evidence on issues indispensable to proving their cases, their examination of witnesses and their legal arguments are often ineffective at best, and many such litigants are confused about the issues and have little or no knowledge of the law. A concept as familiar to practicing lawyers as "service of process" (delivering papers to a party in legal action, particularly those that give notice of the party's involvement in the case) can be confusing and complex to an unrepresented litigant.

If a case is in the middle of trial and an unrepresented party tells the judge she or he has no idea how to question a witness or respond to an objection to the admission

of evidence made by another party's lawyer, the judge cannot intervene to help no matter how important it may be to the litigant's case. Judges, of course, must maintain neutrality and cannot legally or ethically provide legal advice or legal assistance to a party who happens to be unrepresented.

New York's early responses to the crisis in civil legal services included opening more help centers in high-volume courthouses, expanding volunteer lawyer-for-a-day programs that provide lawyers for poor litigants when they enter New York City courthouses, and expanding pro bono programs throughout the state. Although these innovations have been and continue to be essential, they are not nearly enough to provide adequate protection of the fundamental rights of so many litigants who cannot afford counsel.

As the steward of the state court system, I question whether our judiciary can fulfill its constitutional mission when millions of low-income people are being denied access to justice because they cannot afford to pay a lawyer to protect their interests and that of their families. The judiciary cannot stand by idly and ignore the possibility that justice is not truly being done in our courtrooms. I believe that the judiciary and the legal profession have an obligation to stand up for civil legal services for poor and low-income individuals. The key is to exercise strong and visible judicial leadership and work toward a systemic approach to providing a substantial and stable source of funding for civil legal services.

In 2010, the New York judiciary developed a plan to address the state's justice gap, recognizing that the unequivocal commitment of state government to fund civil legal services is vital to the goals of ensuring equal justice. We committed ourselves to holding annual hearings to assess both the extent of the need for civil legal services for low-income New Yorkers

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and the amount of resources necessary to fill that need. The hearings are now held annually in each of the four Appellate Division Judicial Departments in our state. I personally preside over each hearing along with the leaders of the Judiciary and the New York State Bar Association. We also established the Task Force to Expand Access to Civil Legal Services, which supports the annual hearings and studies potential new initiatives to increase access to civil legal services. Helaine Barnett, a former Chair of the LSC, chairs the Task Force, and its members include judges, lawyers, business executives, academics, labor leaders, and others from across New York State.

During the first four years of hearings (2010 – 2013), testifying witnesses included indigent litigants, legal service providers, business and religious leaders, prominent legislators, executive branch officials, economists, law professors, and judges. The stories of the litigants who testified at the hearings in particular illustrate the dire need for legal services experienced by many people in crisis. One litigant from Uzbekistan, for example, described the horrific abuse she suffered from her husband, which included isolation, repeated beatings, and rape. He made threats against her parents in their home country and called them on speaker phone while he beat her. She attempted to escape many times, but her husband always tracked her down. It was only when she found help from a free legal service provider that she was able to divorce, get an order of protection, and obtain sole custody of her daughter. Her husband now faces felony criminal charges.¹⁰ Another witness, a small business owner, lost his source of income when he developed a chronic medical condition and was unable to work. He fell behind on his mortgage and nearly lost his co-op apartment in a wrongful foreclosure sale. Once he found a legal services provider to assist him free of charge, he was able to

reverse the foreclosure and remain in his home.¹¹

Also with the help of a legal services provider, a man whose home was flooded while he was in the hospital undergoing cancer treatment was able to obtain relief from his landlord and find alternate housing. Other witnesses described how having a lawyer enabled them to recover from major debt or escape indentured servitude. A twenty-five-year-old college student with muscular dystrophy was able to maintain the transportation benefits he needed to stay in school and sustain an independent existence.¹² Again and again over the three years of hearings, the personal stories of litigants illuminated the essential role that lawyers play in resolving serious problems and avoiding future harm.

Based on the hearings and the Task Force's own extensive research, including input both from experts and from those "in the trenches," the Task Force issued four reports with recommendations for action, which have prompted a number of reforms.¹³ The most significant recommendation was that the judiciary budget include funding to support civil legal service providers. By including funding in our budget, we make clear that preserving civil legal services for the poor is not a tangential issue for the courts, but rather is at the very heart of our constitutional mandate to foster equal justice. In an endorsement of this initiative, the New York State Legislature issued a joint resolution of support requesting that the Chief Judge report each year on unmet needs and the resources needed to meet those needs.

Although it is not feasible for every person with a legal problem to be provided a lawyer at public expense, we are prioritizing our resources, focusing on providing counsel for those people seeking the "essentials of life," which the Task Force defined as including four major categories: 1) housing, including evictions, foreclo-

asures, and homelessness; 2) family matters, including domestic violence, children, and family stability; 3) access to health care and education; and 4) subsistence income, including wages, disability and other benefits, and consumer debts.¹⁴

In spite of very difficult economic times, the judiciary budget now provides substantial funding for civil legal services, with the support of the legislative and executive branches: \$12.5 million in FY2011 – 2012, \$25 million in FY 2012 – 2013, and \$40 million in FY 2013 – 2014. Additionally, the judiciary budget included \$15 million in rescue funding for IOLA in each of those years. As recommended by the Task Force, I appointed an oversight board to oversee the process of obtaining grant requests and making grant awards. The board made awards to fifty-six civil legal services providers for FY 2011 – 2012 and to sixty providers for FY 2012 – 2013.

Preliminary data for the \$12.5 million provided in 2011 – 2012 shows that the funding enabled providers to give direct representation to more than 125,000 clients and that more than 733,000 additional individuals either benefitted from that work (for example, as class action members or household members other than the client) or received indirect legal assistance from projects such as clinics, workshops, help desks, hotlines, brief legal advice, and referrals. For the second year ending March 31, 2013, \$25 million in funding enabled providers to give direct representation to more than 267,000 clients and otherwise assist another 3.5 million individuals (approximately 1.65 million benefitting from the client representation and another 1.85 million receiving indirect legal assistance). Additionally, this funding has enabled other access-to-justice enhancements, such as expanding pro bono programs and encouraging new collaborations among legal service providers to achieve efficiencies. In short, in the first

two years of the program, the new state funding provided a significant lifeline to nearly four million New Yorkers in need. *Jonathan Lippman*

Through the hearings and the Task Force, a systemic annual process to fund civil legal services with state funds has been implemented. This funding not only provides help for people in need, but also produces significant economic benefits for the state. At the hearings, business leaders, bankers, property owners, health care providers, and government and community leaders testified that increasing access to legal assistance benefits their institutional performance and financial bottom lines. Providing pro bono assistance to the Task Force, consulting firms estimated that investing in civil legal services to prevent domestic violence in New York State can achieve annual savings of \$85 million in the costs associated with assistance for survivors of domestic violence. Additionally, anti-eviction legal services programs save approximately \$116 million annually in averted shelter costs. Further, an expert analysis of the impact of federal funds brought into New York through the provision of free legal services concluded that the investment of a single dollar in legal services funding generates approximately six dollars in combined cost-savings, benefits obtained, and economic activity for New York State.

This does not mean that money alone can fill the justice gap; the amount of funding needed would simply be too great. Therefore, the Task Force has also been pursuing noneconomic measures to help make the most effective use of existing resources to help close the gap. One initiative was to increase the involvement of law schools and law students in enhancing access to justice. The Task Force convened a day-long conference in 2012 and 2013 attended by representatives from all fifteen of New York's law schools, as well as by judges, bar leaders, legal services provid-

ers, practicing attorneys, and court administrators. A major outcome was the formation of a statewide council composed of administrative deans from each law school and a representative selection of legal services providers and bar leaders from around the state, who are now working to foster coordination and collaboration in programs that increase access to justice for low-income or vulnerable New Yorkers. A third law school conference took place in May of 2014. Another Task Force proposal was to examine the potential for expanding the use of non-lawyers to help bridge the justice gap. In response, I formed an advisory committee to explore that subject and design a pilot project to test the idea, and the group is currently at work.

The Task Force has also urged that court forms and procedures in the sprawling court system be simplified and made uniform – which would benefit unrepresented parties – and such efforts are ongoing. Further, the court system will continue with established programs to assist the unrepresented, such as CourtHelp, an online resource containing legal and procedural information and a growing list of do-it-yourself interactive forms; help centers staffed by attorneys and court clerks, who provide procedural and legal information as well as referrals to attorneys, legal clinics, and other services; and on-site volunteer lawyer programs that provide assistance at the courthouse. The Task Force also directed recommendations to the community of legal services providers, encouraging more preventive and early-intervention legal assistance so that, where possible, disputes could be resolved without involving the courts. We also took steps to encourage increasing collaboration among providers in order to avoid duplication of effort and to minimize costs. Finally, we also decided that a comprehensive approach to closing the justice gap has to involve the entire legal community work-

ing together, as well as more volunteer pro bono programs from law schools, bar associations, law firms, and the courts.

The pursuit of equal justice for all has been the hallmark of the legal profession since its inception. Every attorney has an obligation to foster the values of justice, equality, and the rule of law. Although attorney ethics rules may vary in their specifics from state to state, most acknowledge that every lawyer has a professional responsibility to provide legal services to those unable to pay. In other words, it is not just the judiciary that is obligated to ensure access to justice; it is the entire legal profession. While acknowledging that many New York lawyers already do a substantial amount of volunteer legal services, several recent court initiatives have been focused on increasing pro bono services by all New York lawyers.

The necessity of pro bono legal services is starkly evident in the event of a natural disaster, as was the case in the aftermath of Hurricane Sandy in October 2012. The storm devastated the homes and property of tens of thousands of New Yorkers. In addition to physical damage, however, it also left behind a host of legal problems for individuals and businesses, including: insurance-related issues; accessing benefits; healthcare; bankruptcy; and determining the responsibilities of landlords, tenants, and homeowners. The bar displayed its typical generosity and responsiveness: legal service providers and bar associations sprung into action to help the victims of the storm recover, filing for FEMA and Disaster Unemployment Insurance benefits, answering immigration status questions, documenting and filing insurance claims, and addressing many other civil legal needs of individuals and small businesses.

One recent initiative intended to increase the level of pro bono work by attorneys is

the Attorney Emeritus Program. Its goal is to engage seasoned lawyers in pro bono projects under the auspices of civil legal services providers, thereby enhancing the capacity of those providers to serve clients. Attorneys who might otherwise retire are now linked with programs that provide them not only with any necessary training and supervision, but also with resources a retired attorney would not likely have, such as access to offices and staff and malpractice coverage.

Furthermore, in 2013, I announced that as a condition of admission to the New York State bar, applicants would be required to demonstrate having performed at least 50 hours of law-related pro bono service to the poor, or equivalent public service work. In addition to easing the justice gap by providing assistance to legal services providers and pro bono programs (all of which must be done under the supervision of an admitted attorney), the requirement provides law students with a deeper understanding of the problems confronted by segments of society that have little access to legal resources and institutions. New York is the first state in the country to require pro bono services prior to bar admission. Through this program, New York law students will come to embrace the core values of the legal profession, first and foremost of which is service to others. This admission requirement will help make pro bono legal services to the poor a part of a new attorney's DNA – a commitment that, we hope, will endure throughout his or her legal career.

Most recently, in direct response to a Task Force recommendation in its 2012 report, New York's biennial registration process now requires all attorneys to report both the number of volunteer pro bono hours they have provided to the poor and the financial contributions they have made to legal services providers. The dual pur-

pose of this requirement is to obtain accurate information about pro bono work done by the bar, and to increase attorney awareness of the need for pro bono services.

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The rule of law – arguably the very bedrock of our society – loses meaning when the protection of our laws is available only to those who can afford it. Our courthouses, which are some of the most important structures in American life, must be accessible to litigants from every segment of society. We might as well close the courthouse doors if we are not able to provide equal justice for all – our very reason for being in the Judiciary and the legal profession.

The pursuit of justice is the ultimate goal of the courts. It is this pursuit that makes our mission so absolutely critical to the well-being of our nation and its people, who in a difficult economy need the courts more than ever before. My fervent hope is that our comprehensive efforts toward enabling access to justice in the New York state courts will significantly reduce the justice gap. Every society is judged by how it treats its most vulnerable citizens. We can and should be judged by whether we are “enabling access” to the courts for each and every person – rich and poor, high and low alike.

- ¹ Lewis F. Powell Jr., “Foreword” to John O. Peters and Margaret T. Peters, *Virginia’s Historic Courthouses* (Charlottesville, Va.: University of Virginia Press, 1995), ix.
- ² Mark David Agrast, Juan Carlos Botero, Joel Martinez, Alejandro Ponce, and Christine Pratt, *World Justice Project Rule of Law Index 2012 – 2013* (Washington, D.C.: The World Justice Project, 2013), 27, http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf.
- ³ *Ibid.*, 175.
- ⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963).
- ⁵ Many have argued that there should be a right to counsel at least in some civil cases, but a full discussion of the issues is beyond the scope of this essay. For example, see American Bar Association Recommendation 112A (2006), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.
- ⁶ The poverty guidelines are updated periodically in the *Federal Register* by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2).
- ⁷ The Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York, November 2010*, 1, <http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf>.
- ⁸ A. Gail Prudenti, 2013 *Report of the Chief Administrator of the Courts Pursuant to Chapter 507 of the Laws of 2009*, <http://www.nycourts.gov/publications/pdfs/2013ForeclosureReport.pdf>.
- ⁹ Richard M. Nixon, “Special Message to the Congress Proposing Establishment of a Legal Services Corporation,” May 5, 1971, <http://www.presidency.ucsb.edu/ws/?pid=2998>.
- ¹⁰ Testimony at the Chief Judge’s Hearings on Civil Legal Services. See <http://www.nycourts.gov/ip/access-civil-legal-services/public-hearings.shtml>.
- ¹¹ *Ibid.*
- ¹² *Ibid.*
- ¹³ The Task Force’s reports are available at <http://www.nycourts.gov/ip/access-civil-legal-services>.
- ¹⁴ The Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York, November 2010*, 5.

When Legal Representation is Deficient: The Challenge of Immigration Cases for the Courts

Robert A. Katzmann

Abstract: When the quality of lawyering is inadequate, courts are frustrated in their adjudicative role. Nowhere is this more apparent than in cases involving immigrants hoping to fend off deportation. As an appellate judge on a court whose immigration docket reached 40 percent of our caseload, I have too often seen deficient legal representation of immigrants. Although courts are reactive, resolving cases before them, judges can systematically promote the fair and effective administration of justice. With the aid of some outstanding legal talent, I created the Study Group on Immigrant Representation to help address the immigrant representation crisis. Our work has encompassed a variety of activities, including: publishing symposia; conducting studies documenting the enormity of the problem and proposing solutions; creating initiatives to expand pro bono representation; facilitating the first local government funding of direct immigrant legal services; creating legal orientation programs for immigrants; and developing the Immigrant Justice Corps, an innovative fellowship program. These initiatives represent some steps towards easing the crisis in immigrant legal representation.

ROBERT A. KATZMANN, a Fellow of the American Academy since 2003, is Chief Judge of the United States Court of Appeals for the Second Circuit. His publications include *Judging Statutes* (forthcoming 2014), *Courts and Congress* (1997), *Institutional Disability: The Saga of Transportation Policy for the Disabled* (1986), and *Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy* (1980).

A courtroom has multiple players with different roles, but all would agree that adequate legal representation of the parties is essential to the fair and effective administration of justice. Deficient representation frustrates the work of courts and ill serves litigants. All too often, and throughout the country, courts that address immigration matters must contend with such a breakdown in legal representation – a breakdown of crisis proportions.

In brief, the nation's immigrant representation problem is twofold: 1) there is a profound lack of representation, indicated by the fact that more than 40 percent of non-citizens in deportation proceedings lack representation nationwide; and 2) in far too many deportation cases, the quality of counsel is substandard. Immigrants are easy prey for unscrupulous lawyers, who gouge their clients out of scarce resources and provide shoddy legal services. Apart

from the representation problem, there are also issues relating to the functioning of the immigration adjudication system itself (a subject worthy of its own examination).¹

My views are shaped by experience as a judge on the United States Court of Appeals for the Second Circuit, where our workload nearly doubled as a consequence of an avalanche of immigration cases (ranging from thirty-two to forty-eight cases per week at the peak). My perspective is also informed by new research, described below, on immigrants and the impact of representation on case outcomes. I write, I should emphasize, in an individual capacity, not as an official representative of my Court. In my work on immigrant representation, I have been guided by Canon 4 of the Code of Conduct for United States Judges, which encourages judges, to the extent that their time permits and impartiality is not compromised, to contribute to the law, the legal system, and the administration of justice.

Immigrants are largely a vulnerable population of human beings who come to this country in the hopes of a better life, often entering without knowledge of the English language or American culture, in economic deprivation and in fear. Too often, the lack of adequate counsel for immigrants all but eliminates their hopes to experience the American dream, to live with their families openly and with security, to contribute to their new country.² This failure should be a concern for all of us: I think we can all imagine our own ancestors or the ancestors of friends and relate to the anxieties of today's newcomers. We are a nation of immigrants, whose contributions have been vital to who we are and hope to be.

What follows is a description of my efforts, working with the legal community both in and outside of government and philanthropic organizations, to help im-

prove the administration of justice for non-citizens, thereby addressing a grave problem of profound human consequence that has tested the federal courts' ability to render justice. I first offer some background on the representation issue, and then give a sense of the activities of the Study Group on Immigrant Representation, based in New York City, which I had the privilege of creating.

In the past decade, the number of immigration cases – that is, proceedings in which the federal government seeks to deport an individual residing in the United States – has increased dramatically. These cases begin when the Department of Homeland Security (DHS) charges a non-citizen as deportable. The case is then heard by an immigration judge in immigration court, based in the Department of Justice (DOJ). In adjudicating the matter, the immigration judge may conduct a trial-like hearing. The immigrant is entitled to defend him or herself, but because deportation charges are not criminal, the government does not provide the immigrant with a lawyer. Because many immigrants cannot afford to pay thousands or tens of thousands of dollars to an attorney, a significant portion of them must go it alone, trying to navigate our complex immigration system without the aid of legal counsel.

If either the immigrant or DHS want to challenge the immigration judge's decision, the next step is to appeal to the Board of Immigration Appeals (BIA), which is an administrative adjudicatory body within the DOJ that oversees the immigration courts. The party making that appeal must explain why the immigration judge's decision was legally or factually wrong; for immigrants who may lack education, language skills, and legal training, appealing without the help of counsel is a tall order.

These cases reach federal courts of appeals like mine if, after the BIA decides the

case, the immigrant seeks review again. As before, the party seeking review makes the appeal must explain why the BIA's decision was legally or factually wrong. There are procedural hurdles associated with navigating this process, facts to marshal into evidence, and complexities of law that can make this process difficult for those without legal training.

Until the 2000s, immigration cases were a small percentage of the workload of my court, the Court of Appeals for the Second Circuit (which encompasses New York, Connecticut, and Vermont). In 1999, when I began working as an appellate judge, the immigration docket was a minuscule percentage of our workload. But within a few years, that changed dramatically. In 2000, 255,420 cases were initiated in immigration courts and 28,104 cases were appealed to the BIA nationwide.³ By 2012, those numbers had grown significantly: 410,753 cases were initiated in immigration courts and 31,489 cases were appealed to the BIA.⁴ This means that each immigration judge must review nearly 1,500 cases each year, which amounts to more than five cases each business day. Consequently, the burdens on all actors in the immigration system are now extraordinary and the challenges for any judge, however conscientious, to dispose of all these cases with due care are overwhelming. As Chief Judge John M. Walker, Jr., observed in 2006 in his testimony before the Senate Judiciary Committee: "I fail to see how Immigration Judges can be expected to make thorough and competent findings of fact and conclusions of law under these circumstances."⁵

In order to reduce a backlog of some 56,000 cases that had accumulated nationally by 2002, the BIA began disposing of a significant number of the appeals through stripped-down procedures, such as allowing single board members to adjudicate

cases rather than the usual three-member panels, and permitting single board members to decide appeals through summary dismissals and affirmances without issuing an opinion explaining their reasoning. As BIA decisions greatly increased, the number of petitions for review in federal court grew exponentially and began to overwhelm our dockets. As my colleague Judge Jon O. Newman put it: "It's as if a dam had built up a massive amount of water over the years, and then suddenly the sluice gates were opened up and the water poured out."⁶ Indeed, by 2005, appellate courts were receiving about five times as many petitions for review as they were before 2002. As Judge Walker remarked: "What we thought was a one-time bubble has turned into a steady flow of cases," in excess of 2,500 a year,⁷ which was about a 50 percent increase in our total annual filings.⁸ Most of these cases were asylum matters, which involve claims that the individual will be persecuted if he or she returns to the home country, and therefore require careful review of often lengthy records.

The vast majority of these appeals are concentrated in two circuits. Half are located in the Ninth Circuit, which covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and the territories of Guam and the Northern Mariana Islands. Twenty percent are located in the comparatively smaller Second Circuit. The massive increase in the immigration docket of the Second Circuit, which approached 40 percent of the caseload of an already busy court, meant that our Court had to develop procedures to manage such cases. This system was devised largely by Jon Newman under the chief judgeship of John Walker,⁹ continued under the chief judgeship of Dennis Jacobs, and continues today. The new system, instituted by the Second Circuit in October 2005, added a non-argument

calendar (NAC) for immigration cases whereby cases are decided on the papers unless any judge on the panel seeks oral argument. The NAC runs parallel to the regular argument calendar (RAC). In the first year under that procedure, three-judge panels of our court adjudicated between thirty-two and forty-eight NAC cases per week, in addition to one or two immigration cases per sitting day on the RAC. This review was especially important with respect to decisions affirmed by the BIA without opinion (a practice that has since largely been curtailed). The Court of Appeals became effectively the first line of review (however limited) in a system where the immigration judges and the BIA are under extraordinary pressure to resolve cases. Pursuant to the NAC/RAC process, the Second Circuit resolved more than 17,400 immigration cases between January 1, 2006, and July 30, 2013, and the immigration case backlog has been essentially eliminated.

The sheer volume of immigration cases gives a sense of the substantial impact on the work of an appellate court, but more needs to be said about the task of the judge in those cases and the effects of inadequate counsel on the decisional process. As I am an appellate judge, immigration cases tend to come before me in a legally circumscribed context. An appellate judge's role is to review the administrative record and decision; absent legal error or lack of substantial evidence supporting the decision, the Court is largely constrained to defer to the agency's ruling. Therefore, the record made by the immigrant and the legal points preserved therein for review are critical to the outcome, especially where the immigrant has the burden of coming forward with evidence and the burden of proof of entitlement to status or relief. Even if an appellate judge would have ruled differently in the first instance, he or she has no authority to do so on appeal. Thus, quality legal representation in gathering

and presenting legal evidence to the immigration judge or BIA in a hearing context and the skill in advocacy regarding legal issues and their preservation for appeal can make all the difference between deportation and the right to remain in the country. It also means that getting effective counseling *before*, not *after*, applying for relief or getting immersed in proceedings provides the best chance for fleshing out the merits of the case, avoiding false or prejudicial filings, and securing lawful status or appropriate relief for the immigrant.

In all too many immigration cases, I could not help but notice a substantial obstacle to the fair and effective administration of justice: the frequently deficient counsel of represented non-citizens. For instance, the briefs of the lawyers too often were boilerplate submissions, with little attention to the facts of the individual cases: sometimes the briefs were virtually identical, with only the name changed. At times, the name in the body of the brief did not even match the name of the immigrant because the lawyer had not bothered to change the name of the party. Far too frequently, the lawyers had failed to keep their client apprised of developments in the case, documents the client was required to file, and even hearing dates that their client was obligated to attend (but missed because of the lawyer's lapse).

For immigrants, the stakes could not be higher: these cases determine whether they can remain in the country or whether they will be separated from their loved ones – often including their children – and barred from returning for many years. I often had the feeling that if only the immigrant had competent counsel at the very beginning of immigration proceedings (where the record is made with lasting impact) long before the case reached the court of appeals (where review is limited) the result might have been different, and

the non-citizen might have secured relief that would have allowed her or him to remain in the United States.

The importance of quality representation is especially acute for immigrants, not only because they stand to lose what Justice Brandeis described as “all that makes life worth living,”¹⁰ but also because there is a wide disparity in the success rate of those who have lawyers and those who proceed without counsel. For example, several studies have shown that asylum seekers are much more likely to be granted asylum when they are represented in immigration proceedings.¹¹ These findings are particularly noteworthy because they do not even take into account the varying quality of representation that asylum seekers receive. While differences in success rates do not by themselves tell us about causation, these data make the uncomfortable suggestion that outcomes can be affected by whether the immigrant can afford a lawyer or has the ability to access free legal services. Immigrants can secure their own legal representation in immigration proceedings, but generally “at no expense to the Government.”¹² For immigrants with limited means, the difficulty of securing legal representation may be compounded by regulations forbidding them from working during the initial pendency of their claims, thus depriving them of the capacity to earn money to hire a lawyer.¹³

Hoping to raise awareness and to effect change, I took the occasion of the 2007 Marden Lecture of the New York City Bar¹⁴ to challenge the New York legal establishment and others interacting with that establishment (law firms, bar associations, nonprofits, corporate counsel, foundations, law schools, state and local government, the media, the immigration bar, senior lawyers and retirees, providers of continuing education and training, and think tanks) to increase efforts to help address

the large – and largely unmet – legal needs in non-citizen communities. I stated there what I reiterate here: justice should not depend upon the income level of immigrants.¹⁵ A lawyer’s duty to serve those unable to pay is not an act of charity or benevolence, but rather one of professional responsibility, reinforced by the terms under which the state has granted to the legal profession effective control of the legal system.

When I gave the Marden Lecture, I was not sure what the response would be, but the reaction was, and has continued to be, incredibly supportive. In 2008, I started a working group, the Study Group on Immigrant Representation, with the counsel of several outstanding lawyers. The Study Group is made up of some seventy-five lawyers from a range of firms; nonprofits; bar organizations; immigrant legal service providers; immigrant organizations; law schools; federal, state, and local governments; and judicial colleagues. It has been an honor to work with lawyers so devoted to helping those in need and it has been wonderful to see their eagerness in a city where over one-third of our community is foreign-born.¹⁶ Study Group work has focused on three areas: 1) increasing pro bono activity of firms, especially at the outset of immigration proceedings; 2) improving mechanisms of legal service delivery; and 3) rooting out inadequate counsel and improving the quality of representation available to non-citizens. Our diverse group gathers together in the early mornings at the courthouse in downtown New York City to share ideas, collaborate on initiatives, and help think through solutions to challenges to immigration representation. The industriousness, intelligence, follow-through, and accomplishment of group participants have been remarkable and exciting. I have been inspired by the range of the Study Group’s activities and how its members (even those who might

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be adversaries in court) come together around the core value we all share: safeguarding the integrity, fairness, and efficiency of our system of justice – which depends on adequate and effective counsel.

Our method is to bring together key participants from the federal, state, and city governments, the private bar, bar associations, nonprofits, legal service providers, immigrant organizations, philanthropies, and law schools to foster the fair and effective administration of justice. This interdisciplinary approach has been fruitful and energizing; we have produced reports, pilot projects, colloquia, and training sessions. Justice Ginsburg and Justice Stevens have publicly praised our project, and Justice Breyer and Justice Sotomayor have also offered encouragement.¹⁷ Our Study Group concept is serving as a model for other jurisdictions, such as New Jersey, seeking to find ways to provide adequate counsel for immigrants.

Over the past five years, Study Group work has included numerous initiatives:

Data-Driven Study:

- The New York Immigrant Representation Study, a foundational Study Group initiative, began in 2010. We hoped to document the areas of the most urgent representational needs of indigent non-citizens facing removal in New York, with the eventual goal of advancing recommendations about necessary resources and strategies. Our findings about the scope of the need were published in 2011, and were followed by a report in 2012 that set forth a solution to address this need: the creation of a system of institutionally provided counsel for those facing deportation.

Increasing Pro Bono Representation:

- One of our most recent initiatives, the Immigrant Justice Corps, is a fellowship program I proposed, which enables

young lawyers and senior lawyers of retirement age, as well as trained college graduates, to provide pro bono legal services to immigrants for two to three years.

- We have partnered with bar organizations to recruit more pro bono lawyers. For example, the Second Circuit recently sought to facilitate representation for individuals possibly eligible for relief pursuant to recommendations by the Department of Justice. The Federal Bar Council's Public Service Committee, chaired by Study Group member Lewis Liman, gathered and trained a cadre of lawyers who offered pro bono representation to fifteen to twenty immigrants who could not afford counsel.
- Working with other organizations, we devised training sessions for deferred law firm associates so that they could spend their deferral years representing immigrants. Young lawyers would thus enter law firm practice with an understanding of immigration law and a commitment to immigration pro bono cases.
- We created a pilot project to foster greater law firm pro bono activity.¹⁸ The hope is that this two-year fellowship program will challenge the private bar to take on more pro bono asylum cases, as well as increase firms' ability to do so by creating a greater capacity to screen potential clients, conduct intake interviews, place new pro bono cases with law firms, and mentor the attorneys in those cases. This pilot project could serve as a model for an expanded program and encourage action by other foundations and firms.

Facilitating Collaboration:

- We have promoted the creation of law school clinics, the leading example being the Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law. The Cardozo Law

clinic has been so successful that it has recently received significant multi-year funding from our philanthropic partners for its work.

- We worked with Attorney General Eric Holder, Senator Charles Schumer, and others in addressing the immigrant representation problem; and in 2010, the Attorney General announced the creation of a Legal Orientation Program in New York, which gives not-for-profit providers greater opportunities to advise immigrants in groups and individually.
- Study Group members have joined with state, local, and federal government to examine how consumer law could be used to attack the problem of fraudulent legal services.
- In 2011, in response to federal efforts to address immigration fraud, the Study Group, together with the American Immigration Lawyers Association and other organizations, sponsored two days of intensive training in immigration law for non-immigration lawyers.
- Recognizing the substantial unmet needs in upstate New York,¹⁹ Study Group members have supported the work of Albany Law School and Prisoners' Legal Services of New York in their joint project to provide pro bono representation at the Ulster, New York Immigration Court.

Publications and Events:

- We have organized two major conferences, one at Fordham Law School and one at Cardozo Law (the latter with retired Justice John Paul Stevens), which led to a series of studies and reports published in the *Fordham Law Review* and *Cardozo Law Review*.²⁰ Reporting in *The New York Times*, the *New York Law Journal*, and *El Diario* has brought our activities to the attention of a larger audience.²¹

Although much more could be said about each of these initiatives,²² I will now focus on two in particular that have significant potential to influence the system of immigration adjudication in the United States.

The first of these is the New York Immigrant Representation Study (NYIRS).²³ In the immigration law field, it was a common refrain that having an attorney makes a significant difference for people who risk being deported. But, as my great mentor Senator Daniel Patrick Moynihan said, "You're entitled to your own opinion, but not to your own facts." In that spirit, I believed that the Study Group needed to assemble comprehensive data so that the problem could be better defined and addressed. To that end, Study Group members undertook the NYIRS, which was chaired by Professor Peter Markowitz of Cardozo Law, Professor Stacy Caplow of Brooklyn Law School, and attorney Claudia Slovinsky. The study, conducted with the support of the Leon Levy Foundation and the Governance Institute, was a two-year project in collaboration with the Vera Institute of Justice. The two reports that were issued as a product of that study provide, for the first time ever, comprehensive data about the scope of the immigrant representation challenge in New York (published in the 2011 report) and a plan for addressing it (published in the 2012 report).²⁴ Below are a few findings from the 2011 report that most strikingly show the depth of the problem:

- A significant percentage of immigrants appearing before the New York immigration courts do not have representation.
 - 60 percent of immigrants who were detained during the pendency of their deportation proceedings did not have counsel by the time their cases were completed.

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- 27 percent of immigrants who were *not* detained during the pendency of their deportation proceedings did not have counsel by the time their cases were completed.
- According to the providers surveyed, cases in which non-citizens are held in detention during the deportation proceedings were least served by existing immigration attorneys, particularly non-profit or pro bono resources.
- The DHS's detention and transfer policies have created significant obstacles for immigrants facing removal to obtain counsel.
 - DHS transferred almost two-thirds (64 percent) of those detained in New York to far-off detention centers (most frequently in Louisiana, Pennsylvania, and Texas) where they faced the greatest obstacles to obtaining counsel, a practice which subsided when DHS changed its detainee transfer policy in 2012.²⁵
 - Individuals who were transferred elsewhere and who remain detained outside of New York were unrepresented 79 percent of the time.
- The two most important variables affecting the ability to secure a successful outcome in a case (defined as relief or termination) are having representation and being free from detention.
 - The absence of either factor in a case – being detained but represented or being unrepresented but not detained – decreases the success rate dramatically. When immigrants are detained and unrepresented, the rate of successful outcomes decreases even more substantially. The success rates are as follows:
 - Represented and released or never detained: 74 percent have successful outcomes.
 - Unrepresented but released or never detained: 13 percent have successful outcomes.
 - Represented but detained: 18 percent have successful outcomes.
 - Unrepresented and detained: 3 percent have successful outcomes.

It is clear from the data that having a lawyer makes a substantial difference. But the report also found that deficient performance by lawyers providing deportation-defense services create more problems for non-citizens facing deportation. In its survey, New York immigration judges rated nearly half of all legal representatives as inadequate in terms of overall performance, meaning that the attorneys did not investigate the case, could not respond to questions about the facts or the law, did not meet deadlines to file documents, and sometimes even failed to appear in court.

The study also showed that the two greatest impediments to increasing the availability and quality of legal services for immigrants are a lack of funding and a lack of resources to build a qualified core of experienced attorneys who can provide deportation defense. These dramatic findings underscore the immensity of the task before us and help us understand where to focus resources most immediately.

The second part of the New York Immigrant Representation Study, released in November 2012, was devoted to developing concrete proposals to address the immigrant representation crisis in New York.²⁶ The study's steering committee (a group of experts from diverse legal institutions) was tasked with using the data from NYIRS's first report and other available information to make realistic short- to medium-term proposals. The committee set forth a blueprint for a system whereby a small group of competitively selected providers would deliver public defender-type universal representation to indigent detainees facing deportation.

The project they proposed would ensure universal representation, with screening for income eligibility only; as well as providing basic support services such as translation and interpretation services, social work, and mental health services. It would also be implemented through existing institutional providers to minimize administrative complexities and would work in cooperation with other key institutional actors such as DHS and the immigration court system. Finally, it would be overseen by an organization that could provide centralized oversight and project management, and would derive its funding primarily or significantly from a reliable public revenue stream.

This model, created by the NYIRS steering committee, became the basis for a pilot project of deportation defense in New York City, called the New York Immigrant Family Unity Project. When fully funded, this effort will provide representation to approximately 2,750 New Yorkers each year who face exile from their homes and families. It would increase the likelihood of keeping these New York families together by as much as 500 percent, and provide a general roadmap for how communities like New York can address critical problems in our immigration system. With this in mind, Study Group members brought together a community of relevant actors to make this system a reality and achieved a major milestone in June of 2013. In a historic action that affirmed governmental commitment to fund legal services for immigration, the City Council of New York City announced funding of \$500,000 for the New York Family Unity Project, “the nation’s first assigned counsel system for immigrants.”²⁷ Christine Quinn, then-speaker of the New York City Council, acknowledged the work of the Study Group in devising the New York Family Unity Project and called for other such collaborative efforts to ensure access to counsel

for immigrants.²⁸ Since then, our group has been contacted by organizations across the country interested in implementing our model in other cities and states.

*Robert A.
Katzmann*

Another major initiative of the Study Group is a project I proposed called the Immigrant Justice Corps (IJC), launched in January 2014 with substantial planning, support, and initial funding from the Robin Hood Foundation and subsequent additional funding from the JPB Foundation.²⁹ The IJC is the nation’s first fellowship program dedicated to meeting the need for legal assistance for immigrants seeking citizenship and fighting deportation.³⁰ The IJC concept is based on the supposition that the need for effective counsel for immigrants will only increase in the years ahead. If there is comprehensive immigration legislation, the imperative of having an expanded pool of quality counsel will be greater because virtually every person eligible for relief will need legal assistance. Moreover, to the extent that the executive branch exercises greater discretion about whether or not to pursue a case at the outset of its immigration deliberations, there will be a greater need for lawyers to provide advice to non-citizens. Fiscal circumstances are tight, and adequate public support for counsel will be difficult to realize on a national level; in that climate, the fair and effective administration of justice will depend on broad thinking about how to supplement whatever resources may be available to provide counsel to non-citizens possibly eligible for relief. To that end, I urged the creation of the IJC,³¹ which unites recently minted and senior lawyers in a common cause across the generations. It allows young lawyers at the outset of their careers to do something significant for themselves and for those in need, and senior lawyers, eager to share their experience, to give back to the system that has supported them. The IJC also includes

young college graduates, who will be trained in immigration law and work essentially as paralegals in support of community based organizations.

The IJC proposal borrows from other fellowship program models that call young people to public service, such as Teach for America, the Peace Corps, and Americorps, as well as such private law fellowship programs as Equal Justice Works, the Liman Program, and the Skadden Foundation. Through a selection process, lawyers are chosen to participate in a two-to three-year program and trained – with the aid of nonprofits and law school clinics – in a boot camp of intensive courses on immigration law. IJC lawyers are then placed with local immigrant service providers and provide legal counsel to non-citizens in immigration proceedings.

The project is funded through philanthropy, and over time, we expect a mix of philanthropy and government support. One great virtue of the project is its administrative simplicity. As the IJC expands from New York to a national effort, the IJC will be administered through an independent 501(c)(3).

This program has many benefits. Primarily, of course, it makes a fundamental difference in the lives of immigrants and their families. The IJC's very existence raises awareness of the crisis of representation and encourages efforts to meet that crisis. It facilitates the resolution of cases and promotes the fair and effective administration of justice, thereby aiding already busy courts. As a model of efficient legal-services delivery, the IJC could stimulate public funding streams for other projects, such as the New York Immigrant Family Unity Project. For law schools, the IJC provides new ways of thinking about how to provide legal services while at the same time enhancing job prospects for graduates at a time when the law market is tightening.

By populating the field of immigration law with a cadre of dedicated lawyers, the IJC will change the immigrant representation arena in much-needed ways. It will create leadership for the next generation to help meet the legal and policy challenges in the years ahead. It will also summon lawyers to serve the noblest purposes of the law: to assist those in dire straits and in this way address a national problem. For young lawyers, the experience will have a lasting impact on their careers since they will experience how human beings benefit from their counsel and how families in danger of being torn apart can stay together. Some IJC lawyers will stay in the nonprofit world, while others who decide to enter private practice or work in government may become advocates for their firms' increasing pro bono involvement. They will also be leaders of individual philanthropic giving as their careers progress. They will contribute to public policy discussions with sophistication in the years ahead; and their own experience will add to a body of knowledge that will enrich future research and analysis.

For senior lawyers, who often have few outlets to direct their energies and skills, the IJC will provide opportunities to serve the public good in the face of unwanted retirement. As a consequence of their IJC experiences, both recently minted and senior lawyers could provide insight about approaches to ensure greater access to justice, not only through individual representation but also through systemic innovation. Most important, as I have said, the IJC could make all the difference to those without resources, those who seek to realize the American dream and contribute to this nation's vitality.

To date, the concept has received support from a variety of sectors, including some top New York City officials. Then-mayor Michael Bloomberg, for instance, convened a session of foundations urging

their involvement.³² Foundations, such as Robin Hood and the JPB Foundation, have been generous with support. Law schools have been very encouraging as well.³³ Law firms have expressed interest in sponsoring IJC fellows, and American Bar Association President James Silkenat convened a meeting in New York of leading lawyers to draw attention to the program.

The volume of immigration cases before a court is largely beyond the judiciary's control.³⁴ The litigation docket will be affected by congressional action and by the way the executive branch sets enforcement priorities. This may determine, for example, whether DHS will exercise greater discretion and, consistent with its stated en-

forcement priorities, refrain from initiating deportation actions against certain non-citizens who have contributed to the community; who have ties, including familial relationships, to the community; and who are not threats to public safety. Internal reforms within the DHS and DOJ can also bear upon the adjudication of immigration matters. But whatever the future number of cases, the stakes for those facing deportation are high and the dire need for quality representation will not change. All of us involved in the administration of justice have a responsibility to seek to ensure its fairness and effectiveness. In that effort, I welcome the opportunity to collaborate further with colleagues both within and outside of government.

ENDNOTES

- ¹ See, for example, Lenni B. Benson and Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration and Removal Adjudication*, <http://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-final-June-72012.pdf> (accessed May 12, 2014); Russell R. Wheeler, "Practical Impediments to Structural Reform and the Promise of Third Branch and Analytical Methods: A Reply to Professors Baum and Legomsky," *Duke Law Journal* 59 (2010): 1847–1882; and American Bar Association Commission on Immigration and Arnold & Porter, LLP, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (Washington, D.C.: American Bar Association, 2010), http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf.
- ² On the impact of immigrants' legal and socioeconomic status on their children, see Hirokazu Yoshikawa, *Immigrants Raising Citizens: Undocumented Parents and Their Young Children* (New York: Russell Sage Foundation, 2012).
- ³ Office of Analysis and Planning for the Executive Office for Immigration Review, *Statistical Yearbook 2001* (Falls Church, Va.: Department of Justice, 2002), A-1, E-1.
- ⁴ Office of Analysis and Planning for the Executive Office for Immigration Review, *Statistical Yearbook 2012* (Falls Church, Va.: Department of Justice, 2013), A-1, S-1.
- ⁵ See statement of the Honorable John M. Walker, Jr., United States Court of Appeals for the Second Circuit, *Immigration Litigation Reduction?: Hearings Before the Senate Committee on the Judiciary*, 109th Cong. 6 (2006). Although very substantial challenges remain within the immigration adjudication system, there have been improvements in recent years. There has been some increase in resources, though the need is still vast. There are far more precedential opinions by the BIA, which aid the federal courts in their deliberations. Largely gone are single-member BIA decisions, and, as I indicated above, the BIA no longer issues summary affirmances.
- ⁶ Libby Lewis, "Appeals Courts Flooded with Immigration Cases," All Things Considered, National Public Radio, November 19, 2004, <http://www.npr.org/templates/story/story.php?storyId=4179087>.

- 7 See statement of the Honorable John M. Walker, Jr., United States Court of Appeals for the Second Circuit, *Immigration Litigation Reduction?: Hearings Before the Senate Committee on the Judiciary*, 109th Cong. 5 (2006).
- 8 Administrative Office of the United States Courts, Federal Judicial Caseload Statistics March 31, 2005, Table B1.
- 9 Judge Jon O. Newman, "The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management," *Brooklyn Law Review* 74 (2008): 429.
- 10 *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).
- 11 Donald M. Kerwin, "Revisiting the Need for Appointed Counsel," *Insight* (4) (April 2005): 1–6, http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf. In political asylum cases, 39 percent of nondetained, represented asylum seekers received political asylum, compared with 14 percent of nondetained, unrepresented asylum seekers. Of all detained, represented asylum seekers, 18 percent received asylum; compared with 3 percent of detained, unrepresented asylum seekers. See *ibid*; United States Commission on International Religious Freedom, *Asylum Seekers in Expedited Removal*, http://www.uscirf.gov/images/stories/pdf/asylum_seekers/execsum.pdf (accessed May 12, 2014); and Andrew I. Schoenholtz and Jonathan Jacobs, "The State of Asylum Representation: Ideas for Change," *Georgetown Immigration Law Journal* 16 (2002): 739–740.
- 12 Immigration and Nationality Act, 8 U.S.C. sec. 1362 (2012).
- 13 Code of Federal Regulations, Title 8, sec. 208.7(a) (2004). "[A]sylum seekers – who by definition have fled from their homes and, as a result, their means of income – generally cannot pay for legal representation." See also Eleanor Acer, "Making a Difference: A Legacy of Pro Bono Representation," *Journal of Refugee Studies* 17 (2004): 349; and Schoenholtz and Jacobs, "Asylum Representation," 747.
- 14 Robert A. Katzmann, "Orison S. Marden Lecture: The Legal Profession and the Unmet Needs of the Immigrant Poor," *The Record of the Association of the Bar of the City of New York* 62 (2) (2007): 287–311. A slightly revised version with footnotes can be found in Robert A. Katzmann, "The Marden Lecture: The Legal Profession and the Unmet Needs of the Immigrant Poor," *Georgetown Journal of Legal Ethics* 21 (2008): 3–20.
- 15 Katzmann, "The Marden Lecture," 20.
- 16 We have been guided by an outstanding steering committee, including: Jojo Annobil of Legal Aid, Immigration Judge Noel Brennan, Judge Denny Chin, Peter Cobb, Peter Eikenberry, Philip Graham, Robert Juceam, William Kuntz (then in private practice and now District Judge for the Eastern District of New York), Lewis Liman, Peter Markowitz, Liman Fellow Lindsay Nash, Michael Patrick, Careen Shannon, and Claudia Slovinsky.
- 17 Pro Bono Institute, "Words of Wisdom," The Pro Bono Wire, <http://pbi.informz.net/admin31/content/template.asp?sid=15374&brandid=4063&uid=1012842200&mi=1465561&ptid=1053> (accessed May 12, 2014); and Tony Mauro, "Sotomayor: Lack of Diversity on Bench is 'Huge Danger,'" *Legal Intelligencer*, November 21, 2013, <http://www.thelegalintelligencer.com/id=1202629016315/Sotomayor:-Lack-of-Diversity-on-Bench-Is-'Huge-Danger'?slreturn=20140311124034> (accessed April 11, 2014).
- 18 A grant from the Leon Levy Foundation provides funding for the nonprofit Human Rights First to work with pro bono lawyers from firms on asylum cases. Lori Adams and Alida Y. Lasker, "The Asylum Representation Project & Leon Levy Fellowship at Human Rights First: An Innovative Partnership to Increase Pro Bono Representation to Indigent Asylum Seekers," *Cardozo Law Review* 33 (2011): 417–436, http://www.cardozolawreview.com/content/33-2/Adams_Lasker.33-2.pdf. In this pilot effort, the Federal Bar Council Public Service Committee (with appreciation to Jamie Levitt, Alida Lasker, and Lewis Liman) has secured the commitment of Cleary Gottlieb, Sullivan & Cromwell, Fried Frank, Morrison & Foerster, and Wilmer Hale

to assist with the screening of potential asylum clients at the New York Immigration Court, and to have those law firms take asylum cases pro bono. Robert A. Katzmann

- ¹⁹ Denny Chin, “Representation of the Immigrant Poor: Upstate New York,” *Cardozo Law Review* 33 (2011): 351–356.
- ²⁰ The Robert L. Levine Distinguished Lecture with articles, reports, and commentaries of the Study Group, *Fordham Law Review* 78 (2) (2009): 453–640, <http://law.fordham.edu/fordham-law-review/15905.htm>; Mark Hamblett, “Lawyers Target ‘Assembly Line’ Practice, Abuse of Poor Immigrants,” *New York Law Journal*, January 4, 2010, 1, <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202437343741&hbxlogin=1>; and “Symposium, Innovative Approaches to Immigrant Representation: Exploring New Partnerships,” *Cardozo Law Review* 33 (2011): 331–490, http://www.cardozolawreview.com/index.php?option=com_content&view=article&id=188&Itemid=7.
- ²¹ See Nina Bernstein, “In a City of Lawyers, Many Immigrants Fighting Deportation Go It Alone,” *The New York Times*, March 13, 2009, <http://www.nytimes.com/2009/03/13/nyregion/13immigration.html>; Sam Dolnick, “As Barriers to Lawyers Persist, Immigrant Advocates Ponder Solutions,” *The New York Times*, May 4, 2011, <http://www.nytimes.com/2011/05/04/nyregion/barriers-to-lawyers-persist-for-immigrants.html>; Kirk Semple, “In A Study, Judges Express a Bleak View of Lawyers Representing Indigents,” *The New York Times*, December 19, 2011; “For Want of a Good Lawyer: Deportation Without Representation,” *The New York Times*, December 24, 2011, <http://www.nytimes.com/2011/12/25/opinion/sunday/deportation-without-representation.html>; Kirk Semple, “Plan Would Add Lawyers to Fight Deportation Cases,” *The New York Times*, November 27, 2012, http://www.nytimes.com/2012/11/28/nyregion/plan-would-add-lawyers-to-contest-deportation-cases.html?_r=0; Hamblett, “Abuse of Poor Immigrants,” 1; Mark Hamblett, “Study, Forum Stress Plight of New York’s Unrepresented Immigrants,” *New York Law Journal*, May 6, 2011, <http://www.law.com/jsp/law/international/LawArticleFriendlyIntl.jsp?id=1202493130604>; and Mark Hamblett, “Summit Participants Discuss Effort to Find Competent Lawyers for Poor N.Y. Immigrants,” *New York Law Journal*, January 30, 2012, <http://www.newyorklawjournal.com/PubArticleFriendlyNY.jsp?id=1202540386731&slreturn=1>.
- ²² To learn more about our Study Group activities, you may download our Fordham and Cardozo symposia and reports, contact the Study Group (studygroupimmigrantrep@gmail.com) or the Federal Bar Council Public Service Committee, or contact the organizations featured in our materials, who are all doing excellent work.
- ²³ NYIRS Steering Committee, “Accessing Justice I: The Availability and Adequacy of Counsel in Removal Proceedings (New York Immigrant Representation Study Report: Part 1),” *Cardozo Law Review* 33 (2011): 357–416, http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf.
- ²⁴ NYIRS Steering Committee, “Accessing Justice I”; and NYIRS Steering Committee, “Accessing Justice II: A Model for Providing Counsel to New York Immigrants in Removal Proceedings (2012),” http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.
- ²⁵ U.S. Immigration and Customs Enforcement, Policy 11022.1: Detainee Transfers, January 4, 2012, <http://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf>.
- ²⁶ NYIRS Steering Committee, “Accessing Justice II.”
- ²⁷ As Peter Markowitz put it: “The NYC Council and Speaker [Christine] Quinn should be applauded for creating the nation’s first assigned counsel system for immigrants.” Speaker Christine Quinn, “Council Members & Immigrant Rights Groups Announce Pilot Program Providing Legal Counsel For Immigrants Facing Deportation,” 2013, <http://council.nyc.gov/html/pr/071913nyifup.shtml> (accessed May 12, 2014).
- ²⁸ Then-speaker Quinn remarked: “I want to thank Judge Robert Katzmann and the New York Immigrant Family Unity Project for all their work on the issue.” See Christine Quinn, “Pilot Program Announcement.”

²⁹ Kirk Semple, “Seeking Better Legal Help for Immigrants,” *The New York Times*, January 28, 2014, http://www.nytimes.com/2014/01/29/nyregion/service-program-will-recruit-law-school-graduates-to-help-represent-immigrants.html?_r=0.

³⁰ The Immigrant Justice Corps website is at www.justicecorps.org.

³¹ Kirk Semple, “Judge Proposes a National Lawyer Corps to Help Immigrants,” *City Room, The New York Times*, March 19, 2013, <http://cityroom.blogs.nytimes.com/2013/03/19/judge-proposes-a-national-lawyers-corps-to-help-immigrants/>.

³² In an October 2009 report, the Bloomberg Administration committed to support the training of lawyers who would represent immigrants, stating that “[t]he City will commit \$2 million to the effort to cover a team of supervising attorneys and on-going training of associates and technical assistance in the area of immigration law.” See Michael Bloomberg, “Immigrants: The Lifeblood of New York City,” AILA InfoNet (2009), 3, <http://www.aila.org/content/default.aspx?docid=30284>.

In an October, 2009 speech, then-mayor Michael Bloomberg committed to “creat[ing] a \$2 million fund to deploy these lawyers to community organizations with high concentrations of immigrants – and we’ll give them the support they need to help more families get a fair shake of the justice system . . . and stay here in our City.” He also emphasized the need to keep families unified and said that “the stakes are too high” not to provide adequate representation to immigrants. Finally, he personally thanked me and Chung-Wha Hong, director of the New York Immigration Coalition, for the idea, calling it “an example of how we can turn the national economic downturn to our advantage – if we think innovatively and act boldly.” See Michael Bloomberg, “Speech at City University of New York Graduate Center,” New York, New York, October 8, 2009.

In November 2011, Mayor Bloomberg, Deputy Mayor for Legal Affairs Carol Robles-Roman, Chief Policy Adviser John Feinblatt, Commissioner of the Mayor’s Office to Combat Domestic Violence Yolanda Jimenez, and Commissioner of the Mayor’s Office of Immigrant Affairs Fatima Shama announced a new program that would add thirteen additional full-time attorneys to the city’s ten indigent criminal defense providers, as well as provide counseling to immigrant domestic violence victims. See News from the Blue Room, “Mayor Bloomberg, Deputy Mayor Robles-Roman and Chief Policy Adviser John Feinblatt Announce Expansion of Legal Services for Immigrants,” Press Release, November 21, 2011, <http://www.nyc.gov/html/om/html/2011b/pr419-11.html>.

³³ I especially acknowledge the counsel and active involvement and encouragement of then–NYU School of Law Dean Ricky Revesz.

³⁴ The Second Circuit, in the interest of judicial economy and in order to prioritize its docket, decided to toll all immigration cases for ninety days to allow petitioners and DHS to determine whether there would be an exercise of prosecutorial discretion, noting that the court currently had a thousand immigration cases pending. The Court established a procedure for how the appellate process for pending immigration cases could either proceed or allow the case to be remanded to the BIA for a grant of prosecutorial discretion. See *In the Matter of Immigration Petitions for Review Pending in the United States Court of Appeals for the Second Circuit*, 702 F.3d 160 (2d Cir. 2012). As a consequence, the government exercised discretion in 928 cases in the period from January 1, 2013, to August 15, 2013.

Gideon's Problematic Promises

Carol S. Steiker

Abstract: The landmark case of “Gideon v. Wainwright” (1963) ensured the right of criminal defendants across the country to the effective assistance of counsel, but the overwhelming consensus is that the promise of “Gideon” has not been kept. Although there are significant differences in the delivery of indigent defense services across the country, there are four general reasons for the failure of “Gideon” that obtain across every jurisdiction and collectively cover much of the explanatory terrain: 1) its mandate is inadequately and precariously funded; 2) institutional impediments have impinged on the independence, training and oversight, and advocacy culture of indigent defense counsel; 3) legal remedies for ineffective assistance of counsel are often inadequate, inaccessible, or both; and 4) the ubiquitous practice of plea bargaining shields inadequate representation from view or remedy. Vindicating the right of poor people to effective representation in criminal cases remains a daunting but enormously important task.

CAROL S. STEIKER is the Henry J. Friendly Professor of Law and Special Advisor for Public Service at Harvard Law School. She is the author of numerous works in the broad field of criminal justice. Her recent publications include “*Gideon at Fifty: A Problem of Political Will*,” in the *Yale Law Journal* (2013); “*Capital Punishment and Contingency*,” in the *Harvard Law Review* (2012); and the edited volume *The Political Heart of Criminal Procedure: Essays on Themes of William J. Stuntz* (with Michael Klarman and David Skeel, 2012).

What is at stake in a criminal trial? The special procedural protections that the Constitution provides in criminal cases protect a defendant’s reputation, liberty, and sometimes even life. In addition, a criminal conviction can carry serious collateral (that is, putatively non-punitive) consequences, such as deportation, disenfranchisement, and required registration and community notification (as in the case of convicted sex offenders). Beyond these individual interests, considerable though they are, lie less tangible but no less important collective interests. In the United States, constitutional adjudication establishes minimum national standards regulating police investigative practices, the vast majority of which takes place in the litigation of individual criminal cases. Thus, criminal trials play a crucial role in establishing constitutional limits on the entire range of law enforcement investigative techniques, including police intrusions into private homes, street encounters, border searches, interrogations, identification procedures such as lineups, and the use of technology such as GPS tracking and DNA sampling.¹

Because the U.S. incarceration rate has undergone a massive and unprecedented increase over the past

several decades (as documented in the Summer 2010 issue of *Dædalus*) even more is now at stake in the criminal process.² The United States has become the leading incarcerator in the world, with some 2.3 million people behind bars and an incarceration rate of around 750 per 100,000 of the population, which is far above our own past (and Europe's current) rate of around 100 per 100,000.³ This exponential rise of our prison and jail populations since the 1970s has had enormous consequences not only for individuals, but also for their families and communities – consequences with a highly disproportionate impact on racial minorities and the poor. The study of the society-wide effects of what has come to be called “mass incarceration” has demonstrated that the operation of the criminal justice process is directly linked to the substantial racial and socioeconomic divides in contemporary American society.⁴

With so much at stake in our criminal justice system, it is obvious that serious attention must be paid to its proper functioning. Anyone familiar with the operation of the criminal justice process – any judge, litigator, or informed policy-maker – will attest that one of the best ways to promote the proper functioning of the criminal justice system is to ensure that it is staffed with qualified lawyers working under conditions that permit them to practice effectively. Indeed, this rather obvious conclusion was reached by the Supreme Court fifty years ago in its landmark decision in *Gideon v. Wainwright* (1963),⁵ which held that the Sixth Amendment's guarantee of court-appointed counsel for indigent defendants in serious criminal cases applied as matter of “due process of law” to the states in addition to the federal government. The *Gideon* decision is often hailed as a triumphant story of progress: it was the subject of the bestselling book by the journalist Anthony Lewis, *Gideon's Trumpet*, which was adapted into a film of the

same name starring Henry Fonda; it is also the only decision recognized by the Supreme Court itself as establishing a “watershed” right of criminal procedure for the purposes of retroactive application.⁶

Anthony Lewis passed away in 2013, the year of *Gideon's* fiftieth birthday, but the triumphal version of the *Gideon* story died much longer ago, as Lewis himself recognized. On each significant anniversary of the decision, commentators have wrung their hands over the failure of the reality of indigent defense representation to live up to the promises implicit in the recognition of the right. Horror stories abound of the failure of indigent defense systems in infamously low-performing jurisdictions. For example, in the wake of Hurricane Katrina, the New Orleans public defender office was unable to produce a list of the 6,500 to 8,000 prisoners whom they were supposed to be representing.⁸ And in some Mississippi counties, defendants may wait up to a year to speak to a court-appointed lawyer about their case, and many lawyers do not meet their clients until the day of trial.⁹

Less obvious culprits, too, have left *Gideon's* promises unmet. For example, the state of New York – a relatively wealthy state in the relatively progressive Northeast – has failed to establish a well-functioning statewide system of indigent defense services; rather, services are supplied through a patchwork of inadequately funded county-based systems, without any statewide attorney training, supervision, or monitoring.¹⁰ And even the federal defender system, often promoted as a model for the states, was thrown into crisis as a consequence of the fiscal sequester in 2013, which forced substantial and unprecedented cuts in staffing and resources.¹¹ Even the nation's chief prosecutor recognizes the grave deficiencies that indigent defense providers face across the country. As Attorney General Eric Holder has forcefully

acknowledged, “Too often, when legal representation is available to the poor, it’s rendered less effective by insufficient resources, overwhelming caseloads, and inadequate oversight. . . . [T]he basic rights guaranteed under *Gideon* have yet to be fully realized.”¹²

Why has it proven so difficult to meet *Gideon*’s promise of minimally adequate indigent defense representation for the poor in serious criminal cases? Unlike the fairly simple story of *Gideon*’s triumph, the story of *Gideon*’s failure is complicated and murky, especially in light of the many differences among the various jurisdictions (local, state, and federal) that are charged with the task of providing indigent defense services. However, there are four general reasons for *Gideon*’s failure that obtain across every jurisdiction and collectively cover much of the explanatory terrain.

Gideon’s most obvious deficit is that its command took the form of an unfunded mandate. Unlike most other constitutional guarantees in the Bill of Rights, the right to assistance of counsel in criminal cases is an affirmative rather than a negative right. The government cannot ensure the right merely by abstaining from impermissible intrusions (such as unwarranted searches and seizures or violation of First Amendment free speech rights), but only by directly channeling resources for that particular purpose. However, no court – not even the United States Supreme Court – has control over the power of the purse. Courts may elucidate the contours of constitutional rights, but they cannot compel the appropriation of state or federal monies. What this separation between affirmative rights and fiscal appropriations has meant for *Gideon* is that each jurisdiction (federal, state, or local) has been left to its own devices in deciding how to structure and fund its obligatory services for indigent criminal defendants, who comprise approximately

80 percent of all criminal defendants. Since the 1980s, when the number of prosecutions soared, funding challenges have been enormous. Close to half of the states have established statewide public defender offices of salaried lawyers who handle most of the state’s indigent defense caseload. The other states generally fully or partially delegate the responsibility for providing indigent defense services to counties or judicial districts, which provide for court-appointed counsel through a variety of means, including hourly compensation (often with mandated “caps”) and contracts (often of the “low-bid” variety). Although there are some decently funded and well functioning indigent defense systems, they are clearly the exception rather than the rule: most systems – whether public-defender, court-appointed, or contract-based – are characterized by chronic lack of adequate funding.¹³

The chronic underfunding of indigent defense is the source of many of the most obvious problems that plague such systems. First, there are the astronomically high caseloads that salaried public defenders (and some court-appointed and contract attorneys as well) carry in underfunded locales. For example, by one recent count, Florida public defenders in Miami-Dade County were carrying average caseloads of close to 500 felonies or 2,225 misdemeanors at a time.¹⁴ Crushing caseloads require attorneys to perform a kind of ER “triage” with their cases, moving from emergency to emergency rather than performing the kind of methodical investigation, legal research, client consultation, informed negotiation, and courtroom advocacy that the adversary system presumes. Second, chronically underresourced working conditions make it impossible to recruit enough well-qualified lawyers to take on the job of indigent defense, or to retain experienced lawyers. As a result, too many ill-qualified or inexperienced lawyers are

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providing indigent defense services, and they are the least able to deal with the constraints of inadequate resources. Third, lack of resources precludes the investment in training and supervision that might ameliorate problems caused by under-qualified and inexperienced counsel. Fourth, even if the lawyers could perform adequately, underfunding deprives them of the kind of investigative and expert services that many cases require.

One might wonder why, given all of these serious problems, underfunding persists in so many jurisdictions around the country. The answer is relatively simple: caseloads grow ever larger, and budgets are failing to keep pace and sometimes even shrinking. *Gideon's* mandate is essentially a welfare program, because indigent defense services by definition directly benefit only the poor.¹⁵ Welfare programs are always politically unpopular and fare poorly in comparison to government programs that support things that more apparently benefit all citizens, such as infrastructure and education. But criminal defendants are even less politically powerful than the poor. First, many current and past defendants are politically disenfranchised as a collateral consequence of prior convictions. Second, state officials are not merely insufficiently motivated to remedy the plight of criminal defendants (as is often the case with the poor); rather, they often have some affirmative interest in keeping criminal defendants at a comparative disadvantage in the criminal justice process, in order to produce more certain convictions at a lower cost. In explaining the persistent "defiance and resistance" of state governments to *Gideon's* mandate, some commentators have noted that adequate funding for criminal defense lawyers "could frustrate [governmental] efforts to convict, fine, imprison and execute poor defendants."¹⁶ Moreover, when individual judges control some or all of the funding of

indigent defense, they may "tolerate or welcome inadequate representation because it allows them to process cases quickly."¹⁷ The fact that most state judges must stand for some sort of election may also increase their wariness of the possibility of acquittals in high-profile cases.

Moreover, improvements in funding for indigent criminal defense programs are often short-lived. Even in jurisdictions where episodic increases in funding or resources for indigent defense services have been approved by the political branches, the battle for adequate funding is ongoing, due to the yearly nature of budget appropriations and other competing demands for funds. For example, in Massachusetts (a progressive state whose indigent defense system is considered a high-functioning one), the current Democratic governor has promoted a major reorganization of the structure of the statewide indigent defense program in an attempt to reduce costs by raising public defender caseloads.¹⁸ A recent proposal from the state's House Committee on Ways and Means suggested that Massachusetts experiment with a "low-bid" contracting system for indigent defense (the proposal was rejected in the House budget after a firestorm of criticism).¹⁹ The fragility of indigent defense funding, even in a relatively progressive and wealthy state like Massachusetts, demonstrates how precarious indigent defense funding is around the country and how difficult it is to achieve lasting reform.

Current indigent defense systems are plagued by institutional impediments that go beyond a lack of resources. While adequate funding is clearly necessary, it is also insufficient by itself for the proper functioning of an indigent defense system. In addition to adequate funds, indigent defense systems require institutional structures that 1) ensure their independence from improper political interference; 2)

provide adequate training, supervision, and oversight; and 3) more generally promote a culture of zealous advocacy. In too many jurisdictions around the country, these basic structural components are lacking, which severely undermines the ability of indigent defense counsel to provide minimally adequate representation.

The defense function's independence from improper political interference is of such importance that it commands the first principle of the American Bar Association's *Ten Principles of a Public Defense Delivery System* ("The public defense function, including the selection, funding, and payment of defense counsel, is independent").²⁰ Yet many states do not insulate their indigent defense counsel from direct or indirect political influence. In a small number of jurisdictions, chief public defenders must stand for election – a requirement that pits the public's interest in quick, cheap, and certain criminal convictions against public defenders' obligation to zealously defend their indigent clients. In many more jurisdictions, defense counsel (either chief public defenders or court-appointed counsel) are appointed by the judiciary, which has an interest in processing cases quickly and avoiding politically antagonizing prosecutors and police, whose support judges may need when they themselves stand for election, as is common throughout the United States. Similarly, in contract-based systems, state and local officials who enter into contracts with indigent defense service providers have obvious incentives to seek the lowest price and may demand certain hiring, cost-cutting, or case-processing practices in order for contracts to be renewed – demands that may be antithetical to the norms of zealous representation. Hence, even adequately funded indigent defense lawyers would be severely limited in the quality of representation they could realistically offer in the absence of an independent governing body distinct from the

electorate, the judiciary, and the legislative branch.

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Moreover, adequate training, supervision, and quality oversight of indigent defense counsel are also necessary to ensure the adequacy of indigent defense representation. In the substantial number of states that provide for indigent defense services on a local rather than a state basis, the availability of training and supervision is often spotty, and top-down enforcement of consistent norms of practice through attorney oversight may be nonexistent. The complexity of indigent defense practice and the ever-changing nature of both constitutional rules and technological advances (such as DNA testing) make ongoing training and supervision of criminal defense counsel a necessity rather than a luxury. Yet adequate initial training and continuing education remain unavailable or geographically inaccessible in many jurisdictions. It is similarly essential to require that attorneys have certain kinds of training and/or experience before they become eligible to take on the most serious cases. Yet in many jurisdictions, there are no such clear or generally enforced rules. For example, observers have reported that in Alabama, attorneys fresh out of law school are as likely as experienced attorneys to be assigned to serious cases, even to homicide prosecutions.²¹

The remaining part of the institutional structure necessary for a well-functioning criminal defense system is less concrete, but no less important: the maintenance of a culture of zealous representation. In many jurisdictions, indigent defense lawyers are so overwhelmed that they do not even attempt to advocate for their clients in the way that the adversary system of justice presupposes. They do not even try to investigate the facts underlying the allegations, do legal research, negotiate in an informed way, or file motions and litigate legal issues, much less actually try crimi-

nal cases. Rather, in many jurisdictions, the adversary process has devolved into a “meet ’em and plead ’em” form of perfunctory mass processing for large swaths of cases.²² Even if the funding issues that primarily drove the emergence of “meet ’em and plead ’em” practices were satisfactorily resolved, it would take a massive cultural reorientation to change the perspective of many currently operating indigent defense lawyers about the nature and requirements of their role. The promotion of such abstract institutional reform (the reform of “lawyer culture”) may be the hardest to accomplish or to measure.

One might wonder why, if the problems plaguing indigent defense systems are as dire as described, the lawyers practicing under such circumstances don’t sue to fix them – after all, they *are* lawyers. The answer is that the available legal remedies are often inadequate, inaccessible, or both.

On the one hand, the Supreme Court has maintained that the Sixth Amendment right to “assistance of counsel” for indigent defendants extended in *Gideon* entails the right to *effective* assistance of counsel, thus theoretically enabling defendants to assert their constitutional right to adequate representation in either state or federal court. On the other hand, the Court has defined the contours of “ineffective assistance of counsel” in such a way as to make it very difficult to establish. In the landmark case of *Strickland v. Washington*,²³ the Court mandated that judges evaluating claims of ineffective assistance of counsel must start with a thumb on the scale against such a finding: “[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”²⁴ Moreover, the *Strickland* Court essentially created a safe harbor for “strategic” decisions of counsel, warning that courts must “apply a heavy measure of deference to counsel’s judg-

ments.”²⁵ Because lawyers, of course, do not wish to be found constitutionally ineffective, they have strong incentives to cover up their mistakes by claiming “legal strategy.” Moreover, in a companion case to *Strickland*, the Court further held that defendants seeking to challenge the quality of the representation afforded them must identify particular acts or omissions of their counsel, rather than general circumstances that might negatively affect counsel’s performance (such as insufficient time or resources, or lack of experience).²⁶ Thus, systemic problems are essentially immunized from constitutional review in individual cases.

Furthermore, *Strickland* also established that even if defendants can prove that their lawyers’ performance was constitutionally deficient, they still cannot undermine the validity of their convictions unless they can also demonstrate that they suffered “prejudice” from their lawyers’ mistakes: they must establish a reasonable probability that the outcome of the proceeding would have been different had their counsel performed adequately. Courts are often reluctant to find criminal defense lawyers who appear regularly before them to be constitutionally ineffective even when their performance is highly questionable. As a result, courts often dispose of cases on the grounds that they lack outcome-determinative “prejudice” so as not to be forced to decide the deficiency issue, thus giving even flagrantly deficient lawyers a free pass while failing to set (or uphold) basic norms of practice for future cases.

Even putting aside the substantive standard for ineffectiveness, the procedural setting in which claims of ineffective assistance of counsel are generally litigated makes them extremely unlikely to succeed. Claims of ineffective assistance usually require the development of some new facts (about evidence, arguments, or theories) that should have been developed at trial

but were not, and thus such claims cannot be litigated on direct review of criminal convictions, which is always conducted on the cold trial record. Rather, ineffectiveness claims are generally litigated in the post-conviction civil process afforded by state *habeas corpus* review, at which new evidence may be presented. However, criminal defendants are generally not represented by counsel on state *habeas* review (their constitutional right to representation in criminal cases runs out after their first appeal); thus, most indigent criminal defendants are on their own in seeking to establish the ineffectiveness of their trial (or appellate) counsel. Without the advice and assistance of a lawyer, it is very difficult for most criminal defendants to identify, investigate, and present claims of ineffective assistance of counsel, even when meritorious grounds for such claims exist. Moreover, even in the rare instances when criminal defendants are represented by counsel on state *habeas corpus* review, the state courts reviewing their claims are generally the same courts that oversaw their initial trials and appeals and thus are often resistant to overturning their earlier work.

Federal courts also offer federal *habeas corpus* review of federal constitutional claims after the conclusion of all state processes. It is often thought that federal courts may be more sympathetic than state courts to claims of ineffective assistance of counsel because 1) the claim is based on the federal Constitution rather than on state law; 2) federal judges are appointed rather than elected (as many state judges are); and 3) the consequences of granting *habeas* relief and ordering a new prosecution will have a greater effect on state rather than federal resources. However, accessing federal *habeas corpus* review of constitutional claims is a daunting task, because many complicated procedural hurdles must be cleared, both in the direct review process and on state *habeas corpus* review.

Moreover, even when criminal defendants actually make it through the procedural maze into federal court with their claims, Congress significantly curtailed the ability of federal courts to order relief in its 1996 overhaul of *habeas corpus* procedures, which now require federal courts to use a highly deferential standard in reviewing the decisions of state courts. Because the *Strickland* standard of constitutional ineffectiveness is already deferential to counsel, the overlay of federal deference to state courts yields what the Supreme Court has deemed a “doubly” deferential form of oversight.²⁷ As a result, the federal judiciary has not been able to serve as a robust champion of Sixth Amendment *Gideon* rights through its power of federal *habeas corpus* review of state court convictions.

The difficulties of enforcing *Gideon* through state and federal review of the constitutionality of individual criminal convictions have led some public defense and civil rights advocates to bring civil class action lawsuits in an attempt to directly address the systemic problems (including underfunding, crushing caseloads, and inexperienced counsel) that plague the delivery of indigent defense services. Structural litigation of this type has yielded some judicial rulings and legislative responses promoting indigent defense reform in several jurisdictions. For example, a recent federal court decision found that two cities in Washington State had constitutionally inadequate public defense systems and ordered extensive injunctive relief requiring new resources and monitoring for defense attorneys.²⁸ Nonetheless, structural litigation to remedy systemic inadequacies has run into some of the same obstacles as individual constitutional review, as well as some new ones. Some courts have insisted that structural litigation, like individual defendant litigation, must meet the *Strickland* “prejudice” standard and prove that systemic un-

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derfunding and excessive caseloads caused specific outcome errors – an often difficult task that requires throwing individual lawyers under the bus in order to make the systemic case. In addition, some state courts have dismissed structural claims by insisting that such claims must be addressed to the legislature rather than the courts. And federal courts – generally the more sought-after venue for constitutional litigation – have dismissed structural claims under the *Younger* abstention doctrine, named after the Supreme Court case that held that federal courts may not issue rulings that would interfere with ongoing state criminal prosecutions.²⁹ In short, there is a chasm between the proclaimed existence of the constitutional right to effective indigent defense representation and accessible legal remedies in state or federal courts for violations of that right.

Last but not least, *Gideon*'s promise has proven so hard to vindicate because the vast majority of cases of ineffective assistance of indigent defense counsel are essentially invisible: they are not detectable in the public records kept by the criminal justice system, and they are never raised in any court. The reason for this cloak of invisibility is the extraordinary dominance of the practice of plea bargaining across the country, which accounts for all but a tiny percentage of criminal convictions (more than 95 percent). The possible penalties are often so high as to make plea offers irresistible; the government offers such substantial concessions in the plea process that defendants are unwilling to risk the much higher penalties that might result if they were convicted after trial. Because the government's case is never put to the test, the adequacy of a defense lawyer's preparation, knowledge, and skills is never revealed (to defendants or to anyone else). Moreover, when defendants do have strong reasons to believe that their lawyers are inad-

equat in some significant respect, their incentive to accept a plea bargain becomes stronger, not weaker – by pleading, they at least get a sentencing concession, whereas by going to trial, the chance of acquittal with a subpar lawyer becomes even more remote. Moreover, because misdemeanor courts often fail to inform defendants of their right to counsel and some misdemeanor prosecutors offer plea deals only to those who will waive that right, *Gideon* is often more honored in the breach than in the observance in petty cases without the threat of substantial penalties after trial.³⁰

By pleading guilty, defendants are held to have waived any objections to their conviction other than infirmities in the plea process itself. Until recently, defendants could not claim ineffective assistance of counsel to undermine a conviction based on a guilty plea unless they could demonstrate that they likely would have gone to trial in the absence of their lawyers' incompetence – a difficult burden in light of the steep concessions offered in the plea bargaining process and the overwhelming percentage of defendants who plead guilty. However, the Supreme Court has very recently issued a series of decisions imposing some new duties on lawyers in the plea process that indicate possible new remedies. The Court has held that criminal defense lawyers have a duty to advise their clients about the deportation consequences of a criminal conviction prior to either a trial or a plea.³¹ Moreover, the Court has recognized that an attorney's failure to communicate a more lenient plea offer than the one accepted by a defendant,³² or to offer competent advice that might have prevented a defendant from risking a trial,³³ violates the Sixth Amendment right to effective assistance of counsel and might require reversal of the defendant's convictions. These cases have been hailed as revolutionary in the Court's more expansive re-

cognition of counsel's Sixth Amendment duties, especially in the context of plea bargaining.

These recent cases do indeed represent a substantial departure from prior law in their recognition of the "simple reality" that "plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process."³⁴ Moreover, these cases will undoubtedly open up new avenues of litigation on behalf of indigent criminal defendants. However, it is unlikely that these new pronouncements – even if extended by the Court to cover more cases – can substantially undo the potent "invisibility" effect that the practice of plea bargaining has on Sixth Amendment violations. The enormously powerful incentives to plead guilty – the generally huge differential between the concessions offered in the plea process and the likely sentence after trial, along with the overwhelming caseloads of most indigent defense attorneys – will continue to drive the vast majority of criminal defendants to accept plea bargains. Once such bargains are accepted (by both a defendant and the court), it is the very rare defendant who will seek to "undo" the bargain, because successful challenges generally simply place defendants back where they started. Cases in which defendants discover the kind of information about attorney misfeasance that might make it worthwhile to challenge a plea bargain – such as a better plea offer that was never communicated by defense counsel – are extremely rare, because defendants rarely have the capacity to uncover such information after their plea bargains are entered (especially without the help of a lawyer).

Hence, even with greater recognition by the Supreme Court of attorneys' Sixth Amendment responsibilities during the plea bargaining process, the prevalence of plea bargaining will continue to cloak from

view and shield from remedy the vast majority of Sixth Amendment failures.

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Major disasters are often produced by the confluence of many separate, smaller mistakes. A corollary of this is no less true: fixing major problems usually requires the simultaneous repair of many smaller problems. So it is with realizing *Gideon's* promise: ensuring the right to adequate representation for indigent criminal defendants will require changes from root to branch, from funding and organization to legal institutions and remedies, with careful attention to the current institutional pathologies that drive the problem of inadequate representation. Effecting these changes cannot be done with the stroke of a pen, the way *Gideon's* trumpet was first sounded. Rather, the problem is largely one of "political will."³⁵ The challenges are so widespread and complex that there is no silver bullet to overcome them; rather, the kinds of changes necessary will require the long, slow, and concerted effort of all possible institutional actors: not just governmental officials, but also the private bar, the nonprofit sector, the academy, and the media. The task is daunting, but so much is at stake: not just the rights and liberty of millions of criminal defendants, but the proper limits of the state power that shapes our society, for better or for worse.

- ¹ The last two terms of the Supreme Court have yielded constitutional decisions regarding the investigative use of GPS tracking and DNA sampling – see *United States v. Jones*, 132 S. Ct. 945 (2012), and *Maryland v. King*, 133 S. Ct. 1958 (2013) – but the provisional nature of the opinions in these cases demonstrates that the Court is clearly cognizant that these two tools represent the tip of the iceberg of technological innovation yet to come.
- ² See *Dædalus* 139 (3) (Summer 2010), “On Mass Incarceration,” <http://www.mitpressjournals.org/toc/daed/139/3>.
- ³ See Carol S. Steiker, “Criminalization and the Criminal Process: Prudential Mercy as a Limit on Penal Sanctions in an Era of Mass Incarceration,” in *The Boundaries of the Criminal Law*, ed. R. A. Duff et al. (New York: Oxford University Press, 2010), 31–32; and Roy Walmsley, *World Prison Population List*, 9th ed. (London: International Centre for Prison Studies, 2011).
- ⁴ See, for example, Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (New York: Oxford University Press, 2007).
- ⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963).
- ⁶ See *Teague v. Lane*, 489 U.S. 288, 311–312 (1989).
- ⁷ See Anthony Lewis, “Foreword” to American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice* (Chicago: American Bar Association, 2004), i, http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.
- ⁸ See Karen Houppert, *Chasing Gideon: The Elusive Quest for Poor People’s Justice* (New York: The New Press, 2013).
- ⁹ See NAACP Legal Defense and Educational Fund, Inc., *Assembly Line Justice: Mississippi’s Indigent Defense Crisis* (New York: National Association for the Advancement of Colored People, 2003), 6, http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/ms_assemblylinejustice.authcheckdam.pdf.
- ¹⁰ See Commission on the Future of Indigent Defense Services, *Final Report to the Chief Judge of the State of New York* (New York: New York State Unified Court System, 2006), 15–19, http://www.nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf.
- ¹¹ Michael S. Nachmanoff, “Sequestration Threatens to Eviscerate Federal Public Defenders,” *The Hill Congress Blog*, July 23, 2013, <http://thehill.com/blogs/congress-blog/judicial/312659-sequestration-threatens-to-eviscerate-federal-public-defenders>.
- ¹² Attorney General Eric Holder, “Address to the American Bar Association National Summit on Indigent Defense,” February 2, 2012, <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html>.
- ¹³ See generally National Right to Counsel Committee, Constitution Project, *Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel* (2009), 52–64, <http://www.constitutionproject.org/pdf/139.pdf>.
- ¹⁴ *Ibid.*, 68 (citing Erik Eckholm, “Citing Workload, Public Lawyers Reject New Cases,” *The New York Times*, November 9, 2008).
- ¹⁵ “[P]roviding for criminal defendants is regarded as akin to providing welfare.” See Erwin Chemerinsky, “Lessons from *Gideon*,” *Yale Law Journal* 122 (8) (2013): 2676, 2692.
- ¹⁶ Stephen B. Bright and Sia M. Sanneh, “Fifty Years of Defiance and Resistance After *Gideon v. Wainwright*,” *Yale Law Journal* 122 (8) (2013): 2150, 2153.
- ¹⁷ *Ibid.*, 2154.

- ¹⁸ See Matt Murphy, “Patrick’s Call for More Public Defenders Draws Lawyers’ Pushback,” *The Carol S. Herald News*, February 8, 2012, <http://www.heraldnews.com/news/x962219952/Patricks-call-for-more-public-defenders-draws-lawyers-push-back>. Steiker
- ¹⁹ See Kurt Wise, “Law and Public Safety in the House Budget for FY 2014,” *MassBudget*, May 7, 2013, http://massbudget.org/report_window.php?loc=law_safety_house_fy14.html.
- ²⁰ American Bar Association, *Ten Principles of a Public Defense Delivery System*, 2002, <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.
- ²¹ See American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon’s Broken Promise*, 17.
- ²² See Bright and Sanneh, “Fifty Years of Defiance and Resistance After *Gideon v. Wainwright*,” 2152.
- ²³ *Strickland v. Washington* 466 U.S. 668 (1984).
- ²⁴ *Ibid.*, 689.
- ²⁵ *Ibid.*, 691.
- ²⁶ See *United States v. Cronin*, 466 U.S. 648 (1984).
- ²⁷ *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011).
- ²⁸ See *Wilbur v. City of Mount Vernon*, No. C11-1100RSL (W.D. Wash. Dec. 4, 2013). See also *State ex rel. Missouri Public Defender Commission v. Pratte*, 298 S.W.3d 870 (Mo. 2009) (opinion of Missouri Supreme Court setting limits on caseloads of indigent defense attorneys); and *Hurrell-Harring v. New York*, 15 N.Y.3d 8 (N.Y. 2010) (opinion of highest court in New York reinstating challenge on behalf of indigent defendants to the constitutional adequacy of defense counsel services, allowing the case to proceed to trial). See generally Stephen F. Hanlon, “State Constitutional Challenges to Indigent Defense Systems,” *Missouri Law Review* 75 (2010): 1 (surveying recent successful systemic challenges); and Cara H. Drinan, “The Third Generation of Indigent Defense Litigation,” *N.Y.U. Review of Law & Social Change* 33 (2009): 427.
- ²⁹ *Younger v. Harris*, 401 U.S. 37 (1971).
- ³⁰ See National Right to Counsel Committee, *Justice Denied*, 88 – 89.
- ³¹ See *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).
- ³² See *Missouri v. Frye*, 132 S. Ct. 1399 (2012).
- ³³ See *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).
- ³⁴ *Missouri v. Frye*, 132 S. Ct. at 1407 (quoting *Lafler v. Cooper*, 132 S. Ct. 1t 1388, for the proposition that ours “is for the most part a system of pleas, not a system of trials”).
- ³⁵ See Carol S. Steiker, “*Gideon* at Fifty: A Problem of Political Will,” *Yale Law Journal* 122 (3) (2013): 2694.

Uncommon Law: America's Excessive Criminal Law & Our Common-Law Origins

Jonathan Simon

Abstract: This essay explores the role that U.S. criminal courts play in shaping the uniquely punitive social order of the United States. U.S. courts have long been defined against the common law of England, from which they emerged. In this essay, I consider the English legacy and suggest that while the United States does draw heavily from common-law traditions, it has also innovated to alter them, a process that has established a criminal justice system even more punitive than that of England.

JONATHAN SIMON is the Adrian A. Kragen Professor of Law and the Director of the Center for the Study of Law and Society at the University of California, Berkeley. He is the author of *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (2007), and he has contributed chapters to such volumes as *The Oxford Handbook of Sentencing and Corrections* (ed. Joan Petersilia and Kevin R. Reitz, 2012) and *The SAGE Handbook of Punishment and Society* (ed. Jonathan Simon and Richard Sparks, 2012).

Comparative analysis of incarceration rates, an imperfect albeit ready measure of national punitiveness, shows common-law countries at the top of the distribution of wealthy liberal democracies. Within this group, the United States stands apart, incarcerating nearly three times the percentage of its population than does England, the next most punitive common-law nation.¹ How the United States arrived at this state is the subject of its own considerable literature.² Among the leading sociological factors are the unresolved legacies of slavery and racial discrimination, the weakening of the welfare state as a framework for politics and governance, comparatively high rates of violent crime (homicide in particular), and the politicized nature of criminal justice in the highly decentralized U.S. criminal justice system – especially the political influence of home-owning middle-class voters and the power of prosecutors to use their enormous discretion for political advancement. Here I want to focus on how the criminal trial courts, both in their common-law inheritance and in their long-term evolution, have contributed to the rapid emergence of severe U.S. punitiveness.

U.S. criminal courts – the most visible in the world in no small part because of popular crime television

shows like *Law & Order* – are often thought to provide a comparatively protective environment for the defendant, who is presumed innocent, given a lawyer, and subject to punishment only if a jury of his or her peers finds the government’s case overwhelmingly persuasive. Of course, empirical research on courts has long shown this to be a highly idealized picture at best, since the delivery of these promises is obstructed by overwhelmed public defenders, plea-bargaining, and inadequate opportunity for pretrial release. While all of these certainly contribute to the scale of mass incarceration in the United States, it is the very structure of the U.S. criminal trial court that has transformed the United States into the punitive juggernaut we find today at the start of the twenty-first century.

Rooted both in their English origins and in their many innovations since independence, U.S. criminal trial courts have evolved to grant local politicians and prosecutors extraordinary power of exclusion against citizens or residents whose presence in the community may alarm electorally significant or majority populations. While many readers are familiar with the “war on crime,” “mandatory sentencing,” plea-bargaining, and other harshly punitive or discriminatory features of contemporary criminal justice, this essay suggests that the roots of America’s mass-incarceration state extend back further than the founding of the nation itself. Prosecutorial power has steadily grown since independence through new legislation that has improved the prospects of state prosecutors in proving guilt or, as is more common, avoiding trial altogether through plea-bargaining. As we will see, the criteria of certain crimes have been redefined and refocused in order to make them more easily proven in court, and prosecutorial and judicial procedures have been smoothed or simplified to eliminate possible sources

of resistance. And why not? The prosecution, called “the People” in court, represents the public interest as much as the legislature itself does, and perhaps more so.

Televised portrayals of the U.S. criminal trial may bear little resemblance to routine practice in criminal courts, but they do bear a close resemblance to the form described in the U.S. Constitution and Bill of Rights, both of which are predicated on a highly idealized, indeed contentious, conception of trial practice in the late eighteenth century. By the time of the American Revolution, English practice of law was partway through a remarkable transformation away from what legal historian John Langbein has memorably called the “accused speaks” trial, in which defendants were compelled to confront the prosecutor’s witnesses and evidence in a summary hearing before a judge and jury, and toward a “lawyer conducted trial,” a duel over evidence and elements, complete with cross-examinations of key prosecution and defense witnesses by professional lawyers.³ The accused-speaks trial, which remained the dominant practice in both England and colonial America until well into the nineteenth century, hardly exemplified the model of the fair contest that we pay homage to today. Defendants, typically ripe from a period in jail, were left to their own devices to explain away the accusations against them, with a judge and jury looking on and at times joining in the questioning.

The new English trial model adapted to the rise of defense lawyers, who had gradually sought and won the rights to earn fees through cross-examination and objection to the prosecution’s evidence. These changes first took hold in political cases with high-status defendants, but because defense counsels hoped to build their professional reputations through flashy style and victories in long-shot cases (much as

they still do today), these changes also spread to the cases of more common criminals.

America's revolutionary elite embraced the new paradigm. The 1791 Bill of Rights instituted a panoply of criminal trial rights associated with the lawyer conducted trial, such as the right to remain silent, to confront witnesses testifying against you, and most centrally, to be represented by a defense lawyer who could replace the defendant as challenger to the prosecution. Historians agree that few ordinary criminal defendants in the new republic, or in England for that matter, enjoyed anything like this constitutionally guaranteed model before the modern era. Until the 1960s, in criminal trial courts across the United States, something closer to the accused-speaks trial method prevailed, but the image of the lawyerly duel, in which the prosecution is forced to prove the evidence to a jury over the fierce opposition of a defense lawyer, enshrined in the Constitution and in popular culture, has long served as an emblem of legitimacy.

Trial by jury – specifically by a jury of peers – was the core feature of English criminal trials. In colonial America, even before independence, this practice translated to a jury of local citizens whose unanimous verdict was necessary for a finding of guilt. In contrast, most Continental legal systems placed a judge (or committee of judges) as the finder of both fact and law.

The English system gave the jury the authority to decide the facts, though under the strict governance of a judge who instructed them in the law and at times dictated the verdict. Further, if the judge believed that the jury had misapplied the law to the facts of the case, he could order summary penalties against them. From the very beginning, the American jury was far more populist than its English cousin, and less subject to judicial reprisal; indeed, in the

many districts with elected judgeships, it was in the judges' best interest to appease and appeal to their juries, who also composed their base of voters. Trial before one's peers in England did not mean a jury made of common residents of your community; rather, the jury was typically made up of local gentlemen eager to see potentially dangerous members of the lower classes removed from society through either hanging or exile to the colonies (known as transportation), first to North America and later to Australia. In the United States, race and gender remained grounds for exclusion from the jury, though property ownership was not a decisive factor. The criminal-trial jury eventually became just as potent a symbol of U.S. democracy as the voting booth. Not surprisingly, disenfranchisement and exclusion from jury service together became central fronts in U.S. civil rights legal battles since the nineteenth century.

The constitutional requirement of due process – which mandates that the prosecution carry the burden of persuading the jury of each fact necessary to prove the crime beyond a reasonable doubt – places the authority of the American jury at the core of trials. This simple and widely known right actually comes with a set of expectations. When a judge refuses to admit evidence submitted by the defense, rejects the defense's instruction to the jury, or instructs the jury in a manner that the defense objects to – leading to the conviction of the defendant – the defendant may appeal the conviction on the grounds that the judge's actions relieved the state of some part of the burden of proof. And the court must order a new trial if it finds that a reasonable juror could have reached a different verdict had the evidence or instructions been different.⁴

Whether or not the jury right operates as a bulwark to protect individuals is, in fact, dependent on the conceptions of

crime to which legal judgments can attach. Common-law crimes consisted mostly of manifestly criminal acts: difficult to rationalize without criminal intent, but also within the realm of jurors' understanding. Modern criminal law is legislation-based, although that legislation is sometimes but a copy of common-law rules. The principle of proof beyond a reasonable doubt is the foundation for what is popularly known in the United States as the presumption of innocence. That same value extends into the penal phase, limiting punishments to only when authorized by a jury's finding of fact. However, during the twentieth century, many statutes were amended to lighten that burden on the prosecution.

But if proof beyond a reasonable doubt is deservedly celebrated as a shield for defendants, it also validates the highly punitive attitude toward those who *are* convicted. Indeed, as a legal principle, proof beyond a reasonable doubt is the flipside of the extraordinary discretion legislatures have to criminalize – through statutes defining the elements – conduct they view as socially harmful. The elements of a crime and the burden they pose for the prosecution render the jury the guarantor of the appropriateness of the punishment. In this way, the American jury, even more than its English predecessor, legitimizes the whole of the penal system. The freedom of juries to reject the elements of the prosecution's proof (should defendants exercise their rights and demand a test of that proof), removes for most Americans any serious consideration of the equity of our comparatively severe penal sanctions, including the death penalty. The extreme length of U.S. prison sentences, coupled with the prosecution's unprecedented power to influence that length by rewarding cooperation, has reduced the historically small portion of criminal cases resolved by trial to the single digits.

The highly adversarial style of the lawyer-conducted trial model that was enshrined in our Constitution (if imperfectly realized) has also fueled punitiveness. The Anglo-American criminal trial is built on the model of the private battle or litigation between two rival and equal parties. In contrast, the inquisitorial procedure embraced by Continental Europeans features a scientist-like judge or magistrate who investigates the crime and then presents legal proof to a still higher-ranking judge. While the English procedure hides the public role in investigating and prosecuting the crime, with the crown represented primarily through the judge as an only sporadically active umpire, the Continental procedure invites state restraint and paternalism. On the Continent, punishment is the result of a procedure thoroughly shaped and marked by the presence of state power, while the English adversary system makes state punishment appear as the prosecution's prize.

The U.S. innovation on the English adversary system was to preserve the emotional affectation of the victim and the accused as contestants locked in struggle, while altogether dispensing with the fiction that the prosecution represents strictly private interests. Until the reforms of the twentieth century, English criminal cases were formally private prosecutions brought by victims. The crown's prosecution service operated only in the trials of state crimes. While prosecution associations allowed many victims to be represented by professional counsel, the structure of trials, specifically the role of judges and the royal prerogative of mercy, kept the role of the state at arm's length until the legal process was complete.

The American colonies, by contrast, were quick to adopt the practice of electing a local public prosecutor.⁵ The creation of a unique political office with the mandate and exclusive authority to bring criminal

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charges for a jurisdiction has had a number of profound consequences. By professionalizing state prosecution, the United States accelerated the shift already taking place in eighteenth-century England, where professional lawyers had begun to appear in significant numbers for both parties in criminal trials, though especially on the prosecution's side.

Professionalizing and empowering state prosecutors in the United States not only increased the government's advantage over frequently unrepresented defendants, but it also created a distinctive class of lawyer-prosecutors with a shared interest in redefining the elements of crimes, making guilt easier to prove in court, and revising laws to increase the severity of punishments. This new interest found a receptive audience in state legislators, many of whom had themselves been prosecutors earlier in their political careers. By the twentieth century, these increasingly organized prosecutors were instrumental in passing waves of reform legislation designed to address crime generally as well as specific criminal threats with populist resonance, like recidivists or sex offenders.⁶

The creation of strong felony murder rules in the majority of U.S. states is a powerful example of the influence of professional prosecutors on criminal law development. These rules relieve the prosecution of the burden of proving the mental element of intent to kill in cases where the defendant caused the death in the course of certain felony crimes. While felony murder in the United States has long been thought an archaic vestige of common-law murder, legal scholar Guyora Binder has shown that English law actually had no clear doctrine under which a clearly accidental killing became murder simply because it was caused during another felony. Rather, felony murder charges were a creation of U.S. legislatures in the nineteenth century. By removing the necessity of prov-

ing premeditation and deliberation in murder prosecutions, this new classification of murder gave prosecutors a potent tool for inducing plea bargaining.⁷

America's second innovation on the adversary trial model was the standardization of defense counsel. The English had legally excluded defense representation in felonies until the nineteenth century. The U.S. Constitution, in contrast, guarantees the right to counsel in "all criminal prosecutions," though in practice, until the mid-twentieth century, representation was available only to those who could either hire a lawyer or secure a volunteer. Only in capital cases were defendants routinely appointed counsel if they could not afford one. But the 1963 Supreme Court decision in *Gideon v. Wainwright* required all states to provide assistance of counsel to defendants who are too poor to pay for one, and the overwhelming majority of criminal defendants in the U.S. system are now, in fact, represented.⁸

The quality of that guaranteed representation, however, is far less assured. In 2013, on the fiftieth anniversary of the *Gideon* decision, a spate of reports suggested that in many parts of the country, underfunded public defender agencies struggle to provide legally adequate representation. Defendants facing felony charges typically are represented at trial, but the tens of thousands of defendants facing misdemeanor charges that dominate large urban courts are not; and even in felony cases, defendants may not have access to counsel in the early stages of the process, when lack of access to bail may have significant consequences for the case. Yet the myth of an egalitarian lawyerly battle grants America's hyper-punitive system an ethos of sporting fairness, wrongly celebrated and reinforced in television trials that imply that criminal defendants face a sentence carefully calibrated to the criminal acts they have been convicted of, and

only after the evidence has been carefully validated in a fair fight.

In recent decades, the U.S. criminal justice system has operated as a system of de facto racial segregation, with overwhelmingly African-American and Latino male defendants, and prisons that often operate explicitly on color lines to avoid gang conflict.⁹ The racial concentration in criminal court has its origins in the great migrations that, from World War I through the Vietnam era, brought African Americans from the South and Latinos from Mexico to large U.S. industrial cities, where they were more exposed to professionalized policing and prosecution systems than in the rural districts from whence they came.¹⁰ This racialization of crime has been exacerbated by the “war on crime” that has, since the 1970s, introduced a heavy investment by state and federal government to reduce urban crime through arrest-oriented policing and aggressive felony prosecution. Inside these courts, defendants face a powerful blend of English common-law crimes, such as robbery or burglary, focused on the most overt violations of personal rights, and modern statutory measures designed to criminalize preparatory conduct, such as possession of controlled substances.

Despite the strong influence of English penal reformers like Jeremy Bentham on revolutionary-era Americans, early U.S. criminal law most prominently carried the stamp of English criminal law conservatives like William Blackstone. With the famous exception of murder, reforms were procedural; the basic common-law definitions of crimes were left intact, and were frequently codified into statute law wholesale, where they remain the textual foundations for our definitions of many significant crimes today.

The English common law of crimes – so venerated by American lawyers and jurists

as a source of the distinctive Anglo-American criminal-law values of both autonomy and the vigorous response to criminal offenses – was already heavily supplemented by crimes legislated in Parliament. These parliamentary crimes were sometimes variations of common-law crimes and sometimes new crimes entirely. The penalties for parliamentary crimes could be as harsh as common-law crimes, and the differences were almost certainly favorable to the prosecution. Beginning in the seventeenth century, the production of such laws reflected the increasing influence of money over the legal process, especially when modern competitive elections became more common in the nineteenth century.

In the United States, eighteenth- and nineteenth-century state legislatures, many of them filled with men who began their political careers as elected county prosecutors, adopted common-law crimes whole cloth from Blackstone, but then liberally supplemented them to increase conviction rates of suspected criminals. The example of felony murder (enormously important in securing guilty pleas by making more homicide cases eligible for the death penalty) has already been given. More recently, burglary has gone through a major evolution from its Blackstonian origins as a crime of near-violence – suggested by the memorable phrase “breaking and entering” – to a mere trespass combined with intent to commit a crime.

All of these changes have tended to bend the law in U.S. criminal courts even more in favor of the prosecution, producing over time a qualitative adjustment in favor of conviction.¹¹ If the common-law trial once operated like a colonial flintlock rifle, deadly if fired close enough but inaccurate and generally limited to one shot, modern U.S. criminal procedure works more like a fully automatic machine gun, with which the prosecution is able to spread a stream of fire sufficient to suppress almost any resistance.

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The classification of degrees of murder, first adopted in Pennsylvania at the turn of the nineteenth century and shortly thereafter widely copied across the United States, is perhaps the most famous and consequential of all U.S. innovations on the substantive law of criminal courts, and through it, on the course of the common-law trial. It is especially effective in contrasting the differences in Anglo and U.S. criminal procedure, given the consistently much higher rate of intentional killing in the United States than in England, as well as the fact that proposals to adopt the degrees of murder have been repeatedly rejected in England, including as recently as 2009.¹²

Pennsylvania's pioneer statute essentially split the common-law crime of murder into two crimes. Second-degree murder was a killing done intentionally, or with an extreme contempt and disregard for the lives of others, but without premeditation and deliberation. First-degree murder was originally an intentional killing committed with stealth, such as by using poison or lying in wait for a victim, as well as any other intentional killing done with premeditation and deliberation. Some states would later add new "theories" of both first-degree and second-degree murder, most significantly the theory of felony murder.

This innovation has almost universally been treated as an American advance in leniency, but significantly, it has also contributed to penal severity. The connection between extreme punitiveness and degrees of murder stems from the evolution of attitudes toward capital punishment. In England, until its abolition in the 1960s, death by hanging was the mandatory penalty for murder; after abolition, life imprisonment became the mandatory penalty. In U.S. states, those convicted of second-degree murder were spared any consideration of death and faced a term of

years in prison, while those convicted of first-degree murder faced a possibility of death at the discretion of the jury, not the mandatory death penalty as was practiced in England.

Although consistent with an American desire to tame capital punishment,¹³ the degrees of murder have helped constitute a structure of punishment that is, in overall terms, severe rather than lenient, especially when we look from capital punishment toward imprisonment. First, second-degree murder opened an alternative not only to the possibility of hanging, but also to conviction of the lesser homicide crime of manslaughter. In the late eighteenth and early nineteenth century, manslaughter was often punished with the mostly symbolic sentencing of branding on the thumb combined with several months in jail before and after the trial. English jurors reluctant to sentence a defendant to the mandatory death penalty had to choose manslaughter, if not outright acquittal. American jurors, in contrast, could choose second-degree murder, assuring that the person convicted would not die, but also assuring that he or she would not return to the community for many years.

In the nineteenth and twentieth century, the jury's freer conscience about conviction and punishment meant that U.S. criminal courts were producing lengthy prison sentences in cases that, had they been tried in England, would have demanded that the jury either sentence the convicted to death or spare him or her from any significant punishment at all. Meanwhile, U.S. parole laws that developed in the twentieth century ensured that this dual-murder structure did not create too many unreasonably long prison sentences. However, as states moved away from parole and toward longer determinate sentences in the 1980s and 1990s, the tiered structure of murder convictions became the anchor for the modern U.S. sentencing system, producing ex-

cessive prison sentences on a scale never before seen in a liberal society.

In much the same way, the constitutional regulation of the practice of the death penalty in U.S. criminal courts since the 1970s (America's latest innovation on the laws of murder) has actually contributed to the severe punitiveness of prison terms while purporting to reduce recourse to capital punishment. With the death penalty for capital murder replaced by, or competing with, life-without-parole sentences, thousands of American prisoners now face permanent imprisonment; such sentences are virtually non-existent in politically comparable countries and have recently been declared a violation of the European Convention on Human Rights. Even for non-capital-second- and first-degree murder cases, sentences can be extraordinarily long by international standards. Most states now have mandatory minimums of fifteen, twenty, or twenty-five years, sentences that are typically extended by five or ten years if a gun was involved in the crime. In some states, parole is uncommon following mandatory minimum sentencing.¹⁴

Thus, while from the late eighteenth century on England executed more of its convicted murderers than did the United States, its overall structure of punishment – especially considering the increasing dominance of punishment by imprisonment – was certainly no more punitive, and was likely somewhat less punitive, than its former colony's. In the mid-nineteenth century until capital punishment was abolished by Parliament in 1964, English prisoners sentenced to death who ultimately received a royal pardon were either transported to Australia (a practice that ended in 1868) or released from English prison after approximately ten years. Since the 1990s, as a result of the politicization of crime policy, there has been considerable pressure to raise murder

sentences, but the European Court of Human Rights has intervened to sharply limit these legislative efforts.

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Incarceration is the end result of criminal court processing for an astounding portion of Americans, especially men of color; but it also plays an enduring role at the beginning of the process. America inherited from England the system of imprisoning pretrial detainees, as well as prisoners awaiting the execution of their sentences, in local jails, often managed for a fee by local entrepreneurs. At the time of the American Revolution, the English jail system was excoriated by the pioneer penal reformer John Howard, whose book *State of the Jails* portrayed jails as places of disease in which people in various statuses and conditions were locked and largely uncared for amidst all manner of moral and organic contamination.¹⁵ Howard's critique helped launch the penitentiary system in both England and the United States, though they did not replace the vilified local jails so much as they built on them an even broader structure of incarceration.

In both pre-American Revolution England and colonial North America, jails played a largely invisible but crucial adjunct to the common-law trial, coloring defendants – through the miseries of confinement – with characteristics of criminality that allowed the jury to confidently form its judgment. Remarkably, despite many changes in the scale and bureaucratic form of criminal justice across the ensuing centuries, jail still plays this structural role. In the accused-speaks trials in Revolution-era England and North America, a tenure in jail assured that most defendants would show up for their ordeal weakened and possibly ill, looking and acting a disreputable person.¹⁶ For the modern form of common-law criminal trial, in which the accused is represented by counsel and rarely speaks, jail plays a different series of roles, primar-

ily pressuring defendants to bargain with prosecution by offering their testimony in other cases. In this way, modern jails help produce the evidence that prosecutors need to build a case on the “elements” that can deliver the verdict of guilt.

In a 2012 decision that extended the constitutional guarantee of effective assistance of counsel to the lawyer’s performance of negotiating a guilty plea, Justice Anthony Kennedy wrote that “criminal justice today is for the most part a system of pleas, not a system of trials,” citing the fact that 97 percent of federal convictions and 94 percent of state convictions go through a negotiated plea of guilt.¹⁷ But this system of pleas remains anchored in the common-law trial, with its adversary contest over whether the elements of the crime have been proven and its system of moralistic common-law crimes, layered with large portions of statutory laws that support the prosecution.

Of course, this inheritance has endured for a long time, through periods of high and low incarceration. It does not drive us toward extreme punishment, like some kind of dead hand, so much as it facilitates our periodic swings between optimistic and pessimistic perceptions of crime and criminal defendants. Nor is it easy to replace. The 1962 Model Penal Code, the last major effort at revising U.S. criminal law, ultimately carried over most of the features of the common law.¹⁸ Systematic, substantive criminal law reform has been on the political agenda since the 1970s, but it was overtaken, first by procedural reforms that did little to restrain criminalization and then by the unrestrained war on crime.

If almost every move toward independence from England has, in fact, made U.S. criminal courts more punitive, we may need to look beyond the Anglo-American dialectic for legal solutions. England’s own

growing conflict with the European Court of Human Rights, the Committee for the Prevention of Torture, and the Committee of Ministers on the European Prison Rules may suggest a more promising course for the United States.¹⁹ In recent years, England has suffered numerous rebukes by the European Court of Human Rights, including rejections of its blanket ban on prisoners voting and its use of whole-life-term sentences.²⁰ The latter decisions included striking down the previous Labour government’s signature “imprisonment for public protection” law that allowed for life sentences for dangerous felons, and also declared that the English equivalent of life-without-parole sentences is a violation of the convention. These rulings have drawn considerable condemnation from English politicians – who debate the U.K.’s relationship to Europe in part through conflicts about such cases – calling into question whether compliance is forthcoming. While the United States is not a signatory to the European Convention, it is a signatory to several United Nations treaties that cover much of the same ground.²¹

In the United States, after a period of constitutional retrenchment, the Supreme Court has shown a broad interest in reconsidering the constitutional significance of core features of the common-law trial and its penal consequences. Because it cuts across the Court’s typical ideological divide, this recent line of Supreme Court cases presents one particularly interesting area of inquiry. The Court has held that the Sixth Amendment right to a jury trial requires that the prosecution prove every fact necessary to increase punishment.²² Also under the Sixth Amendment, the Court has invigorated the meaning of competent counsel in a series of mostly capital cases,²³ and has asserted the Eighth Amendment as a more robust limit on extreme punishments²⁴ and prison conditions, citing human dignity as a core value

of that amendment.²⁵ These decisions offer promising avenues to engage the democratic forces that have historically set limits on penal excesses, but that became badly misaligned through the intense crime politics of the late twentieth century. Jonathan Simon

ENDNOTES

- ¹ Michael Cavadino and James Dignan, "Penal Policy and Political Economy," *Criminology and Public Policy* 6 (2006): 435 – 456.
- ² For a summary, see Mona Lynch, *Sunbelt Justice: Arizona and the Transformation of American Punishment* (Stanford, Calif.: Stanford University Press, 2010).
- ³ John Langbein, "The Historical Origins of the Privilege Against Self-Incrimination at Common Law," *Michigan Law Review* 92 (1994): 1047 – 1085.
- ⁴ *In re Winship*, 397 U.S. 358 (1970).
- ⁵ Angela Davis, *Arbitrary Justice: The Power of the American Prosecutor* (New York: Oxford University Press, 2009), 10 – 11.
- ⁶ William Stuntz, "The Pathological Politics of Criminal Law," *Michigan Law Review* 100 (2001): 505 – 600; and Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford University Press, 2007).
- ⁷ See Guyora Binder, *Felony Murder* (Stanford, Calif.: Stanford University Press, 2012).
- ⁸ *Gideon v. Wainwright*, 372 U.S. 335 (1963).
- ⁹ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010).
- ¹⁰ Kahil Gibran Muhammed, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge, Mass.: Harvard University Press, 2011).
- ¹¹ In the 1980s, some states introduced mental illness as an element defense (something the prosecution must disprove once evoked), and more recently – as an outgrowth of the successful gun-rights political movement – some states have adopted "stand your ground" laws that purport to expand self-defense by permitting people in public space to use lethal violence without the need to retreat, even if retreat were possible with minimal risk. These are among what I would estimate to be a small category of exceptions to the rule that legislation favors the prosecution. See William Stuntz, "The Pathological Politics of Criminal Law," *Michigan Law Review* 100 (2001): 505 – 600.
- ¹² The Coroners and Justice Act of 2009 adopted some recommendations on partial defenses, but rejected the recommendation of the Royal Commission on Law Reform that England and Wales adopt degrees of murder.
- ¹³ The survival of the modern death penalty regime in the United States – in contrast to England, where it has been abolished – is, in many respects, a monument to the taming enterprise of U.S. law, with complex rules of aggravating and mitigating factors, weighing, and appeals. See David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Cambridge, Mass.: Belknap Press, 2010).
- ¹⁴ Findings from behavioral economics, as well as Supreme Court precedents, suggest that high sentences for murder have an inflationary effect on penal sentences down the scale of offenses. If death or life without parole is the most severe sentence for murder, it becomes plausible to sentence robbers and burglars to ten, twenty, or thirty years. Whereas if current death-penalty cases were sentenced with a maximum of thirty years, lengthy sentences for lesser crimes would almost certainly seem excessive to more of the public, and perhaps even to the Supreme Court. See *Graham v. Florida*, 560 U.S. 48 (2010).

- ¹⁵ Jonathan Simon, "The Return of the Medical Model : Disease and the Meaning of Imprisonment from John Howard to *Brown v. Plata*," *The Harvard Civil Rights-Civil Liberties Law Review* 48 (2013): 217 – 256.
- ¹⁶ Contemporary criminal procedure rules would protect trial defendants from the harmful influences of jails (which violate both the Eighth Amendment and the Sixth Amendment), although they would not protect defendants from *all* disadvantages (such as the enormous pressure to plea bargain while in jails, whose conditions are often worse than prisons').
- ¹⁷ *Missouri v. Frye*, 132 S.Ct 1399 (2012).
- ¹⁸ A new draft is underway but has yet to take up substantive criminal law.
- ¹⁹ For a comprehensive account of the human rights framework for penal law in Europe, see Dirk van zyl Smit and Sonja Snacken, *Principles of European Penal Law and Policy* (Oxford: Oxford University Press, 2009).
- ²⁰ See *Hirst v. United Kingdom*, Application nos. 74025/01, 2005 ECHR 681 (2006) 42 EHRR 41 [voting ban case] ; and *Vinter and others v. United Kingdom*, Application nos. 66069/09, 130/10 and 3896/10 ECHR (9 July 2013) [whole term life sentence case].
- ²¹ See UN General Assembly, *The Universal Declaration of Human Rights*, December 10, 1948, resolution 217 A (III); and UN General Assembly, *The International Covenant of Civil and Political Rights*, December 16, 1966, Treaty Series, vol. 999, 171.
- ²² *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
- ²³ *Lafler v. Cooper*, 566 U.S. (2012); and *Missouri v. Frye*, 1399.
- ²⁴ *Graham v. Florida*, 130 S.Ct. 2011 (2010).
- ²⁵ *Brown v. Plata*, 131 S.Ct. 1910 (2011).

Justice for the Masses?

Aggregate Litigation & Its Alternatives

Deborah R. Hensler

Abstract: Traditionally, disputes over injury compensation that were brought to court involved one or a few plaintiffs and defendants and were processed individually. The risk and expense of such litigation meant that most victims of legally cognizable injuries never came through the courthouse doors. The modern global economy, however, has vastly increased the potential for mass harms and losses, and modern mass media have created felicitous circumstances for mass claiming. Aggregated mass litigation blasts open the courthouse doors for individuals who might otherwise find them closed. Aggregation benefits some but disadvantages others. Class action rules attempt to mitigate these conflicts, but such procedures do not apply to aggregate non-class litigation. It is time for courts to adopt rules and practices that recognize the realities of such litigation.

DEBORAH R. HENSLER, a Fellow of the American Academy since 2009, is the Judge John W. Ford Professor of Dispute Resolution at Stanford Law School. She is the author of *Asbestos Litigation* (with Stephen J. Carroll et al., 2005), and editor of *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (with Christopher Hodges and Ianika Tzankova, forthcoming). She has recently contributed to such volumes as *Research Handbook on the Economics of Torts* (ed. Jennifer Arlan, 2013) and *New Trends in Financing Civil Litigation in Europe* (ed. Mark Tuil and Louis Visscher, 2010).

In the popular image of civil litigation, two parties face off against each other in a courtroom, a judge sits on high overseeing the process, and a jury decides who wins and who loses. Virtually nothing about this image is accurate today. Few lawyers or parties ever see the inside of a courtroom; the judge's role is to manage rather than adjudicate; and the lawyers are more likely to be arguing about schedules, procedure, and evidence than about the substantive merits of the dispute. Most of the activity takes place in the judge's and lawyers' offices – or, increasingly, by videoconference – in the parties' absence. The dispute most often ends either with a judge's decision on a legal requirement or a compromise between the parties, rather than a judge or jury decision based on the merits of the issues presented in full. And increasingly, especially in complex and high-stakes cases, rather than one party suing another, hundreds or more plaintiffs seek a remedy from multiple defendants.

The growth of what has come to be known as “mass litigation” – which encompasses both class actions and aggregate non-class litigation – began sev-

eral decades ago in the United States. However, courts continue to struggle to contain these mass disputes within the structure of a legal system designed for the canonical battle of single plaintiff versus single defendant. Nor is this struggle limited to the United States; across the world, in jurisdictions that differ from each other in many other important ways, courts are confronting the problem of mass litigation.

Mass litigation is the child of modern capitalist economies and legal doctrines. To succeed in a global marketplace, manufacturers and service providers must sell their products to huge numbers of people or other businesses. When something goes wrong – when a product proves defective, a service is not what it was advertised to be, or a financial scheme violates legal rules – hundreds, thousands, and sometimes tens of thousands of consumers, purchasers, or investors are injured in many different parts of the world. Some harms are minor and exclusively financial; others involve personal injury or death. Once victims had no recourse against businesses responsible for their losses or injuries; depending on the time and place, they would turn to personal insurance or a social welfare scheme, or simply “lump it.” In most countries today, the law holds businesses responsible for compensating losses attributable to their behavior in many – although not all – circumstances. As a result, when mass losses or injuries occur, large numbers of victims have potential lawsuits. In some areas of law, such as securities and antitrust, the harm itself is defined in terms of the market, from which mass litigation logically flows.

It is common in the United States, and increasingly common in other countries, to decry citizens’ “litigiousness.” Contrary to popular perception, however, the overwhelming majority of people with potential claims for compensation fail to pursue them. The best data for the United

States indicate that less than 5 percent of people injured by products file suit against product manufacturers.¹ There are multiple reasons for this. Many victims blame their own carelessness – or plain bad luck – for their injuries. They may not realize that they have a claim under law. They may not know how to hire a lawyer, or they may believe they cannot afford to hire one.² A lawyer may tell them their claim is too expensive or too uncertain of success to be worth pursuing. As a result, until fairly recently, even when many people were injured as a result of a single event or pattern of activity, not many lawsuits ensued.

Modern mass media, now including social media, have changed these dynamics. The news of high-salience events – the announcement of a catastrophic fire, bridge failure, or airplane crash; an article in a prestigious medical journal announcing a link between a widely used pharmaceutical product and a serious disease; a whistle-blower’s disclosure of financial shenanigans; or an investigative reporter’s story of widespread sexual abuse – is immediately flashed around the world. Harmful behavior is labeled as such, blame is quickly apportioned (fairly or not), and the notion that those harmed could – and perhaps *should* – pursue legal claims almost immediately becomes part of conversations at macro- and micro-levels. Information about how to pursue legal redress is available at the click of a mouse.

In these situations, the potentially large number of people with viable legal claims for even modest amounts of money quickly attracts lawyers. Historically, this occurred more often in the United States, where lawyers’ ability to charge contingent fees (fees contingent on the client receiving an award in the case, usually in the form of a percentage of that award) makes legal representation feasible for people at all income levels, than in other countries, where contingent fees are prohibited. The situa-

tion outside the United States is changing, however, as some countries have eliminated or diminished barriers against contingent fees and lawyers in other countries have found other means of obtaining speculative financing.

Over the past several decades, plaintiff lawyers have developed sophisticated strategies for coordinating representation of plaintiffs in mass litigation. By sharing information and costs among law firms and spreading their own financial risk across large portfolios of lawsuits, U.S. plaintiff law firms have been able to substantially level the playing field between plaintiffs and well-heeled corporate defendants. Today, lawyers are sharing these strategies worldwide.³ This is reflected by parallel litigation in multiple jurisdictions over personal injury claims associated with everything from pharmaceutical products and medical devices such as Vioxx and hip implants to financial injury claims following on the Lehman Brothers bankruptcy and the collapse of Bernard Madoff's Ponzi scheme.

For legal and logistical reasons, when mass litigation erupts, lawyers tend to file claims in a relatively small number of courts. Without much warning, a local court with a dozen or so judges may find itself inundated with hundreds or even thousands of similar claims. As a practical matter, the court has three options for dealing with this mass of claims: treat each claim individually in the ordinary fashion; collect the claims and deal with them as a group; or—if the law permits—allow one or a few claimants to represent all of those with similar claims in a single lawsuit such as a class action. Often the key consideration for judges and lawmakers who adopt special rules for mass litigation is procedural efficiency: that is, which approach will resolve claims the quickest and at the least expense for parties and for the taxpayers who subsidize the court system. Yet the

courts' decisions about how to treat mass claims concern far more than expenses – they have profound implications for procedural fairness and distributive justice.

*Deborah R.
Hensler*

The history of asbestos worker injury litigation in the United States vividly demonstrates the complicated consequences of procedural choice in mass litigation. Exposure to asbestos causes a variety of diseases, including mesothelioma (a deadly cancer) and asbestosis (a moderate to severe respiratory impairment).⁴ Yet while some of the health risks of asbestos have been known since the late nineteenth century, it was not until the early 1970s that plaintiff attorneys managed to convince a court that sufferers of asbestos-related diseases could be compensated under product liability law. By that time, tens of thousands of workers had been exposed to asbestos, most of them in a handful of regions where on-the-job exposure was especially prevalent. When a legal avenue for obtaining compensation for medical costs and work loss opened up, workers turned to the lawyers in these regions. Fearful of the risk that pursuing novel litigation against major corporations entailed – and perhaps mindful of the experience of other plaintiff attorneys who had tried unsuccessfully to win personal injury lawsuits against tobacco manufacturers – few law firms were willing to take on these cases. Those who did filed cases in a handful of federal and state courts.⁵

At first, these courts treated asbestos lawsuits conventionally, one case at a time. Although the lawsuits raised novel doctrinal issues and required complicated scientific evidence to support the workers' claims, it was not obvious that they would pose special burdens on judges and other court personnel and, in any event, most courts had no procedures in place for handling civil lawsuits any differently. But treating these cases individually was not

without consequences; the sheer proliferation of cases meant long delays to disposition. Large corporations with substantial legal resources could profitably wait out plaintiff attorneys, and protracted litigation also benefited defense counsel, who billed by the hour. The reverse was true for plaintiff attorneys who self-financed the litigation, looking to benefit when cases were settled and they could take their share of plaintiffs' compensation. As litigation lingered on court dockets, some plaintiffs died while others' diseases intensified.

Eventually, judges began to question the wisdom of individual treatment. Drafting separate orders for almost identical individual lawsuits did not seem to make much sense, so judges invented the notion of a "master case," the decisions in which would apply to all asbestos cases in their courtrooms. Holding separate conferences to set schedules for proceedings in hundreds of cases filed around the same time by the same law firm against the same defendants seemed like a waste of time, so the judges called the lawyers and scheduled all their cases for the year. Once that idea had taken hold, it seemed logical to hold mass settlement conferences with those lawyers. These conferences somewhat ameliorated the uneven playing field between plaintiffs and defendants, allowing plaintiff attorneys to offer defendants the bargaining chip of a single mass settlement, which could put a substantial dent in defendants' liability exposure.

Not all cases were susceptible to settlement, however. Judges needed to try some cases in order to test plaintiff attorney's legal theories and produce evidence of causation and liability. Product liability trials are more time-consuming than trials of ordinary personal injury lawsuits. Few if any courts had a sufficient number of judges to rapidly try the scores of asbestos lawsuits that were deemed "trial-ready"; some courts calculated the likely

waiting time to trial for asbestos lawsuits in years, not days or months. Some judges attempted to remedy congestion on the trial calendar by grouping cases for trial, asking a single jury to hear and deliver verdicts for several cases at a time. In one famous instance, a state judge in Baltimore instructed a six-person jury to hear and decide some eight hundred asbestos lawsuits in a single trial. In another, a federal judge in East Texas applied a sophisticated statistical sampling technique to select cases representing different factual circumstances, with the goal of applying the jury's average verdict for each case type to *all* such cases on his trial calendar.⁶ On their face, these innovations posed significant due process issues. The difficulty of constructing an efficient and fair trial procedure for masses of cases led judges and lawyers to rely increasingly on aggregate settlements.

As time passed, plaintiff attorneys and defendants negotiated standing agreements to settle asbestos lawsuits. The few plaintiff law firms that had been willing to invest in the litigation early on by now had thousands of asbestos-worker clients. Defendants whose products had an attenuated relationship to workers' asbestos-related diseases paid small amounts to extinguish claims that had a small chance of success; more culpable defendants paid larger amounts. Claims in different disease categories were valued according to the severity of plaintiffs' injuries. To help defendants manage their cash flow (and plaintiff attorneys manage their tax burdens), these agreements called for defendants to settle a fixed number of claims annually.

Although usually described as efficiency moves necessitated by the large numbers of lawsuits, group settlement conferences, group trials, and wholesale settlement contracts reflected a radical re-conceptualization of asbestos litigation that would come

to apply to all mass litigation. Mass litigation was increasingly viewed *as a mass itself*, an aggregate liability (to defendants) or asset (to plaintiff attorneys) capable of evaluation and disposition at the macro-level. Trial court judges who designed management strategies for resolving cases in the aggregate could substantially reduce their caseload and win acclaim within the judiciary. Defendants who developed strategies for resolving the claims against them in the aggregate could reduce their litigation cost-to-compensation ratios to a more acceptable level and reap benefits in the capital markets. Plaintiff law firms that accumulated large inventories of cases and resolved them in aggregate settlements or in accordance with standing agreements could bank on a business model that would support their firms for many years.

The calculus for individual plaintiffs and for society was more complicated. For many injured asbestos workers, aggregate procedures offered the only avenue into the legal system, and – given the minimalist U.S. safety net – the only path to compensation for medical costs and work loss. Among the plaintiffs who gained access to the courts were asbestos-exposed workers who were not currently impaired but were at risk of suffering impairment in the future. Under the conventional “one case at a time” procedural model, these plaintiffs would have been unlikely to find representation and, because of time limits on litigation, they ran a risk of not being able to pursue a claim if and when they developed more serious injuries. Other workers had moderate-to-severe injuries and some had terminal illnesses. Because product liability litigation is expensive, many of these workers also would have been unlikely to obtain legal representation if plaintiff attorneys had to litigate their cases individually.

But providing access to all these plaintiffs had costs as well as benefits. In mass

settlement negotiations, plaintiff lawyers might discount the value of more seriously injured plaintiffs’ claims in order to encourage defendants to settle lesser-value claims. Weaker claims clogged the courts and ultimately contributed to decisions by scores of asbestos defendants to file for bankruptcy. In some instances, the perceived availability of “easy money” led to fraudulent claims. Providing access to court to all those with legitimate claims – including many who would not have had access if courts insisted on individual litigation – arguably drew appropriate attention to the harm associated with defendants’ behavior, contributing to socially valuable deterrence from repeating the same actions in the future. However, incentivizing questionable or fraudulent claims raised the specter of “overdeterrence” and undermined the legitimacy of the courts’ role in compensating mass harms.

From a procedural perspective, aggregation offered plaintiffs virtually no opportunity for individualized hearings of their claims, except for the few plaintiffs whose cases went to trial. Although on the surface this may seem to have been a loss for plaintiffs in mass litigation, their experience in this regard was not much different from that of plaintiffs in ordinary litigation, who also have few opportunities to make their voices heard in the courtroom.⁷

By the mid-1980s, judges and lawyers were applying the aggregation template to scores of mass litigations. U.S. federal law provides a procedural tool for aggregating cases: the *multi-district litigation* (MDL) procedure, of which judges and lawyers made full use for claims arising out of the use of heart valves, stents, and pacemakers; intra-uterine devices and other contraceptives; diet drugs; silicone gel breast implants; and exposure to Agent Orange, DDT, and radiation. Once it became clear that there

was a potential for mass claims, few judges were prepared to deal with these lawsuits conventionally, one case at a time.⁸ Their first move was to appoint a small committee of plaintiff lawyers – usually those that had taken on the largest number of clients with the relevant claims – to lead the litigation. Securing these appointments increased these firms' power (and fees) and helped construct the mass tort plaintiff bar. Although it does not provide for mass trials, the MDL statute created a framework for mass settlement. Once defendants were persuaded that plaintiff attorneys had enough viable claims to pose significant legal, financial, and public relations problems, they often proved willing to agree to settlement of all the claims that had been filed regarding a specific product.

As the number and size of mass litigations mounted in the 1990s, a new realization set in. By aggregating claims and processing them efficiently, courts were incentivizing plaintiff lawyers' firms to expand their efforts to identify potential mass litigations. And by agreeing to mass settlements, defendants incentivized plaintiff firms to represent increasing numbers of claims in a single litigation, including not only meritorious smaller-value claims that would have been too expensive to prosecute individually, but also claims that might well have failed if subjected to individual investigation and hearing. Over time, judges and defendants began to adjust their strategies to narrow access for mass claimants. Judges became more wary of promoting settlement before they had decided key legal or factual issues. Defendants insisted on trying bellwether cases in order to test their strength – and their appeal to juries – before agreeing to settle, and only agreed to aggregate settlements that excluded weaker claims that plaintiff attorneys were unlikely to pursue individually. In some instances, alternative dispute resolution procedures such as me-

diation and arbitration were used to assess the value of individual claims, offering an opportunity for an individualized hearing. Mass litigation continued, albeit in a more circumspect fashion.⁹

Though claims are aggregated, mass litigation is still an agglomeration of individual claims, each represented by an individual lawyer who has agreed to represent his or her client for an individual fee.¹⁰ To finalize an aggregate settlement, therefore, each of the individual claimants must agree to its terms. Often defendants will require that most plaintiffs accept an aggregate settlement as a condition of the defendants' agreement to settle. For example, the defendants in the litigation concerning recovery worker toxicity exposure at Ground Zero following the September 11 terrorist attacks required that 95 percent of the approximately ten thousand individual plaintiffs accept the proposed aggregate settlement.¹¹ Even when a settlement occurs in part because of judicial pressure, there is no formal hearing on the terms of the settlement and the judge does not have specific authority to approve it; nor is the judge specifically authorized to regulate the plaintiff attorneys' fees. Fairness is considered a matter for discussion between plaintiffs and their lawyers outside of court. How often such discussions occur when a single firm represents tens of thousands of claimants in a single litigation is a matter for conjecture.

The lack of formal judicial regulation of aggregated mass litigation may surprise readers familiar with the third procedural option for resolving mass litigation, a class action in which one or a few plaintiffs represent a large number of other similarly situated people. U.S. courts have long provided a representative litigation procedure for situations where a court ruling on the legality of a policy or practice will inevitably affect an entire group of people (such

as taxpayers, African-American school-children, or older employees) or where it is more efficient to decide some or all aspects of similar individual claims in a single proceeding. Litigation can only proceed in class action form with the approval of a judge, who is required to “certify” that the case meets the conditions set forth in the rule. Today, at least two dozen other jurisdictions in North and South America, Europe, the Middle East, and Asia have adopted class action procedures for similar purposes.

The rules for class action proceedings, as well as the extensive legal requirements for class certification, are intended to protect the interests of individuals who are not present in the courtroom and whose claim outcomes are determined collectively rather than individually. The judge must approve the class representatives, as well as the lawyer(s) who will represent the class. If a class is claiming monetary compensation, class members must receive an adequate notification of the proceeding and the terms of any proposed settlement (including proposed attorney fees) and must have an opportunity to “opt out” so that they can pursue individual litigation. The judge must approve a proposed settlement for “fairness, reasonableness, and adequacy,” after a public hearing at which any class member can speak in opposition to the settlement’s terms. Although in most instances few class members appear at such hearings, some judges have scheduled multiple sessions in large spaces, including auditoriums and sports arenas, and encouraged class members to come forward to share their opinions.¹²

If class members prevail (by settlement or trial), the judge decides how much they must pay their counsel. Some judges model lawyers’ fee awards on the prevailing one-third contingency fee in ordinary tort litigation; however, when settlement

amounts are huge, most judges award fees that constitute a much smaller percentage of the total paid by defendants.¹³ As a result, total class counsel fees may be substantially less than the total earned by plaintiff attorneys representing clients in aggregate litigation. Mindful of this discrepancy, a few judges who have presided over aggregate mass litigation have limited plaintiff attorneys’ fees either by persuasion or fiat, asserting the litigation is a “quasi-class action” subject to judicial regulation.¹⁴ Plaintiff attorneys (and some academics) have contested judges’ authority to set attorney fees in non-class aggregate litigation but, to date, few challenges have reached appellate courts.

Although the current U.S. Supreme Court has steadily restricted class action suits,¹⁵ U.S. courts have historically viewed the procedure as appropriate for securities, anti-trust, and consumer protection litigation, as well as suits for injunctive relief, such as employment discrimination claims. Deciding such suits on a class-wide basis (and in some instances determining monetary remedies by formula) obviously increases efficiency. Requiring judges to regulate class litigation was intended to ensure that these efficiency gains did not come at the cost of denying procedural rights to class members.

In contrast, on the grounds that the many individual differences among tort claimants and their potential conflicts of interest require individual consideration, U.S. courts have generally refused to certify mass tort litigation for class treatment. (Interestingly, outside the United States, some jurisdictions have adopted class actions specifically *for* mass tort claims.) The judicial authors of the leading decisions on class certification of mass torts have seemed to assume that the alternative to representative litigation is individualized litigation, affording

plaintiffs the full panoply of due process protections and putting plaintiffs firmly in control of the process – notwithstanding the extensive evidence that this is rarely true.

Like aggregate procedures, representative class actions create winners and losers. Deputizing a single lawyer to represent large numbers of claimants (many of whose claims are worth such small amounts that they are not worth pursuing individually) with the promise that the lawyer will receive a large share of any aggregate award or settlement incentivizes lawyers to look for opportunities to bring such cases to trial. If the claims are meritorious, the consequence is socially beneficial: defendants are deterred from future wrongdoing by the aggregate monetary sanction, and individual class members receive recompense (small though it may be) for their losses. As class action filings mounted in the 1990s, however, defendants began to push back against class certification, arguing that a large majority of class actions were *non-meritorious*. Both because of the direct expense of contesting class actions and because of the potential for media coverage to tarnish their products' reputation, corporations claim that they are "blackmailed" into settling damage class actions as soon as they are filed.

Available data contradict these claims; only a small percentage of claims that seek class status are certified, although those cases are almost always settled. Most cases filed in the form of class actions are either dismissed, disposed of by summary judgment in favor of the defendant, or dropped; in some cases, the defendants settle with an individual plaintiff.¹⁶ However, the perception that plaintiff law firms abuse class actions has gained widespread traction and arguably contributed to recent U.S. Supreme Court decisions making class certification more difficult in a wide vari-

ety of circumstances in which it was once deemed appropriate.

Three decades of mass litigation in aggregate and class form have brought home to corporate America the power that collective legal action confers on individuals and smaller businesses that do not have the wherewithal to litigate individually and cannot find legal representation on contingency. Just as "divide and conquer" can be an effective strategy in political conflicts, it is also effective in preventing access to courts to victims of mass financial harm. Today, employment, consumer, and other such contracts routinely include arbitration clauses waiving parties' rights to pursue legal claims in court; instead, they are directed to private arbitration tribunals. A key provision of these clauses is a prohibition on any kind of collective arbitration proceeding. The U.S. Supreme Court has upheld these prohibitions.

Nonetheless, plaintiff attorneys continue to litigate mass tort claims, which are difficult for corporations to constrain by contract in aggregate form. And, notwithstanding the general disfavor shown toward class certification for mass torts, judges continue to certify class actions in some instances. (For example, in August 2013 a class of former football players who are suing the NFL in federal court for concussion-related injuries announced they had reached a settlement with the NFL; in January 2014, the judge overseeing the case refused to approve the settlement but implied that she would be willing to certify a class for settlement purposes if the terms were more generous.¹⁷)

It is tempting to assess mass litigation procedures against the benchmark of individualized due process. Judged this way, aggregate litigation fails: it provides neither individualized process nor individualized outcomes to plaintiffs or defendants. But insisting on individual dispute

processing almost guarantees that injury victims will be denied justice: no court has the resources to manage a flood of claims individually in a timely enough fashion to serve plaintiffs' needs. In complex cases, individual litigation is too expensive for ordinary plaintiffs to pay for on an hourly basis and too expensive and risky to attract lawyers working on contingency. Aggregate litigation therefore opens the courthouse doors to mass claimants who would otherwise find them closed.

Because aggregate litigation relies almost exclusively on settlement – turning to adjudication only in rare and possibly aberrant cases – the soundness of plaintiffs' claims is not fully legally tested. As a result, it is difficult to determine whether the net effect of the litigation is overdeterrence (as defendants claim), underdeterrence, or optimal deterrence. Nor is it possible to assess whether the litigation delivers on tort law's promise of corrective justice.

Aggregate litigation empowers mass tort plaintiff lawyers and defendants; it does so, however, by treating the plaintiffs themselves more as objects than as subjects. Because there have been few surveys of mass plaintiffs, we know virtually nothing about how they assess their experiences or outcomes, although grumbling on websites devoted to specific mass litigations suggest they are often unhappy and distrustful of

their own lawyers, the defendants, and the courts.

If judges were willing to abandon the fiction that aggregate litigation is no different from individual litigation, courts could, as a few judges have demonstrated, incorporate protection for individualized rights into aggregate litigation procedures. When appointing attorneys to lead the litigation, they could consider how well the candidate law firms have communicated the progress of the litigation to their clients in the past. They could encourage, if not require, the establishment of websites and Facebook pages giving up-to-date information about the litigation and its prospects. The judiciary, through rule reform, could seek specific authority to review and approve settlements and attorney fees in mass litigations that look for all the world like class actions. Neither individual parties nor society as a whole can afford to litigate claims arising out of mass harms individually, and the benefits of resolving such claims collectively are too great for defendants to insist on *never* doing so. By confronting the realities of mass litigation and thinking creatively about how to balance efficiency and fairness in aggregate litigation, the judiciary can help maintain the relevance and legitimacy of courts in the twenty-first century.

ENDNOTES

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Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets

Gillian K. Hadfield

Abstract: Struggling to navigate a world that is increasingly shaped by legal rules and obligations, most ordinary Americans lack real access to courts. Often this means simply forgoing legal rights and entitlements or giving up in the face of claims of wrongdoing. Among those who cannot avoid courts – such as those facing eviction, collection, or foreclosure and those seeking child support, custodial access, or protection from violence or harassment – the vast majority (as many as 99 percent in some cases) find themselves in court without any legal assistance at all. There are many reasons for this lack of meaningful access, including the underfunding of courts and legal aid, but perhaps the most fundamental is the excessively restrictive American approach to regulating legal markets. This regulation, controlled by the American legal profession and judiciary, closes off the potential for significant reductions in the cost of, and hence increases in access to, courts. Unlike the problem of funding, that is a problem that state courts have the power, if they can find the judicial will, to change.

GILLIAN K. HADFIELD is the Richard L. and Antoinette Schamoi Kirtland Professor of Law and Professor of Economics at the University of Southern California. Her publications include recent articles in such journals as *Law & Ethics of Human Rights*, *Journal of Legal Analysis*, *Journal of Law and Courts*, and *International Review of Law and Economics*. Her latest book project is *Law for a Flat World: Reinventing Legal Infrastructure for the New Economy* (forthcoming, Oxford University Press).

The vast majority of ordinary Americans lack any real access to the legal system for resolving their claims and the claims made against them. Few outside the highest income categories can afford to take their disputes about family, inheritance, neighborhoods, schools, employment, and so on to court; they are left to resolve them as they can through other means. For significant numbers of Americans, not being able to afford legal help means simply “lumping” it, more so than in comparable countries.¹ Millions of those who cannot avoid court – those who need a divorce or discharge in bankruptcy, for example, or who are facing eviction, foreclosure, garnishment, deportation, fines, or imprisonment – are left to navigate a complex and forbidding process without legal help. As Jonathan Lippman, Chief Judge of the State of New York, notes in his contribution to this issue, in 2010 in New York, for example, 98 percent of tenants facing eviction in housing court, 99 percent of borrowers in consumer credit matters within New York City, and 95 percent of parents in child support

matters were unrepresented; and in 2013 in New York, 46 percent of those facing foreclosure (and thus facing a well-represented corporate entity) were unrepresented.² In Los Angeles, 90 percent of those in domestic violence matters are unrepresented, as are up to 80 percent of people in landlord/tenant and family cases. The numbers are about the same throughout the country.

Difficulties of access haven't always been with us. In colonial America, local courts were, "on the whole, cheap, informal and accessible."³ Today they are, on the whole, expensive, highly formalized, and effectively unavailable to all but wealthy individuals and businesses. Why is it so expensive to obtain access to the courtroom in America today? Why haven't we invented better, cheaper, more effective ways to deliver on one of the central promises of the rule of law: the promise of a neutral place to take one's disagreements with others?

The reasons for the high cost and inefficiency of modern litigation are multiple. A major problem is that American courts are woefully underfunded and understaffed. On a per capita basis, U.S. public expenditure on courts in 2010 (including the cost of prosecutors, public defenders, and legal aid) was high (\$175) relative to comparable systems in major advanced economies such as the United Kingdom (\$103), Germany (\$127), and France (\$77). But the per capita numbers are misleading. The U.S. system handles a much higher number of cases than these other systems – largely because the U.S. style of government is much more oriented to the use of rights that must be exercised in court than is the case with European regulatory regimes, which rely more heavily on direct regulation.⁴ Per capita, the U.S. system (comprised primarily of state courts; federal courts receive a lot of scholarly attention, but they account for about 4 percent of all litigation) handles about twice as

many cases – civil and criminal – as the United Kingdom and Germany, and three times as many as France. As a result, public expenditure on courts in the United States, per case, is significantly lower: Germany, France, and the United Kingdom spend about 30 percent more on an average per case basis (approximately \$1,475) than the United States does (\$1,115). And although the United States has roughly the same number of judges per capita as France and the United Kingdom (approximately 10 for every 100,000 people; Germany has more than twice as many, at 24), these judges are expected to handle much higher numbers of cases. So whereas the United Kingdom has 126 judges per 100,000 cases; France, 205; and Germany, 283, the U.S. system struggles through with just 65.⁵

The fiscal problem, as bad as it is, is only one piece of the picture. Realistically, the likelihood of robust increases in taxpayer support for court budgets in the future is low. For these reasons, it is imperative that we look at the fundamentals: the reasons for the high cost of legal processes and the lawyers needed to navigate them. Here the core problems are twofold: the extraordinary complexity of modern law and process, and the very high cost of obtaining legal assistance in navigating that complexity. Some view both of these features of modern law as inevitable: we live in a complex society, one that requires complex procedures and expensively trained lawyers. But I don't believe either is a given. Indeed, there is tremendous potential for reducing both the complexity and the cost of managing the legal disputes of ordinary people. Achieving that potential, however, requires recognizing that both the problem of complexity and the problem of expensive lawyers are rooted in our excessively restrictive approach to regulating legal markets – regulation that is controlled by the American legal profession to a degree that is largely unmatched elsewhere in the

developed world, but that is within the power of state courts to change.

The first thing to know about the regulation of legal markets in the United States is that both the right to provide legal goods and services and the rules of operating a legal business are fundamentally controlled by lawyers themselves. Here's how it works in theory in most states: the supreme court of the state decides what constitutes "the practice of law" and then establishes rules, expressed as ethical rules, for how the practice of law is conducted. In practice, the supreme courts of most states delegate or defer to state bar associations to decide these matters, and many state bar associations follow the model rules and policies suggested by the American Bar Association (ABA). The ABA adopts its rules and policies on the basis of majority votes held in its House of Delegates, composed primarily of more than five hundred lawyers who are elected by state and local bar associations. Thus, unless state supreme courts are exceptionally independent of their professional brethren (not a common occurrence, particularly in states with elected judiciaries), the rules governing who can provide legal services and under what terms are determined politically by lawyers' personal preferences and politics. In some cases state legislatures get involved: enacting laws that criminalize the unauthorized practice of law, for example. But the jurisdictional issues are murky: in some cases, such as when legislatures have attempted to expand the right to practice law beyond bar-licensed lawyers, state supreme courts have pushed back, declaring such actions a violation of the separation of powers and the courts' inherent and exclusive authority to regulate the practice of law.⁶

Of course, there is a built-in danger that a lawyer-controlled process ends up creating legal markets that serve lawyer

interests and not the public interest. But even if well-meaning lawyers and judges involved in these processes try to keep the public interest front and center, practically this has not happened and is not likely to happen because the existing providers and their business models are insulated from competition from other potential providers of legal help. More to the point, the regulatory providers themselves are insulated from competition from other regulators who might devise alternative approaches to regulating legal markets.

Insulation from regulatory competition happens in two steps. First, the profession defines the practice of law expansively and in self-referential fashion to mean "everything lawyers do." This definition includes not only full-scale representation of litigants in court but also anything that might assist those who represent themselves, such as legal advice or help filling out legal documents or forms. Then, having defined the scope of their regulatory authority to reach anything that might be helpful to people involved with legal processes, the legal profession declares that all legal help must be provided by a person who has been licensed by a state bar association. Together, the expansive definition of the practice of law and the decree that only attorneys who comply with bar association rules may engage in the practice of law establishes lawyers as the exclusive source of regulatory authority – controlling everything about how any aspect of legal assistance is provided.

One way of thinking about why such a system promotes complexity and high costs is to focus on the role of monopoly here. Lawyers own the whole market, they don't have to share it with anyone, and they can therefore extract the full value from it. This is the line of thinking that supposes that state bar associations drive up lawyers' fees by limiting the supply of lawyers, and that lawyers, with the keys to the court-

*Gillian K.
Hadfield*

house, can extract whatever the market will bear. It is also the line of thinking that supposes that lawyers have an incentive to make things more complex than they have to be in order to create more work and therefore more billings for themselves.

But we don't need to go so far as to assume that lawyers and judges are acting in deliberately greedy ways to reach the conclusion that what stands in the way of reducing the cost and complexity of access to American courts is the way in which the legal profession controls the regulation of legal markets. Even if judges and lawyers are honestly concerned (as many are) about the high cost of legal access, and even if the complexity of legal processes and rules is just a systemic response to the complexity of modern life (as many surely believe), the regulatory system that the legal profession implements in good faith nonetheless stands as a central barrier to reducing cost and complexity. The reason is that this approach to regulation creates an environment that is exceedingly hostile to innovation and the creation of better, less expensive ways of connecting people to courts. Yes, there may be substantial pressure for law and process to become ever more complex in a complex world; and yes, navigating complexity may require ever greater levels of expensive specialization and expertise.⁷ But the question is why legal markets are not changing to develop smart ways of responding to complexity in less complex and less expensive ways. Think about the smartphone in your pocket or purse: it navigates an environment that is constantly ratcheting up in terms of complexity. Yet it does so in ways that grow ever simpler, more elegant, and less costly. Why doesn't that happen in our court systems?

Innovation feeds on two key ingredients: creative thinking and a willingness to put time and money behind risky new ideas.

But the regulatory environment created by the profession stymies its ability to secure either. First, the way in which legal markets are regulated makes them highly insular echo chambers. Everyone who can participate in providing legal services is trained in the same way, and spends most of their time interacting with professionals just like themselves. This limits the likelihood that new ideas will emerge. Imagining that it is likely that a process that involves lawyers talking only to other lawyers will give birth to fundamentally new means of accomplishing long-held objectives is like imagining that librarians, whose job after all is advising on how to find information, would have eventually invented Google.

Second, professional regulations prohibit those lawyers who do have new ideas from accessing the capital necessary to support the long journey from idea to implementable innovation. In my experience, lawyers routinely underestimate the significant up-front investment in time and trial and error required to get a truly new business model off the ground. Most of our dramatic innovations in technology and the Internet took a long time to iron out the details. Few were initially imagined to work the way they do now. Facebook started out as a way for college students to meet each other on campus, not as the global platform for all manner of social, political, and commercial interactions that it is today. Twitter, which has transformed commercial media, began as a way for friends to share status updates. Despite their transformative impact on our world, both needed huge amounts of investment to support their operations as the two companies figured out who and what they were. We should not expect new models of legal services to help people navigate courts at lower cost to be assembled on the cheap. But professional regulation in law prohibits innovators in law from accessing any investment capital beyond

what they can extract from other lawyers. That cuts off legal innovation, such as it is, from the sources of funds – angel investors, friends and family, venture capital, private equity, public capital markets – that fuel innovation everywhere else in the economy.⁸

Without access to fresh thinking from outside the echo chamber of legal debates, and without the capital needed to test new and risky ideas, innovation in the legal profession has foundered. Confronted with the problem of access to courts, almost all lawyers start thinking in the same way: how can we get more lawyers for those in need? The ideas that emerge end up forming a short list: increase legal aid, increase pro bono work, and secure a statutory or constitutional right to civil legal representation – a civil *Gideon* to parallel the right to counsel for the criminally accused facing risk of imprisonment.⁹ There is no doubt that increased legal aid, pro bono work, and expanded rights to publicly funded legal counsel are an important part of what we need to do to improve the functioning and fairness of our legal systems. But the stark reality is that none of these conventional solutions can make any serious dent in the problem. Providing even one hour of attorney time to every U.S. household facing a legal problem would cost on the order of \$20 billion. Total U.S. expenditures on legal aid, counting both public and charitable sources, are just 5 percent of that amount, or \$1 billion. Even if lawyers became more willing to work for free, U.S. lawyers would have to increase their pro bono work from an annual average of thirty hours each to over nine hundred hours each to provide some measure of assistance to all households with legal needs.¹⁰ That's pushing toward half a year's worth of billable hours for the average lawyer. That will never happen.

What would people outside the legal echo chamber think up if presented with

the problem of reducing the cost and complexity of helping people navigate court claims? We don't have to venture too far into the fantasy world to know the answer to this question; we just need to look at what emerges in an environment – namely, the United Kingdom – where innovative thinking and risk-taking in the context of legal problems are not the exclusive preserve of lawyers. Here we see significant levels of innovation, not all of which survive market tests – emphasizing the need for the kind of risk capital that underwrites innovation in other sectors. In the legal sector in the United Kingdom, the solutions that the market has attempted include:

- A co-op grocery chain with annual sales of £13.5 billion providing legal services along with other services, such as banking, insurance, travel, funeral, and pharmacy, online and in stores.¹¹
- An online divorce service that provides graduated flat-fee services beginning with simple document completion and ascending to increasing levels of drafting, phone and email assistance from licensed solicitors, and legal opinions from barristers; litigants can represent themselves using these services or opt for a divorce managed entirely by lawyers through the Web.¹²
- A major bank operating a legal document service that provides a means both to create online documents such as wills, powers of attorney, and trusts; and to obtain lawyer-drafted demand letters to resolve issues such as problems with credit ratings, household repairs, and consumer goods. Users complete an online questionnaire for a customized document, and then can choose to submit the document as is, have it reviewed by an internal team of legal experts, or have it reviewed by lawyers in an external law

firm, all for flat fees paid to the online company.¹³

- A national chain of lawyers' offices operating under an umbrella brand name and shared customer service protocols, supported by kiosks in retail bookstores, a consumer-friendly website providing free, easy-to-understand legal information, and a free initial consultation.¹⁴
- A franchise system offering small firm practitioners a "business in a box" – software and procedures for setting up and operating a law office – and affiliation with a national brand focused on using standardization, technology, common marketing, and customer-focused business practices to reduce costs and increase quality.¹⁵
- A nonprofit membership organization for small businesses that includes unlimited legal advice, documents, and insurance that covers legal costs for pursuing or defending legal claims, up to £50,000 per incident, all as a benefit of membership for a flat annual fee.¹⁶
- Online subscriber services that provide unlimited phone and email advice for legal, financial, and other consumer problems, tailored to the user's specific circumstances, for a single annual fee.¹⁷

If you are not an American lawyer, these may not sound like amazing innovations. Indeed, outside of legal markets, these are the kinds of services that are available in most markets in the Web-enabled twenty-first century, powered by technology, consumer research, Internet-based platforms, the advantages of a large customer base, and creative ways of cutting the costs of standardized consumer products.

The sad fact is that none of these relatively simple innovations in legal services is currently possible in the United States.

Each, in one way or another, violates U.S. legal professional regulations.¹⁸

- Most of these entities operate as for-profit or nonprofit businesses that are owned, managed, or financed in significant part by non-lawyers, which violates U.S. professional rules. The online divorce company was founded by a former paralegal with expertise in family law. The franchise company was organized as a partnership with a legal software company; and the company providing an umbrella brand is financed with private equity. The subscription services company is a nonprofit company that also engages in consumer advocacy and publishes reviews of consumer products.
- Some of these entities are licensed as organizations authorized to provide legal services. The co-op grocery stores, for example, were the first "alternative business structures" licensed to provide legal services in the United Kingdom. Only individual lawyers can be licensed in the United States.
- All of these new providers supply a uniform product across a national market. Product uniformity is hampered in the United States because a lawyer licensed under state-based rules must supply any services accessed by individuals in a particular state.
- Most of these entities depend on the use of legal experts who are not traditionally qualified lawyers to supply legal services at low cost, such as paralegals and licensed Legal Executives (who have to complete a community college degree and spend a period of years under solicitor supervision before practicing independently). Documents purchased with "legal review" but not "lawyer review" from the document provider are reviewed by in-house legal experts, but not necessarily solicitors.

- The barristers and solicitors who provide legal services through these companies are either employed by the company or paid out of fees collected by the company from clients. The franchise and branding organizations collect the equivalent of royalties on revenues earned by the law firms that sign up with them. In the United States, lawyers are not permitted to be employees of non-lawyer-owned or -managed entities. The contract payment or royalty mechanisms used would, under most states' professional regulations, constitute either impermissible fee-sharing with a non-lawyer or impermissible payment of referral fees to a for-profit entity.
- Many of these entities integrate a variety of services in addition to legal services, requiring the management guidance of non-lawyer professionals such as finance, tax, consumer, and employment experts. In the United States, any entity that attempts to integrate services must be owned, managed, and financed exclusively by lawyers; other professionals can participate in the business only as employees of lawyers.

The United Kingdom has its own problems with access to justice. In recent years there have been major cuts to a formerly generous legal aid system that in its heyday in the late 1970s was available to almost 80 percent of all households; eligibility had fallen below 30 percent by 2007 and is expected to drop further. Whereas the original legal aid schemes in the United Kingdom covered almost all civil and criminal matters, recent reforms have eliminated major categories such as divorce and custody, immigration, and personal injury and restricted the scope of assistance available for employment, education, debt, housing, and benefits matters. Nonetheless, the U.K. system faces these new limitations on legal aid – the availability of

which still far outstrips U.S. public funding for legal assistance¹⁹ – in the context of a professional regulatory scheme that facilitates innovation of new solutions for access. Relatively low-cost online assistance with divorce matters, for example, is likely to fill at least some of the gap left by elimination of most of these matters from the legal aid scheme.

It is not hard to imagine what kind of impact services like those already available in the United Kingdom could have on the crushing problem of the cost of navigating American courts. Easy access to “lawyer letters” to resolve disputes before they are filed in court could both provide an avenue of recourse for those who cannot afford to go to court and reduce the number of claims that end up in courtrooms. Providing assistance with the completion of forms, drafting of motions or papers, and/or unlimited phone and email assistance to someone who is working his or her way through a housing, bankruptcy, immigration, or family matter, for example, could substantially reduce the errors and misunderstandings that clog dockets, frustrate clerks and judges, and trip up laypeople. The U.K. divorce service mentioned above offers exactly this kind of low-cost help: for £199, a customer seeking a change in a child or spousal support order can arrange online for a licensed solicitor to draft the appropriate motion and accompanying affidavit and then receive unlimited phone and email support from a solicitor up through the hearing on the matter.

This kind of service is only possible for a low flat fee, however, if the entity supplying the service 1) can attain sufficient national scale to smooth out the high-need and low-need cases; 2) can employ legal professionals other than lawyers when providing standardized assistance according to lawyer-generated protocols; and 3) has sufficient access to diversified capital

markets to secure the funds needed to invest in the building of a large customer base and development of easy to comprehend instructions, reliable protocols, appropriate pricing, and a user-friendly interface. The only reason we do not have a comparable service now in the United States is that the current regulatory structure stands in the way of achieving all three of those requirements for innovation.

The way to reduce the cost and complexity of accessing courts is to harness the same mechanisms that reduce costs in other areas: standardization, scale, analysis of data, design, experimentation, and specialization.²⁰ Lawyers do not need to do everything: find the clients, run the business, design the website, develop customer relations expertise, find the other experts, collect the fees, experiment with new methods, provide the investment capital, implement standardized protocols, and so on. But our current regulatory system requires them to do it all, and this plays a substantial role in keeping hourly rates for legal help high.

There are few sectors of the legal market that are more competitive than the lower end of the personal services market; there is no shortage of lawyers anxious to serve the people who are struggling through court processes alone. That fact tells us that the fees these lawyers are charging – on the order of \$250 an hour – are probably close to rock-bottom *for the business model in which these lawyers practice*. That model requires lawyers operating a solo or small firm practice to charge enough to run the risk of not finding or collecting from clients: they lack the scale to smooth those risks and the capacity for investing in marketing, quality control, and customer service protocols to improve profitability. Most of them end up taking home far less than the \$250 per hour that they charge. We know that many of the lawyers prac-

ticing in this sector of the market would be willing to work for a stable income that averages about \$30–40 an hour – \$60,000–70,000 a year – or less. We know this because that’s the going rate for contract attorneys – who supply legal expertise and nothing more.²¹

To reduce the cost of helping people access courts we need to change the business model. And, frankly, that’s not hard to do. There are U.S. companies that already have this business model; some of them are already operating independently or in joint ventures with U.K. companies in the United Kingdom’s more open market. They are ready to make significant leaps forward in harnessing technology and broad-based customer service organizations to support the millions of litigants who, of necessity, have to navigate court without conventional legal representation. LegalZoom,²² RocketLawyer, and Law Depot have built recognized legal brands and large-scale platforms that provide ordinary consumers with a low-cost means of completing the documents necessary to make a will, file a simple divorce, obtain a trademark, or incorporate a company. Current regulations restrict them to serving only as a “scrivener,” filling in the blanks of legal forms; any substantive legal assistance has to be arranged through a legal plan that connects users to private attorneys and is limited to thirty minutes of advice per matter before a regular attorney/client fee arrangement kicks in. But these services could do so much more. They are well positioned to move quickly into the space of providing substantive support to people filing court documents and participating in court proceedings.

Other services such as Pearl²³ and LawGuru provide a platform for purchasing answers to legal questions. Currently these systems are restricted in various ways: providing generic legal information that is not tailored to the circumstances of the

questioner or requiring a more cumbersome process of connecting a questioner to a local lawyer and a complicated consent form from the questioner to authorize limited help. But these systems, designed to provide low-cost rapid responses in real-time with attorneys, could easily scale up to provide more tailored advice and support for litigants facing immediate questions about how to respond to legal documents, the progress of a hearing, and so on. Imagine how much more effective this kind of system could be, installed as kiosks in courthouses throughout the country, than an overburdened clerk's window or a poorly funded and overwhelmed self-help center.

These are just some of the possibilities that could be online and available to Americans in short order. Other possibilities lie on the horizon, particularly ones that involve reconfiguring how cases are received, processed, and handled by courts. While the creation of online claims filings and hearings, for example, could be implemented by individual court systems now, using public dollars, any significant rollout of such systems almost certainly depends on recruiting private companies to develop and deliver them, because they require investment, risk capital, and the kinds of business and technology expertise that lie outside of the domain of lawyerly expertise. Partnerships and contracts with entities to provide low-cost systems for delivering court services are not difficult to imagine or realize, if only we could break out of the existing regulatory framework.

I know what the major objection from the profession will be to these ideas: What about quality? What about protecting the public from unqualified scam artists? But this worry itself is also one that is blinkered by the confines of conventional ideas about legal help. It imagines that the alternative to a qualified lawyer providing

legal help one-on-one in small and solo practice settings is an unqualified non-lawyer providing legal help one-on-one in a small or solo practice setting. The short answer to the challenge often is: something is better than nothing, and currently nothing is what the vast majority of people who need access to our courtrooms get. That's not a bad answer, but there is a better one.

The better answer is to recognize that a change in the business model of how legal help is provided introduces the potential for changes in the regulatory model. The current regulatory model purports to protect people by requiring everyone who provides any legal help to obtain a J.D. and a license and to follow rules set by state bar associations. But there are other, better ways to protect people.

A more robust regulatory model would recognize that quality can be supported in many ways. A business model built on the delivery of legal help by organizations that develop broad-based platforms operating at large scale secures quality in large measure through standardization and organizational protocols. Instead of thousands of individual lawyers in their offices deciding what is a good response to a particular one-off problem, or even an anecdotal sample of legal problems, an organization asks legal experts to collaborate on developing a protocol for common problems and circumstances; scale, technology, and data analysis allow the organization to extend protocols to less-common (but sufficiently frequent) problems. The organization pilots those protocols, collecting data internally and from users to assess how reliably the protocol is understood and implemented (which requires compliance not only by employees but also by the users themselves). It uses that data to refine the protocol. It puts in place auditing and oversight mechanisms to ensure the protocol is followed. It iden-

tifies the cases that are not well handled by standard protocols, and elevates them to more customized (and expensive) treatments or refers them outside to other providers. If the protocol fails, the organization bears the liability – commercial and legal – for those failures. And if, as should be the case, the organization is itself dependent on a license to provide legal assistance, the organization runs the risk of losing its license if its procedures fail to provide adequate legal assistance as promised.

Quality in this organizational model is a product of the system instead of a single individual operating in isolation. And that is a far better guarantee of systematic quality than individual licensing. It is true that organizations can fail to deliver quality as promised because they are poorly run or overly bureaucratic. They can fail because they are tempted under competitive and/or stakeholder pressure to cut corners or mislead their users about what they can actually do for them. But lawyers operating in solo and small firm settings can also fail in many of the same ways: making mistakes, letting personality get in the way, overbilling, misleading, taking on more than they can handle, doing shoddy work. The advantage of the organizational model is that it is far easier to detect, regulate, and correct the organization's failures. It is easier to identify systemic problems when you have enough data to look at. It is easier for a regulator to oversee a few organizations instead of thousands of individuals. It is easier for consumer watchdogs to monitor the quality of an organization that serves thousands of users nationally than to monitor thousands of providers who serve a handful of users in a local market. It is easier for users to obtain reliable information about quality from other users about an organization that delivers a standardized service on a large scale than it is for them to discover anecdotes about a local provider's performance.

The path to greater innovation in the ways people obtain the legal help they need to access and navigate our courts clearly requires change to the way in which the business of law is regulated. Unfortunately, the path to that regulatory change has proven a lot harder to discern. Other professions, such as medicine, traditionally enjoyed self-governance as a matter of delegation from state legislatures. Reform in those professions has come about largely through legislative means at both the state and federal level.

The basis of legal professional regulation, however, is a murky mess. It results from a complex and poorly understood mélange of express state constitutional provisions, state supreme courts' claims to inherent constitutional authority, state statutes, court rules, judicial opinions, and bar association ethics codes and disciplinary committee opinions. A federal solution seems ideal, particularly in light of the importance of increased scale to reduce costs. But states have historically been responsible for creating and operating the courts that manage almost all of the country's litigation, and there are reasonable claims to constitutional authority to continue to regulate the profession locally.

The prospect of working state by state to change the regulatory approach is, however, daunting to say the least. Bar associations wield significant political and practical influence over professional rulemaking; indeed, in most states it is simply taken for granted that the bar associations are the rulemakers. State supreme courts often lack the awareness, much less the wherewithal, to assert a serious role in professional regulation; they are working overtime simply to stay afloat in a sea of unrepresented litigants and struggling with dwindling budgets that force them to close their courtrooms and eliminate staff.²⁴ Legislatures can act, but if they upset bar associations, those bar associa-

tions can and do challenge legislation as unconstitutional on separation of powers grounds.

Some state supreme courts, precisely because they stand at the headwaters of the deluge of unrepresented litigants in courts, are beginning to test their capacity to roll back the excessive limitations that have accumulated on legal markets. The Washington State Supreme Court was the first in the nation, in 2012, to order the state bar association to create a scheme to license a new category of legal assistants to provide a limited set of legal services, such as review of documents and assistance with understanding and navigating court procedures.²⁵ The Board of Trustees of the California State Bar, which is constitutionally created as a branch of the judiciary,²⁶ is exploring the potential for introducing a limited licensing scheme.²⁷ New York's Chief Judge Jonathan Lippman, as he reports in his contribution to this issue, has tasked a working group with creating a pilot program to explore the possi-

ble roles that limited license professionals might play in helping overcome the crushing load of unrepresented litigants in New York courts. These judicial efforts suggest a promising trend.

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As law and legal process have become more complex, as legal rights and duties have become more pervasive, the idea that ordinary citizens can secure due process without any legal help is increasingly untenable. The path to progress may thus have begun to emerge from the fog: courts have the power to say from whom and how the millions who appear before them without lawyers can secure the legal help they need. And if, as is overwhelmingly the case, our existing regulatory scheme has resulted in a system in which lawyers' help lies beyond the reach of the ordinary citizen, then it is within the power – and the duty – of courts to expand access to justice by expanding access to other sources and types of legal help. The innovators for law are just waiting for the call.

ENDNOTES

¹ For estimates of the rates at which people in different countries “lump” their potential legal problems by taking no steps to address them, see Gillian K. Hadfield and Jamie Heine, “Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans,” forthcoming in *Beyond Elite Law: Access to Civil Justice for Americans of Average Means*, ed. S. Estreicher and J. Radice (Cambridge University Press).

² The Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York, November 2010*, 1, <http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf>; and A. Gail Prudenti, *2013 Report of the Chief Administrator of the Courts Pursuant to Chapter 507 of the Laws of 2009*, <http://www.nycourts.gov/publications/pdfs/2013ForeclosureReport.pdf>.

³ Lawrence M. Friedman, *A History of American Law* (New York: Simon & Schuster, 2005), 11.

⁴ For an analysis of this phenomenon, see Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, Mass.: Harvard University Press, 2001).

⁵ See Hadfield and Heine, “Life in the Law-Thick World.”

⁶ See, for example, *Merco Construction Engineers Inc. v. Municipal Court*, 21 Cal.3d 724 (1978) (statute authorizing a corporation to appear in court through a non-attorney corporate employee violates separation of powers). See also *In re Attorney Discipline System*, 19 Cal.4th 582 (1998) (California State Bar is a constitutionally created entity subject to court's primary, inherent authority over the admission and discipline of attorneys and retains the power to impose a fee

on attorneys to fund the disciplinary system despite the Governor's veto of legislation imposing the fee and legislative inaction); and *In re New Hampshire Bar Association*, 855 A.2d 450, 451, 456 (N.H. 2004) (statute requiring the state bar to be bound by the results on referendum asking whether the state bar should be unified or not was unconstitutional). The Missouri Supreme Court has been particularly clear on the inherent and primary power of courts to determine what constitutes the practice of law: "We have generally recognized that the legislature may, in the exercise of the police power, aid the court by providing penalties for unauthorized practice of law, but that it may in no way hinder, interfere with or frustrate the court's inherent power. We have at times recognized and used the statutory definition [of the unauthorized practice of law] . . . we may undoubtedly do so reserving the right, however, at all times to fix our own boundaries and declare our own restrictions in all matters other than a prosecution under the statute." See *Hoffmeister v. Tod*, 349 S.W.2d 5, 11 (1961).

- ⁷ For a discussion of the inherent tendencies toward complexity and specialization in law and the impact on the cost of lawyers, see Gillian K. Hadfield, "The Price of Law: How the Market for Lawyers Distorts the Justice System," *Stanford Law Review* 98 (2000): 953–1006.
- ⁸ See Gillian K. Hadfield, "Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets," *Stanford Law Review* 60 (2008): 1689–1732.
- ⁹ The concept of "civil *Gideon*" gained currency in the late 1980s. See American Bar Association Consortium on Legal Services and the Public, *Civil Justice: An Agenda for the 1990s* (1991).
- ¹⁰ These calculations are based on the evidence from ABA and state bar association surveys between 1995 and 2010 showing that roughly half of U.S. households are experiencing an average of two legal problems at any given time. That's 115 million legal problems. At an average of \$200 an hour, that's over \$20 billion for one hour of help. If the 1.25 million American lawyers are providing help for an average of three problems (average pro bono hours according to the ABA are 30, and I conservatively assume 10 hours per problem), that amounts to 3 percent of total need.
- ¹¹ <http://www.co-operative.coop>.
- ¹² <http://www.divorce-online.co.uk>.
- ¹³ <http://www.halifaxlegalexpress.co.uk>. This service was provided through an outsourcer, Epoq Legal. Halifax Bank discontinued the services in October 2013, directing consumers to <http://www.mylawyer.co.uk>, a comparable service also delivered through Epoq.
- ¹⁴ <http://www.qualitysolicitors.com>. Quality Solicitors discontinued its placement of kiosks in retail bookstores in late 2013.
- ¹⁵ <http://www.face2facesolicitors.net>. Face2Face went out of business in early 2014.
- ¹⁶ <http://www.fsb.org.uk>.
- ¹⁷ <http://www.whichlegalservice.co.uk>.
- ¹⁸ For a discussion of how proposals to allow such business structures in the United States have died because they were voted down among lawyers, see Gillian K. Hadfield, "The cost of law: Promoting access to justice through the (un)corporate practice of law," *International Review of Law and Economics* (forthcoming).
- ¹⁹ In 2012, legal aid per capita in the United Kingdom was five times the level in the United States; measured on a per case basis (that is, taking into account that many more matters are handled through courts in the United States than is the case in most other countries), the level of legal aid in the United Kingdom is more than ten times the levels of U.S. funding. See Hadfield and Heine, "Life in the Law-Thick World."
- ²⁰ For an extended analysis of the economics of legal businesses, see Hadfield, "The cost of law."
- ²¹ <http://www.crainsnewyork.com/article/20120108/SMALLBIZ/301089988>.
- ²² I serve on the Legal Advisory Council of LegalZoom.
- ²³ I serve on the Advisory Board of Pearl.

²⁴ For evidence of the impact of budgetary cuts in California, see the Honorable Barry Goode, *Gillian K. Summary of Impacts from Instant Survey* (March 11, 2013), <http://www.courts.ca.gov/partners/Hadfield/documents/20130312-PJ-Instant-Survey-Impacts.pdf>.

²⁵ See Brooks Holland, “The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice,” http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2196607.

²⁶ *In re Attorney Discipline System: Requests of the Governor and The State Bar of California*, 19 Cal.4th 582 (1998).

²⁷ <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000010722.pdf>.

Trusting the Courts: Redressing the State Court Funding Crisis

Michael J. Graetz

Abstract: In recent years, state courts have suffered serious funding reductions that have threatened their ability to resolve criminal and civil cases in a timely fashion. Proposals for addressing this state court funding crisis have emphasized public education and the creation of coalitions to influence state legislatures. These strategies are unlikely to succeed, however, and new institutional arrangements are necessary. Dedicated state trust funds using specific state revenue sources to fund courts offer the most promise for adequate and stable state court funding.

Let justice be done though the heavens fall.

– Lord Mansfield (1768)¹

We Americans take it for granted that if we buy an automobile or marry someone and the car or spouse turns out to be a lemon, we can go into court to obtain relief. If we get into a dispute with our landlord or a tenant or with our family over a relative's estate, a judge will be sitting in the local courthouse to resolve it. Surely, if confronted with domestic violence, we can promptly obtain a restraining order from a court nearby. If we are wrongfully arrested and charged with a crime, we take comfort in the fact that our constitution provides us the rights to counsel and a speedy trial, and we look forward to our day in court to vindicate ourselves. If we want to validate our rights to speak and worship freely, bear arms, or contribute vast sums to the political contender of our choice, we expect our claims to be heard promptly and fairly in a convenient courthouse.

The judiciary is the indispensable third branch of our democratic government, the one that peacefully resolves our disputes and most vigorously guarantees our liberty. Well-functioning courts are integral to our democracy. Our expectation that we can resolve

MICHAEL J. GRAETZ, a Fellow of the American Academy since 2004, is Columbia Alumni Professor of Tax Law at Columbia Law School and Justus S. Hotchkiss Professor Emeritus of Law at Yale Law School. His most recent books include *The End of Energy: The Unmaking of America's Environment, Security, and Independence* (2013) and *100 Million Unnecessary Returns: A Simple, Fair, and Competitive Tax Plan for the United States* (2008).

our legal rights in a court of law is so ingrained in our culture that we never give a second thought to the prospect that we might not be able to do so.

But many years of tight and frequently declining funding have exacted a substantial toll on the capacity of our courts to function as they should. In 2003, the Conference of State Court Administrators described state courts as facing “the worst fiscal crisis in many decades.”² Of course, the crisis intensified when state budgets were decimated in the wake of the Great Recession. The heavens may not have fallen, but justice has suffered serious blows from the budget ax.

Except in rare and extraordinary circumstances, only federal courts – especially the U.S. Supreme Court – grab the media’s attention. This is hardly surprising: federal court rulings frequently have nationwide consequences. But it is the state courts that we count on to resolve the vast majority of our legal disputes, to ensure justice day-to-day. State courts hear more than 95 percent of all court cases filed in the United States. During 2011, about 370,000 civil cases were filed in federal courts. By comparison, California, Florida, Maryland, New York, and Virginia each had one million or more new civil cases filed in 2011.³ Total cases filed in our nations’ state courts grew from just under 90 million in 1995 to more than 108 million in 2008.⁴

Until the budget sequestration hit the courts in 2013, federal funding for the judiciary had generally increased to match its caseload, as had the number of federal court personnel. Even during the Great Recession, federal court funding held relatively steady at about \$7 billion a year (two-tenths of 1 percent of the total federal budget).⁵ But in 2013, the federal spending sequestration legislation cut \$350 million from federal court budgets, producing furloughs and layoffs of court personnel and causing reductions in drug testing,

mental health services, probation services, court security services, and background checks, as well as periodic closures of the courts that delayed their ability to resolve cases.⁶ Even so, the federal courts have fared much better than state courts, which in recent years have had their budgets sharply reduced.

In 2010, more than forty states cut their courts’ funding. In most states, courts received 10 to 15 percent less funding in the years 2008 through 2011 than they did in 2007. These cumulative budget cuts have taken a harsh toll on state courts’ ability to function properly: more than forty states froze salaries; more than thirty laid off or furloughed judicial staff and stopped filling clerk vacancies; nearly thirty increased their case backlogs; and more than twenty reduced court operating hours and increased filing fees and fines.⁷ Michigan cut forty-nine judgeships, New York laid off five hundred employees, Alabama closed its state courts on Fridays, and New Hampshire essentially suspended civil jury trials.⁸

Delays are ubiquitous. In much of Minnesota, for example, it now takes more than a year for a misdemeanor case to be set for trial. Criminal cases in Georgia routinely take more than a year to resolve, while civil trials there have been suspended indefinitely. Personal injury cases in New Hampshire are commonly delayed two to three years.⁹ Steve White, presiding judge of the Sacramento County Superior Court, told *The New York Times* that, due to reduced staff, people commonly wait five to six hours to see a clerk, and residents frequently wait a full day for help in family courts, only to leave without having seen anyone. Simultaneously, unemployment and the threat (or the reality) of foreclosures and bankruptcy have increased family stress, making this economic downturn an especially bad time for courts to be unable to promptly resolve legal issues related to debtor-creditor relations, domestic rela-

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tions, and parenting-time disputes. Criminal defendants have a constitutional right to a “speedy” trial, and domestic violence and parental misconduct cases require immediate judicial attention, so other civil litigation goes to the back of the line. If a state civil case filed in 2007 took one and a half years to be resolved, the same case filed in 2013 would require nearly four and a half years. In Los Angeles, the average case disposition time increased from just under two years to four and a half years in 2012.¹⁰ Accounts of dysfunction in the state courts could fill this volume. If justice delayed is, in fact, justice denied, injustice abounds.

The National Center for State Courts (NCSC), the American Bar Association (ABA), and many state courts and bar associations have well documented the deleterious consequences of the declines in state court budgets. The NCSC and ABA have both conducted and funded excellent reports on the effects of inadequate funding of state judiciaries and have advanced several proposals to address the problems they uncovered.¹¹ The NCSC concluded that due to decreased state budgets for the judiciary, “the public’s access to justice is being jeopardized.”¹² Both organizations have published numerous calls for greater efforts by judicial officials and their allies to obtain adequate funding from state legislatures.

David Boies and Ted Olson – the famous adversaries in *Bush v. Gore* (2000) who subsequently joined forces to contest California’s ban on gay marriage – teamed up again (far from the national spotlight) to cochair the ABA’s Task Force on Preservation of the Justice System. At the ABA’s annual meeting in August 2011, Boies and Olson received the association’s highest honor for their leadership of this task force, which, after conducting numerous fact-finding hearings around the country, concluded that “the courts of our country are in crisis” due to the “failure of state and

local legislatures to provide adequate funding.”¹³ In 2011, the task force obtained unanimous approval for ABA House of Delegates Resolution 302, which urges state and local bar associations “to document the impact of funding cuts to the justice systems in their jurisdictions, to publicize the effects of those cutbacks, and to create coalitions to address and respond to the ramifications of funding shortages to their justice systems.”¹⁴

No one now denies that the funding problems of state courts are causing serious harm. The adverse consequences have spread far beyond litigants and court personnel. The ABA Task Force Report documented detrimental effects on public safety, ranging from increased travel and delays for police officers waiting to testify at criminal trials to releases of criminal defendants when their speedy trial clocks run out. Cutbacks in courthouse security personnel have increased the risks inside courthouses. Delays in domestic violence cases can have tragic consequences.

State court funding reductions are also costly to the regional economy. Economic losses include not only the direct effects of state employment reductions and lower revenues for the adjacent legal community, but also decreased investment, since funds are held in reserve for longer pending resolution of legal disputes.¹⁵ When uncertainty rises regarding the likelihood of efficacious judicial enforcement of property and contract rights, investment financing becomes more difficult to obtain, economic risks increase, and economically beneficial transactions simply may not occur. Writing in the *Journal of Public Economics*, economist Matthieu Chemin concluded that “[f]inding ways to speed up judiciaries is . . . fundamental to economic growth.”¹⁶ One microeconomic study estimated that in 2012, cutbacks in state judiciary funding would eventually “result in estimated losses of \$53.3 billion from increased un-

certainty on the part of litigants,” not including “losses from declines in employment at state judiciaries, law firms and the resulting declines in economic output . . . resulting from the funding cutbacks.”¹⁷

The ongoing shrinkage of state court resources also encourages those who can afford it to seek alternatives to courts for resolving disputes. Increasing use of arbitration, mediation, and “private” judges raises complex and cross-cutting issues well beyond the scope of this essay. It suffices here to observe that, advantages to litigants notwithstanding, the emergence and evolution of a two-tier system of justice poses substantial risks for state judicial systems. If complex business cases and other controversies among those who can afford private adjudication flee the judicial system, leaving state courts to resolve cases principally involving criminal defendants and the poor and powerless, it will become increasingly difficult to attract and retain high-quality state court judges (and other personnel). In turn, the temptation for state legislatures to further decrease state court funding will grow. As U.S. District Court Judge Jack Weinstein has observed, “This would create a situation analogous to what has happened to public education in some of our central cities because of the middle class exodus to private schools and the suburbs.”¹⁸

In 1970, Warren Burger, then the Chief Justice of the United States, told the American Bar Association:

A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; that

people come to believe that the law – in the larger sense – cannot fulfill its primary function to protect them and their families in their homes, at their work, and on the public streets.¹⁹

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These threats to our system of justice are now being posed a generation later by the inadequate funding of state courts.

The facts of diminished funding of state courts are indisputable. The harmful consequences of funding cutbacks have been well-documented and are now clear. The question of how to redress this situation, however, remains.

State courts obviously must improve their efficiency and enhance their cost-effectiveness. Approximately 95 percent of annual state court costs are for personnel, which means that the diminished funding has left vacancies unfilled and has produced furloughs and firings. It also implies that too little is being spent on technology. In some cases, funding reductions have produced efforts to “re-engineer” state courts, reorganizing them in order to curtail duplicative costs (perhaps most notable among these efforts is the consolidation of trial courts in California). The push for cost savings has also stimulated more electronic payment, document management, and filings of court documents; video conferencing in rural areas; forms downloadable from the web; and online answers to questions – in short, a general increase in the online accessibility of court services. Procedures and forms for straightforward cases, like uncontested divorces and small claims, have been greatly simplified in some states. So, the funding reductions have stimulated some improvements in the courts, prompting them to enhance and streamline services in order to better serve the public. Such enhancements should continue to be implemented and spread to other states.

But on a less positive note, many state courts have responded to cuts by endeavoring to increase their self-funding, principally by raising filing and other fees, but also by raising fines. In Washington, the imposition of new surcharges and increased fees spurred the state Supreme Court in 2013 to reaffirm indigent litigants' rights to waiver of all fees.²⁰ To be sure, although increases in fees may deter low- and middle-income litigants from seeking relief, they may be necessary in some cases. But on the other hand, raising fines to fund court functions is never apt: it conflicts with the impartiality in setting punishments that we expect and deserve from the judiciary.

Historically, state and local judicial functions were largely conducted by judges elected and funded locally. But the court reform movement of the mid-twentieth century changed that, and state courts are now typically unified, and in most states are under the administrative control of the state Supreme Court and at least partly funded by the state.²¹ This unification, along with political pressure to limit property taxes (the prime source of local funds), and a striving for greater stability and uniformity of funding statewide, has provided an impetus to shift funding of state courts to state rather than local budgets. Today, although there are variations among the states, the vast bulk of state court funds are supplied through state budgets.²² These budgets are determined (usually annually) by state legislators. Funds allocated to the judiciary are generally 1 to 2 percent of state budgets, although in a few states they range as high as 3 or 4 percent.

There is a surprising consistency in the recommendations for redressing the state court funding crisis and avoiding similar deficits in the future. The recommendations of the ABA Task Force in their report "Crisis in the Courts," which were endorsed unanimously by the ABA House of Delegates, are typical. Echoing the findings

of virtually all such analyses, the Task Force first urges achieving operating efficiencies in the courts. The task force report also urges state and local bar associations to: 1) "document the impact of funding cutbacks to the justice systems in their jurisdictions"; 2) "publicize the effects of those cutbacks"; and 3) "create coalitions to address and respond to the ramifications of funding shortages to their justice systems." The ABA also recommends that state and local governments "develop principles that would provide for stable and predictable levels of funding." Furthermore, it urges both the courts and bar associations to better communicate with and educate public officials and the public about the "value of adequately funding the justice system."²³ The NCSC has endorsed a similar strategy, calling for more engagement with the legislatures by state chief justices, "regular meetings" between the judiciary and legislative bodies, and "strong alliances" between state and local bar associations and other constituents.²⁴ State bar associations and other independent analysts have advanced similar recommendations.

Mustering any confidence in the potential success of such strategies, however, is difficult, not least because of a lack of public concern. As Paul De Muniz, the former Chief Justice of the Oregon Supreme Court, observed in a report for the NCSC: "The court funding crisis is 'not being talked about around the dinner tables of America.'"²⁵ Putting aside the fact that the American public rarely gathers around dinner tables anymore, such calls for greater public engagement as a response to inadequate state court funding of state judicial systems face serious obstacles. First, only 13 percent of the public has a "great deal of confidence" in state courts (although by this metric, they fare twice as well as state legislatures and four times better than Congress).²⁶ Moreover, state court funding is not a salient issue with the American peo-

ple, who are dealing with far more immediate concerns. When Americans are asked about needs for greater state funding, public schools, roads and bridges, health insurance, public transportation, and the police all enjoy at least twice as much public support as state courts.²⁷ At most, the public will give media articles about acute judicial funding shortages and their consequences a brief glance. Public contact with state courts is episodic, and (in family, probate, or traffic courts, for example) can often be disappointing or even distressing. Endeavoring to engage the public in creating an effective ongoing political coalition to convince state legislatures to provide “adequate, stable, and predictable” judiciary funding is a distracting delusion.

Only fundamental institutional change has the potential to protect the judiciary from the vagaries of annual state legislative budgeting. But despite all the time, energy, and ink devoted to the crisis in funding state judiciaries – including widespread complaints about the threats funding shortages pose to the constitutional independence of the judiciary and the separation of powers, as well as a few instances where funding cutbacks have served as “payback” for judicial decisions key legislators disliked – new institutional arrangements have not been advanced. To be sure, achieving successful institutional change is easier said than done.

What new institutional arrangements would significantly enhance protections for stable judiciary funding? First, a multi-year perspective seems necessary. This suggests that a state “trust fund” might be a viable solution. Trust funds, which typically earmark a specific source of revenue for a particular spending purpose, are widely used by the federal and state governments. At the federal level, the trust funds directing payroll taxes to Social Security and Medicare and the trust fund allocating gas-

oline and diesel fuel taxes to fund highways are the best known, but the United States Code lists ninety-one trust funds, including, for example, funds for the Philippines, the Library of Congress, Puerto Rico, and certain veterans’ benefits.²⁸ The states also maintain trust funds for a large variety of purposes: Wyoming has a trust fund for wildlife and natural resource conservation; Wisconsin and several other states use them for prevention of child abuse and neglect; and California and many other states employ them to pay for affordable housing, to name just a few examples. Many states have created trust funds for spending the proceeds of their settlements with tobacco companies, and all the states maintain trust funds for unemployment insurance.

As political scientist Eric Patashnik has reported, trust funds – while frequently neither legally binding on the legislature nor necessarily economically significant – have been quite successful in producing politically stable long-term funding commitments.²⁹ A state trust fund with earmarked revenues devoted to funding the state’s judicial branch would provide state judiciaries with much more stable and predictable funding over time. Trust fund financing would also help insulate the judicial branch from funding cuts from state legislators who may disapprove of specific court decisions. A state trust fund would also serve to fortify the judiciary’s independence from the executive and legislative branches’ political pressures, thereby strengthening the separation of powers mandated in state constitutions.

Calling for trust fund financing for the judiciary raises two additional questions: 1) from what revenue sources will the trust funds come; and 2) who will determine the level and timing of withdrawals? The second question is considerably easier to answer than the first. Allowing the judicial branch itself to manage withdrawals would have the salutary effect of freeing the ju-

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diciary from detailed legislative directives about how its budget must be spent. It would also discourage “pork-barrel” legislative politics and executive line-item vetoes. This kind of judicial budgetary independence would also better position legislatures to hold the judicial branch responsible for serving the public interest. Spending flexibility and control should be granted to the judicial branch on the condition that it achieve efficiency and economy in the adjudication process. The judicial branch would thus benefit from its own successes but also bear the costs of its failures.

Given the wide variations in public finance among the states, determining the revenue sources for the trust funds is considerably more difficult. These variations include not only differences in the sources and levels of state funds and the share of each state’s budget dedicated to financing the judiciary, but also interstate disparities in the proportion and levels of state versus local financing of the courts. As a general observation, two criteria emerge: 1) the funding source should be adequate; and 2) the revenue should come from a source that will not be dramatically affected by changes in the state’s economic well-being. For most states, dedicating a portion of state sales tax revenues equal to 1 to 2 percent of overall state expenditures to a state

court trust fund would satisfy both criteria.³⁰ Court filing and other fees should also go into the trust fund. (Court fines, however, should be directed to general revenues because of the potential for conflicts of interest and risk of undermining the public’s confidence in judicial integrity.) This combination of revenues should provide an adequate and relatively stable and predictable source of funds for courts in most states.

The political difficulties of convincing state legislatures to create such trust funds for funding their judiciaries loom large. If the endeavor to secure annual funding is any indication, creating a coalition that can persuade state legislatures is an immense challenge. But if successful, such efforts would not need to be repeated annually. Creating a trust fund for state court finances would be a far more fruitful avenue than relying on successful public education and annual coalition-building, which have up to this point been at the forefront of efforts to address the crises caused by inadequate state court funding. The deleterious effects of recent shortfalls in state court funding may have opened up new opportunities for fundamental institutional change. The courts and their allies should endeavor to take advantage of such opportunities wherever they exist.

ENDNOTES

Author’s Note: I would like to thank Marianne Carroll and Brett Peace for their valuable research assistance.

- ¹ Frequently quoted Latin maxim popularized by (and often attributed to) Lord Mansfield in *Rex v. Wilkes* (1768). See Fred Shapiro, *The Yale Book of Quotations* (New Haven, Conn.: Yale University Press 2006), 489. This quotation was used, for example, by Jonathan Lippman, Chief Judge of New York, in his report “The State of the Judiciary 2013,” available at <http://www.nycourts.gov/ctapps/soj.htm>.
- ² Conference of State Court Administrators, “Position Paper on State Judicial Branch Budgets in Times of Fiscal Crisis,” December 2003, <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/BudgetWhitePaper.ashx>.

- ³ John J. Broderick and Lawrence Friedman, "Courts and Public Justice: New Changes, New Choices," *Kentucky Law Journal* 100 (2011–2012): 848.
- ⁴ Nate Pearsall, Bo Shippen, and Roy Weinstein, "Economic Impact of Reduced Judiciary Funding and Resulting Delays in State Civil Litigation," *Micronomics*, March 2012, p. 11, http://www.micronomics.com/articles/Economic_Impact_of_Reduced_Judiciary_Funding_and_Resulting_Delays_in_State_Civil_Litigations.pdf.
- ⁵ Judith Resnik, "Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture," *St. Louis University Law Journal* 56 (2012): 918, 975.
- ⁶ American Bar Association, Government Affairs Office, Federal Court Funding, http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/federal-court-funding.html.
- ⁷ Pearsall, Shippen, and Weinstein, "Economic Impact of Reduced Judiciary Funding," 4.
- ⁸ *Ibid.*, 3–8.
- ⁹ American Bar Association, "Report on Resolution 302," August 8–9, 2011, http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_302.authcheckdam.pdf; and Greg A. Rowe, "Keeping Courts Funded: Recommendations on How Courts Can Avoid the Budget Ax," http://www.sji.gov/PDF/Keeping_Courts_Funded.pdf. Numerous reports by or on behalf of state courts and state bar associations, along with several newspaper articles, document the harmful effects of funding reductions for various states.
- ¹⁰ Pearsall, Shippen, and Weinstein, "Economic Impact of Reduced Judiciary Funding," 15.
- ¹¹ American Bar Association, "Report on Resolution 302"; and Justice at Stake and National Center for State Courts, *Funding Justice: Strategies and Messages for Restoring Court Funding*, http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/Analysis_Strategy/Funding-Justice.aspx. See also, for example, New York State Bar Association, "Report of the Executive Committee on the Impact of Recent Budget Cuts in New York State Court Funding," January 2012, <http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=62096&Template=/CM/ContentDisplay.cfm>.
- ¹² American Bar Association, "Report on Resolution 302"; National Center for State Courts, "State Budget Cuts Threaten Public's Access to Courts," November 29, 2011, <http://www.ncsc.org/Newsroom/Background/2011/Court-Budget-Cuts.aspx>.
- ¹³ American Bar Association, "Report on Resolution 302," 1; and Justice at Stake and National Center for State Courts, *Funding Justice*.
- ¹⁴ American Bar Association, "Report on Resolution 302."
- ¹⁵ See Pearsall, Shippen, and Weinstein, "Economic Impact of Reduced Judiciary Funding," 15.
- ¹⁶ Matthieu Chemin, "The Impact of the Judiciary on Entrepreneurship: Evaluation of Pakistan's Access to Justice Programme," *Journal of Public Economics* 93 (2009): 114–125.
- ¹⁷ Pearsall, Shippen, and Weinstein, "Economic Impact of Reduced Judiciary Funding," 15. See also Heather Rogers, "Business-Killing Cuts to State Court Systems," *PublicCEO*, <http://www.publicceo.com/2012/10/13114>.
- ¹⁸ Jack B. Weinstein, "Some Benefits and Risks of Privatization of Justice Through ADR," *Ohio State Journal on Dispute Resolution* 11 (1996): 241, 262.
- ¹⁹ Warren E. Burger, "Remarks of Warren E. Burger to the American Bar Association," St. Louis, Missouri, August 10, 1970.
- ²⁰ *Jafar v. Webb*, 303 P.3d 1042 (Wash. 2013).
- ²¹ See Stephen C. Yeazell's essay in this volume.
- ²² National Center for State Courts, Fiscal Year 2013 COSCA Budget Survey Analysis, January 2013, <http://www.ncsc.org/information-and-resources/budget-resource-center/~media/files/pdf/>

information%20and%20resources/budget%20resource%20center/2013-cosca-budget-survey-5-14-13.ashx.

²³ American Bar Association, “Report on Resolution 302.”

²⁴ Justice at Stake and National Center for State Courts, *Funding Justice*. See also Rowe, “Keeping Courts Funded”; and Paul De Muniz, “Maintaining Institutional Independence: Funding Sustainable State Courts During Economic Crisis,” <http://www.ncsc.org/Services-and-Experts/Court-leadership/Harvard-Executive-Session/~media/Files/PDF/Services%20and%20Experts/Harvard%20Executive%20Session/Maintaining-Judicial-Independence.ashx>.

²⁵ Ibid. De Muniz is here quoting former Chief Justice of the New Hampshire Supreme Court John T. Broderick, Jr.

²⁶ Justice at Stake and National Center for State Courts, *Funding Justice*, 3. “Great deal of confidence” ratings were 13 percent for state courts, 6 percent for state legislatures, and 3 percent for Congress.

²⁷ Ibid., 4. Seventeen percent supported funding increases for state courts, compared to 66 percent for public schools, 52 percent for roads and bridges, 49 percent for health insurance, 43 percent for public transportation, and 43 percent for police.

²⁸ United States Code, Title 31 (Money and Finance), sec. 1321.

²⁹ Eric M. Patashnik, *Putting Trust in the U.S. Budget: Federal Trust Funds and the Politics of Commitment* (Cambridge: Cambridge University Press, 2000). An empirical analysis of state earmarked taxes in the period 1997–2005 by Susannah Camic Tahk confirms the effectiveness of such arrangements. Susannah Camic Tahk, “Public Choice Theory and Earmarked Taxes,” University of Wisconsin Legal Studies Research Paper, March 17, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2311372.

³⁰ Corporate and personal income tax revenues fluctuate more with economic conditions than does sales tax revenue.

Our Informationally Disabled Courts

Frederick Schauer

Abstract: In order to carry out their functions of deciding particular cases and developing legal rules and principles, courts need information: not just information about the law, but also factual information about the particular matter in controversy and about the world in general. The way in which courts are structured, however, makes it more difficult for them to obtain the information they need than it is for most other public decision-making institutions. As the world becomes more complex, and as sophisticated scientific, technical, and financial information becomes more central to litigation and to the judicial function, the systemic disabilities of the courts in obtaining the information they need become more apparent and increasingly more problematic.

FREDERICK SCHAUER, a Fellow of the American Academy since 1993, is the David and Mary Harrison Distinguished Professor of Law at the University of Virginia. Previously, he was for eighteen years the Frank Stanton Professor of the First Amendment at the Harvard Kennedy School. His publications include *Free Speech: A Philosophical Enquiry* (1982), *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991), *Profiles, Probabilities, and Stereotypes* (2003), *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (2009), and *The Force of Law* (forthcoming 2014).

What makes a court a court? The question is important, but it lacks an obvious answer. We might distinguish courts from other decision-making institutions in terms of being staffed principally by those with legal training. And thus insofar as lawyers and judges occupy a sociologically discrete segment of professional culture,¹ courts can be distinguished by virtue of their sociological differentiation. Or we might begin with the fact that courts make decisions with procedures unlike those of other decision-making environments. The modal number of parties in a court case is two; the modal outcome has a winner and loser; and decisions are typically made by judges or other arbiters with no interest in the outcome. In these and various other ways, courts' procedures differ from those of legislatures, administrative agencies, executive officials, the military, and private corporations. Additionally, or perhaps alternatively, law schools purport to train their students in the arcane art of thinking like a lawyer,² and so what differentiates courts may be the fact that they reach their decisions via methods of thinking and reasoning that differ from those we see in other environments.

Each of these ways of differentiating courts – sociological, procedural, and methodological – constitutes

part of a complete account of how we should characterize and understand them, but my focus here will be on still another criterion, one we can call informational differentiation: the array of information courts use in making decisions. This essay will concern a particular dimension of informational differentiation – the methods by which courts obtain factual, scientific, and technical information, and the potential flaws inherent in those methods.

It is common to think of courts in terms of their outputs: the decisions they make and the opinions they write. But these decisions are based on inputs, which fall into two broad categories. The first of these is the law. For some lawyers, judges, and scholars, the category of law is (and should be) narrow, encompassing little more than statutes, constitutional provisions, reported court cases, and the conventional methods of legal reasoning and interpretation of standard legal materials.³ Others understand the law as including not only the foregoing, but also a broad range of moral, political, and pragmatic factors.⁴ And although the divisions between those holding broad and narrow conceptions of law are profoundly important, this should not obscure the equal or greater importance of the other broad category of court inputs: the world of fact.

The factual inputs to judicial decisions fall into two broad types. The one most familiar to the public – largely from television and other media, but sometimes from personal experience – is the simple question of what happened. Who was it that approached the bank teller with a gun and demanded money? Who started the fight? Did the Ford enter the intersection first, or was it the Toyota? And how fast was the Ford going at the time? If we spend too much of our time focusing only on Supreme Court cases, or even on appellate litigation more broadly, we may ignore factual issues of this variety, for often they

have been stipulated or decided long before a case gets to the highest courts. But we ought not to forget, for reasons we will explore, that basic controversies of raw fact must be resolved before appellate decision-making can take place. Long before *Miranda v. Arizona* reached the Supreme Court and provided the platform for the Court's holding that suspects must be informed of certain constitutional rights prior to questioning, someone had to decide that it was Ernesto Miranda who had been arrested, that Mr. Miranda had made statements that were used against him to his disadvantage, and that he had not in fact been given the warnings that the Supreme Court held were constitutionally mandated.⁵ Beneath virtually all appellate decisions, therefore, are seemingly mundane factual questions that comprise most of what the courts do: determining just who did what; and how, why, and when they did it.

Often the factual inputs to judicial decisions also include those matters of scientific and technical knowledge that enable judges and jurors to draw inferences from the more basic who-did-what kind of fact. Does exposure to certain substances cause cancer, and if so, in whom and under what circumstances? If a fingerprint resembling that of the defendant is found at the scene of a crime, how likely is it that the defendant was there when the crime was committed? Do certain external features of an automobile tire indicate defective manufacture and an increased likelihood of tire failure under normal driving conditions?⁶

It is profoundly important to ask whether courts as presently constituted – especially courts in common-law systems such as the United States – are the institutions best suited to make factual determinations of the two types just sketched, especially the determination of general scientific, technical, financial, and related fact.⁷ This ques-

tion is crucial in part because it raises issues of how to allocate social and public decision-making among institutions of various types; for example, is regulatory policy best made administratively or through litigation?⁸ However, we cannot even begin to address such questions unless we can evaluate the respective competences of the various candidate institutions in making the factual, technical, and scientific determinations on which sound policy-making must rest.

The question of fact-finding competence among institutions is also relevant to concerns about the shrinking number of trials in the United States and about the decreasing access to courts as venues for dispute resolution (concerns at the center of several other contributions to this volume). Trials serve many purposes,⁹ most of which are predicated on the view that litigation in general, and trials in particular, have largely positive epistemic foundations: they get the facts right. But if the epistemic advantages of courts are smaller than is often supposed, the concerns about fewer trials and limited access need to be seen in a different light. And even though trials (especially civil trials¹⁰) are becoming fewer in number, they are increasingly used as the venue for making broad determinations of social policy,¹¹ especially regulatory policy. Thus, the quality of the informational base on which these determinations are made is a question that cannot be avoided. Moreover, the fact-finding function of the trial is to some extent being shifted to other venues and contexts, and the question whether this is a cause for concern is dependent on an assessment of just how good courts and trials are at serving this function. Insofar as other institutions are being created to meet the outsized demand for courts and trials, therefore, it is vital to know whether these alternative institutions should be designed to mimic courts or instead to compensate for what courts may do poorly.

For all of these reasons, therefore, it is essential to examine whether courts are well equipped to make the factual determinations that have important consequences for individual litigants and, increasingly, for social policy as well. There are several reasons to believe that courts may not be suited to the task of adequate factual determination; I will discuss five of them here.

First, courts – especially common-law courts operating with rules developed in the context of a system in which juries were prevalent¹² – make their factual determinations in accordance with rules of evidence that frequently make inadmissible that which in other contexts would be relevant information.¹³ For example, while the exclusion of hearsay evidence ensures the opportunity to confront and cross-examine opposing witnesses and guards against the risk of overvaluation of potentially unreliable evidence, it nevertheless excludes a considerable amount of evidence that investigators in other contexts would find to be of at least some use. Similarly, the rules of evidence typically preclude evidence of character and evidence of past practices from being used to establish what someone may have done on a particular occasion. This exclusion protects against the risk of judges and juries being too heavily swayed by a defendant's incriminating past, but it also frequently results in the exclusion of evidence that most people would find at least somewhat helpful in determining the matter at hand. Indeed, Jeremy Bentham, one of history's great haters, had a particular hatred of the English law of evidence of his time and argued with considerable vitriol that the "artificial" exclusion of relevant evidence produced a far inferior method of factual inquiry than one that would admit almost all evidence, which the trier of fact would then assign the weight it deserved, no more and no less.¹⁴

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Such a system – now far more common in the civil-law world (which traditionally has made no use of juries) and often referred to these days as a system of “free proof” – more closely resembles the methods that ordinary people and many nonlegal professionals use in their factual inquiries. Indeed, Bentham referred to it as the “natural” method. But although the law of evidence in most common-law countries is moving toward fewer rules of exclusion, and although judges will often ignore or treat casually many of the rules of evidence when they are sitting without a jury, these movements have been slow and far from complete. As a result, the typical trial in the common-law world generally and the United States in particular (because of its continued greater reliance on juries than elsewhere) continues to exclude a large amount of information that historians, journalists, detectives, and anyone else trying to make a factual determination would likely consider relevant to their inquiries.

Second, we can ask whether the typical judicial adversary proceeding is actually the best way of evaluating contested factual questions. Consider, for example, the question whether the regular consumption of alcohol is a risk factor for heart disease. One way of determining this would be by conducting a trial-type adversary hearing, in which the opposing positions were advanced by the parties most interested and invested in the outcome – the Temperance League arguing for alcohol’s danger and the wine and spirits trade association taking the opposite position, for example – after which one or more people with no prior exposure to the issue and with no scientific or medical background would decide who had made the stronger case. This scenario may be hypothetical and simplified, but it is hardly an inaccurate portrayal of the way in which courts resolve contested scientific or technical issues dramatically differently from the way in which

scientific researchers attempt to answer them (in a laboratory, for example, or with a controlled clinical trial). Moreover, the concern about the possible defects of an adversary trial as a way of establishing fact is not solely about scientific and technical knowledge. When journalists, detectives, or historians set out to discern just what happened at some time in the past, they do so by attempting to investigate all angles, but not by conducting or presiding over anything even remotely resembling an adversary proceeding. Even more importantly, such non-judicial researchers engage in a continuous process that is vastly different from what typically takes place in a court. A journalist, detective, or historian has the ability to conduct what the great scholar of administrative law James Landis described as “persistent investigation”: the ability to reexamine previously neglected matters as the investigation opens up emerging possibilities and new avenues of inquiry.¹⁵ By contrast, courts tend to hear all the evidence available at one time and then make a decision. Only under exceptional circumstances – as when a court retains jurisdiction to monitor compliance with an environmental or (far less commonly these days) desegregation order – can a court do what most other institutions of factual inquiry do as a matter of course.¹⁶

Third, and closely related to the foregoing, is the fact that courts routinely trade in secondhand knowledge. At some level of philosophical sophistication, we might say that most of our knowledge is secondhand, since what we think of as direct observation involves possibly unreliable inferences from what philosophers call “sense data.” Realistically speaking, however, we can consider much that we perceive with our vision, our hearing, our smell, and our touch to be, in some important sense, direct. And thus, by contrast, it is valuable to note that courts in their nor-

mal operation do not investigate, observe, or experiment. Instead they listen to the accounts of others who have actually done the investigating, the observing, and the experimenting. And by relying so heavily – in fact, virtually exclusively – on second-hand knowledge, courts are routinely vulnerable to the misperception, misrecollection, misdescription, and downright lying of those conveying that knowledge.

Traditionally, secondhand knowledge was not treated as especially problematic. The perceptions and recollections of so-called eyewitnesses – those who had actually observed or perceived the matters about which they were testifying – were presumed to be accurate, and cross-examination was thought to be a reliable way of identifying dissemblance and deception. But now that science has exposed the persistent weaknesses of observation, memory, and description,¹⁷ we have realized that cross-examination is a far less effective method of exposing error in real life than it is on television. We can thus recognize that a court proceeding in which the finders of fact are systematically prohibited from using their own (admittedly imperfect) investigative faculties to corroborate or controvert witnesses' testimonies may bring with it countless additional opportunities for factual error (even while it may also bring the potentially distortion-reducing advantages of disinterest on the part of the decision-maker).

Closely related to the problem of second-hand knowledge is the fourth defect in the way courts engage in fact-determination: the limited and at times artificially constrained domain of inquiry. With respect to matters of law, the issue is relatively familiar. Courts are expected to draw from a limited domain of legal materials (most obviously statutes, constitutions, and reported cases)¹⁸ and are commonly understood to have behaved inappropriately if they draw from other sources not iden-

tified by what legal philosopher H. L. A. Hart labeled the "rule of recognition."¹⁹ Frederick Schauer

Less obviously, much the same applies to the sources of fact in any given case. At a trial, the fact-finder, whether jury or judge, cannot go out and look for what may appear to be relevant information, but must instead rely on the evidence put forth by the parties. In theory, each party would have the incentive to provide information omitted by its adversary, but in practice, various other factors are likely to intrude. Issues of time and expense (to say nothing of attorney competence) may keep one side or the other from offering what seems to be important information; in addition, the parties may have various and conflicting goals that will cause them to withhold information that is in fact relevant to the matter at hand. Other factors come into play as well, but the basic problem is clear: the fact-finder is at the mercy of the parties in ways that less constrained fact-finders in science, journalism, police investigation, and history are not. Furthermore, legal fact-finders are expected to avoid relying on information that is not presented in open court and to avoid using any particular personal expertise they may happen to possess, however genuine or reliable it may be. At the dawning of the English jury system in the Middle Ages, the jury was drawn from the community precisely so that it would base its decision on what the jurors knew about the parties to a controversy and about the matter at hand. Now, however, we select juries substantially for the *absence* of the familiarity that was, centuries ago, considered one of the main reasons for having juries in the first place. The change has not necessarily been for the worse, as matters of fairness provide strong arguments for the disinterested and fact-ignorant jury, but one price of this change has been the unavailability to the decision-maker of information that might otherwise be helpful.

This problem exists at all trials, but it is exacerbated at the appellate level; for not only are appellate judges precluded from relying on most sources of information they may possess in their personal capacity, but they are expected, at least traditionally, to limit their consideration to information contained in the record they receive from the court below. Bringing up facts about the case at hand that are not part of the given record, however true and relevant those facts may be, is considered one of the cardinal errors of appellate advocacy. Although judges are permitted to depart from the record in their search for what are called legislative (as opposed to adjudicative) facts – facts about the world rather than about the particular case at hand – even these inquiries are suspect when they range too far beyond the uncontroverted facts that can be the subject of judicial notice. So although Judge Richard Posner proudly acknowledges that he uses Internet resources to inform him about issues of scientific and technical fact that he believes will help him understand the matter at hand, he admits that this practice has subjected him to criticism.²⁰ And when Justice Stephen Breyer, who does much the same thing with considerable frequency,²¹ cited in a dissenting opinion a large number of social science studies on the question whether using violent video games affected minors' proclivities toward actual and not simulated violence, Justice Scalia in his majority opinion chastised Justice Breyer for relying on sources that were nowhere to be found in the record of the case.²²

Justice Breyer's frequent willingness to engage in his own independent factual research stands in contrast to the traditional view that judges should rely only on those facts – whether adjudicative or legislative – that all parties have had the opportunity to address. Indeed, although the Supreme Court's use of psychological studies in

Brown v. Board of Education to establish the detrimental educational effects of segregated schools is commonly taken as an example of extrajudicial research on appeal, the studies on which the Court relied had in fact been introduced as evidence at the trial stage of the litigation, and thus had been accompanied by safeguards of notice and the opportunity for cross-examination.²³ And, ironically, it was Thurgood Marshall, acting as lead counsel for the NAACP on behalf of the various parties challenging the segregation of schools, who had objected to the introduction of new facts on appeal. When John W. Davis, representing the various segregation-defending states and their boards of education, made reference in his briefs and in oral argument before the Supreme Court to various prominent individuals who had warned against the dangers of too-rapid school desegregation, it was Marshall who objected. In an especially memorable colloquy with Justice Frankfurter, Marshall insisted that factual information should be presented only at trial, where it could be subject to cross-examination.²⁴

Although Justice Breyer has been at the forefront of the practice of going beyond the record, briefs, and oral argument to engage in what he sees as relevant and necessary factual research, his concerns about the limited fact-finding abilities of courts in general (and appellate courts in particular) are actually broader.²⁵ Worried that courts are increasingly being forced to confront issues of scientific and technical knowledge about which the typical judge is somewhere between ill-informed and simply ignorant, Justice Breyer has offered a number of suggestions for ways in which judicial procedures might be modified to ameliorate this informational deficit. He has, for example, encouraged a more extensive use of court-appointed expert witnesses than is now the rarely employed (but officially authorized) prac-

tice, and he has suggested that it should be easier than it now is for appellate proceedings to be suspended in order to allow for additional development of scientific, technical, and factual matters whose importance has been revealed only in the course of the proceedings.

Fifth and finally, consider the factual and informational dimensions of courts and litigation when they serve as institutions of policy-making. Of course, courts do make law and policy. Although we expect our judicial nominees to deny this in their confirmation hearings, they and most of the rest of us know that in a common-law system judicial law-making and policy-making are inevitable, although plainly there are debates about their desirability and the degree of their proliferation. Still, insofar as courts do make policy about such salient issues as products liability, affirmative action, environmental harm, and insider trading, among many others, it is appropriate to ask about the processes that courts use to obtain the information they employ in making these decisions. More particularly, policies are by definition applicable to a wide range of activities engaged in by an even wider range of actors. Courts, however, establish these policies in the context of particular cases with particular facts. Yet it is far from clear that the cases that provide the platform for more general policy-making are representative of the range of events that the policies will cover. We know that the psychological phenomenon called the “availability heuristic” will lead people, including judges, to assume that the events immediately in front of them are more representative of a larger category than they in fact are.²⁶ Just as people will assess the likelihood of airplane crashes as greater than it actually is just after hearing about a plane crash, so too will judges, for example, imagine that the complete array of lawnmower accidents to which some policy will apply will be si-

milar to the particular lawnmower accident involved in the case before them. Yet because of the various incentives that lead some cases to be brought and others not, and that lead some decisions to be appealed and others not,²⁷ there is much reason to believe that a particular case coming before a law-making appellate court will not be representative of the larger field to which the court’s judgment will apply in the future.²⁸ Just as one could not accurately assess human health by talking only to forensic pathologists, courts cannot obtain an accurate image of the events to which their policies will apply if they focus too much on the potentially pathological case before them – a focus that it may be hard for even self-aware judges to avoid.²⁹

Courts thus appear to be informationally disabled in at least these five different ways. The law of evidence excludes not only irrelevant facts, but many relevant ones that would otherwise be important; the adversary system bars the fact-finder from engaging in “persistent investigation” or initiating inquiries, leaving fact-finding at the mercy of the variable talents and incentives of the competing parties; the reliance on witnesses produces a system in which actual firsthand knowledge on the part of the fact-finder is rare; the rules and traditions of the closed record make inquiry into matters outside the limited domain of accepted materials difficult; and the vagaries of case selection may encourage judicial policy-making to take place in the context of highly unrepresentative facts and events. Alleviating some of these disabilities, to the extent that it is possible, is of course no panacea for the kinds of epistemic and cognitive failings that plague all decision-making, whether judicial or otherwise. For example, as the literature on motivated cognition and motivated reasoning has long demonstrated, decision-makers with outcome preferences

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will often distort their factual understandings and reasoning processes to justify their preferred outcomes.³⁰ Additionally, psychologists have for many years been exploring the ways in which human perception may be less reliable than conventional wisdom assumes. But these are problems with *all* decision-making, whether public or private, judicial or otherwise. The central issue here, however, is whether certain epistemic flaws inhere in the particular design of courts and their procedures, or of court-like decision-making institutions and *their* procedures. The methodological issues I discuss here, therefore, are not to be understood as the sole impediments to accuracy in judicial factual determination. Rather, they provide reason to think that courts may be plagued with special informational disabilities beyond those they share with other decision-making institutions and processes.

Each of the restrictions on the access to and evaluation of information that I have discussed here has its justifications, some better than others. And thus because these informational disabilities often bring advantages in terms of fairness, transparency,

and legitimacy, the fact that the courts are systemically informationally disabled is thus not necessarily or always to be lamented. But often the informational disabilities of the courts, and the informational deficits those disabilities produce, are not outweighed by the procedural benefits that a largely closed and highly structured approach to factual inquiry has traditionally been thought to bring. Thus, Judge Posner, Justice Breyer, and many others can be seen as standing at the forefront of a movement that is attempting to remedy at least some of the traditional informational disabilities of the judicial system.³¹ It is much too soon to predict how far this movement will go, and space does not permit considering the full range of its costs and benefits. But if we are to consider the role of courts in decision-making and policy-making, we must take into account the way in which courts (when compared to individuals, institutions, and other decision-making bodies) operate under procedures and traditions that produce a systematically and predictably information-poor decision-making environment.

ENDNOTES

¹ See Niklas Luhmann, *Law as a Social System*, ed. Fatima Kastner and Richard Nobles, trans. Klaus Ziegert (New York: Oxford University Press, 2008); and Niklas Luhmann, *A Sociological Theory of Law*, trans. Martin Albrow and Elizabeth King-Utz (London: Routledge & Kegan Paul, 1985).

² As far back as 1607, Lord Chief Justice Sir Edward Coke celebrated the “artificial reason and judgment” of the law (*Prohibitions del Roy*, 12 Co. Rep. 64 [1607], EWHC KB J23, 77 ER 1342). See also Edward Coke, *The First Part of the Institutes of the Laws of England; or, A Commentary Upon Littleton*, ed. Charles Butler (1628; London: E. Brooke, 1809). For sympathetic commentary, see Charles Fried, “The Artificial Reason of the Law or: What Lawyers Know,” *Texas Law Review* 60 (1981): 35–58. And more generally, see Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, Mass.: Harvard University Press, 2009).

³ See Antonin Scalia, “The Rule of Law as the Law of Rules,” *University of Chicago Law Review* 56 (1989): 1175–1188.

⁴ Two very different but equally broad conceptions of the range of permissible judicial inputs are Ronald Dworkin, *Law’s Empire* (Cambridge, Mass.: Harvard University Press, 1986); and Richard Posner, *How Judges Think* (Cambridge, Mass.: Harvard University Press, 2008).

⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

- ⁶ On the automobile question, see *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).
- ⁷ See Linda Greenhouse, “How Do Judges Know What They Know?” *Proceedings of the American Philosophical Society* 154 (2010): 287.
- ⁸ See the various contributions in *Litigation versus Regulation*, ed. Daniel Kessler (Chicago: University of Chicago Press for the National Bureau of Economic Research, 2011).
- ⁹ See Judith Resnik, “Bring Back Bentham: ‘Open Courts,’ ‘Terror Trials,’ and Public Sphere(s),” *Law & Ethics of Human Rights* 5 (2011): 2, which explores the role of courts as forums for public democratic deliberation and contestation (a role that may be less epistemically dependent than the role of courts as resolvers of disputes and makers of public policy).
- ¹⁰ See John H. Langbein, “The Disappearance of Civil Trial in the United States,” *Yale Law Journal* 122 (2012): 522.
- ¹¹ The importance of trials is not solely a function of how many of them there are; this is especially apparent once we comprehend the extent to which pervasive policy decisions are in effect made in the context of trials, especially civil trials involving the environment, products liability, and financial regulation. For example, there may have been only a small number of trials dealing with the liability of tobacco companies for tobacco-related health consequences, but those trials and the size of the verdicts they produced profoundly and permanently changed the face of tobacco policy in the United States.
- ¹² Juries are largely a creature of the common law, and thus of the legal systems of Great Britain and its former colonies, including the United States, Australia, New Zealand, India, Canada (with the exception of Quebec), and significant parts of Africa and the Caribbean. The civil-law world, which includes much of Asia and the Middle East and most countries whose legal systems are derived from those of France, Germany, Spain, Portugal, and the Netherlands, has traditionally not employed the jury, although in some civil-law countries the judges sit with lay assessors when making decisions. It is worth noting that most common-law countries (with the exception of the United States) have eliminated the jury in all but criminal cases, and that some countries with civil-law traditions, including Japan and South Korea, have begun experimenting with a jury system in a limited number of criminal cases.
- ¹³ See Frederick Schauer, “On the Supposed Jury-Dependence of Evidence Law,” *University of Pennsylvania Law Review* 155 (2006): 165–202.
- ¹⁴ Jeremy Bentham, *Rationale of Judicial Evidence*, ed. John Stuart Mill (London: Hunt & Clarke, 1827).
- ¹⁵ James M. Landis, *The Administrative Process* (New Haven, Conn.: Yale University Press, 1938), 37–38.
- ¹⁶ See Abram Chayes, “The Role of the Judge in Public Law Litigation,” *Harvard Law Review* 89 (1976): 1281–1316.
- ¹⁷ Much of the research is collected and described in Elizabeth F. Loftus, James M. Doyle, and Jennifer Dysart, *Eyewitness Testimony: Civil and Criminal*, 4th ed. (New York: LexisNexis, 2007).
- ¹⁸ Frederick Schauer, “The Limited Domain of the Law,” *Virginia Law Review* 90 (2004): 1909–1956.
- ¹⁹ H. L. A. Hart, *The Concept of Law*, ed. Penelope A. Bulloch, Joseph Raz, and Leslie Green, 3rd ed. (1961; Oxford: Clarendon Press, 2012).
- ²⁰ Richard A. Posner, “Judicial Opinions and Advocacy in Federal Courts,” *Duquesne Law Review* 51 (2013): 3–39.
- ²¹ See *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729, 2767–2779 (2011) (Breyer, J., dissenting); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 803–819 (2007) (Breyer, J., dissenting); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 142–143 (1999) (Breyer, J., for the Court); and *United States v. Lopez*, 514 U.S. 549, 619–623, 631–644 (1995).

- (Breyer, J., dissenting). On Justice Breyer's commitment to the Enlightenment ideal of using fact, reason, and scientific expertise to make decisions, see Linda Greenhouse, "Supreme Court Preview: The Breyer Project: 'Why Couldn't You Work This Thing Out?'" *Charleston Law Review* 4 (2009): 37.
- ²² *Brown v. Entertainment Merchants Ass'n*, 2729, 2739 n.8 (Scalia, J., for the Court).
- ²³ *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954).
- ²⁴ Leon Friedman, ed., *Argument: The Oral Argument Before the Supreme Court in Brown v. Board of Education of Topeka* (New York: Chelsea House, 1969), 63.
- ²⁵ See *General Electric Co. v. Joiner*, 522 U.S. 136, 147 (1997) (Breyer, J., concurring); Stephen Breyer, "Closing Address," Conference on DNA and the Criminal Justice System, John F. Kennedy School of Government, Harvard University, November 21, 2000; and Stephen Breyer, "The Interdependence of Science and Law," *Judicature* 82 (1998): 24–31.
- ²⁶ Amos Tversky and Daniel Kahneman, "Availability: A Heuristic for Judging Frequency and Probability," *Cognitive Psychology* 5 (1973): 207–232.
- ²⁷ On the selection effect generally, see George Priest and Benjamin Klein, "The Selection of Disputes for Litigation," *Journal of Legal Studies* 13 (1984): 1–56. A good overview of much of the research that the Priest-Klein hypothesis has spawned is Leandra Lederman, "Which Cases Go to Trial: An Empirical Study of Predictors of Failure to Settle," *Case Western Reserve Law Review* 49 (1999): 315–362.
- ²⁸ If we assume that policy-makers and the general public glean some of their understanding of scientific and technical issues from the way in which those issues are treated in litigation, the consequences of the unusual way in which courts make those decisions are even more broad-ranging. See Sheila Jasanoff, *Science at the Bar: Law, Science, and Technology in America* (Cambridge, Mass.: Harvard University Press, 1997).
- ²⁹ See Frederick Schauer, "Do Cases Make Bad Law?" *University of Chicago Law Review* 73 (2006): 883–918; and Frederick Schauer and Richard Zeckhauser, "The Trouble with Cases," in *Litigation versus Regulation*, ed. Daniel Kessler (Chicago: National Bureau of Economic Research/University of Chicago Press, 2011), 45–70.
- ³⁰ See Ziva Kunda, "The Case for Motivated Reasoning," *Psychological Bulletin* 108 (1990): 480; and Shelley E. Taylor and Curtis Hardin, "Motivated Cognition: Phenomena in Search of Theory," *Psychological Inquiry* 10 (1999): 75.
- ³¹ This movement might be understood to challenge much of the traditional understanding of the nature of law itself, and of the processes it has so traditionally and centrally employed. See Frederick Schauer, "The Decline of 'The Record': A Comment on Posner," *Duquesne Law Review* 51 (2013): 51–66; and Frederick Schauer and Virginia J. Wise, "Nonlegal Information and the Delegalization of Law," *Journal of Legal Studies* 29 (2000): 495–515.

A Grin without a Cat: The Continuing Decline & Displacement of Trials in American Courts

Marc Galanter & Angela M. Frozena

Abstract: Over the past half-century, the number of cases entering American federal and state courts has multiplied. But, largely unobserved by the public, the percentage of those cases that are disposed of by trial has steadily decreased. In recent decades, as the increase in filings has leveled off but the percentage of cases reaching trial has continued to fall, the absolute number of trials has decreased as well. Conducting trials is a shrinking portion of what judges do. The effects of this turn away from trials on judges, on litigants, and on public perceptions of the legal system remain to be explored.

Courts occupy a prominent place in American life. Common expressions such as having one's "day in court," "the truth, the whole truth, and nothing but the truth," and "the jury's still out on that" reflect this cultural presence. Americans typically link courts and trials: trials are what happen in courts; courts are the places where trials happen. Television news, the ubiquitous *Law and Order*, and *Judge Judy* present an unending stream of images of trials.

Together, the federal and state courts take up tens of millions of civil and criminal matters each year. Trials have always made up only a fraction of court proceedings. In the course of the last half-century, however, trials have become a much-reduced fraction of these proceedings; and, in turn, the courts themselves are the site of a shrinking portion of all trial-like events. During that period, the number of cases brought to the courts by a growing population increased. But in the last decades of the twentieth century, even as court caseloads continued to increase, a smaller and smaller portion of those cases led to trials, so that the absolute number of trials began to decline. These trends are found in federal courts and state courts, in criminal cases and civil cases, and they continue to this day.

MARC GALANTER, a Fellow of the American Academy since 1993, is the John and Rylla Bosshard Professor Emeritus of Law and South Asian Studies at the University of Wisconsin, Madison.

ANGELA M. FROZENA is a non-practicing attorney working in the private sector.

(*See endnotes for complete contributor biographies.)

For the federal courts, we have data from 1962 on that show a long, steady decline in the percentage of cases that reach trial. During the past half-century, the number of civil cases in the federal district courts rose by a factor of five and settled in the range of 250,000 a year. The percentage of civil cases reaching the trial stage, however, continued its long descent. The *number* of trials still continued to rise, somewhat more slowly than the caseload, until the mid-1980s, when they began to decline as the caseload leveled off.

The steady decline depicted in Figure 1 is a continuation of a much longer decline of trials as a portion of terminations in the federal courts.¹ Both jury trials and bench trials (that is, those conducted by the judge without a jury) have declined, but the decline of bench trials has been steeper. In 2012, the number of bench trials was 0.3 percent of total caseload, which is about one-twentieth of the 6.04 percent of dispositions by bench trials in 1962. In 2012, jury trials also reached a new low of 0.73 percent of total dispositions, marking a steady decline from 5.49 percent in 1962 and 2.33 percent in 1985.

Data from the state courts are less abundant and less readily comparable. The National Center for State Courts assembled data on civil trials in the general jurisdiction courts of twenty-two states from 1976–2002.² During that period of rising case-loads, the number of jury trials decreased by 32 percent, and bench trials (which were far more numerous) decreased by 7 percent. Subsequently, the Center assembled data for fifteen states for the period 1976–2009. These figures also show a declining portion of trials, both jury and bench, of comparable magnitude to that in the federal courts (see Figure 2).

This general trend is confirmed and elaborated on by state court data collected by the Bureau of Justice Statistics (BJS) of the U.S. Department of Justice. In a forty-five-

county sample of the seventy-five most populous counties in the United States, the total number of civil trials fell 52 percent – from 22,451 in 1992 to 10,813 in 2005.

This mirrors the decline of the absolute number of civil trials in the federal courts.³ In 2012, across the entire United States, 3,211 civil trials began in the trial level (district) courts. This number is 44 percent less than the 5,802 trials in 1962, when the district courts disposed of about one-fifth as many cases as they have disposed of in recent years. In other words, the ratio of trials to filings in 2012 is only about one-twelfth what it was fifty years earlier.⁴

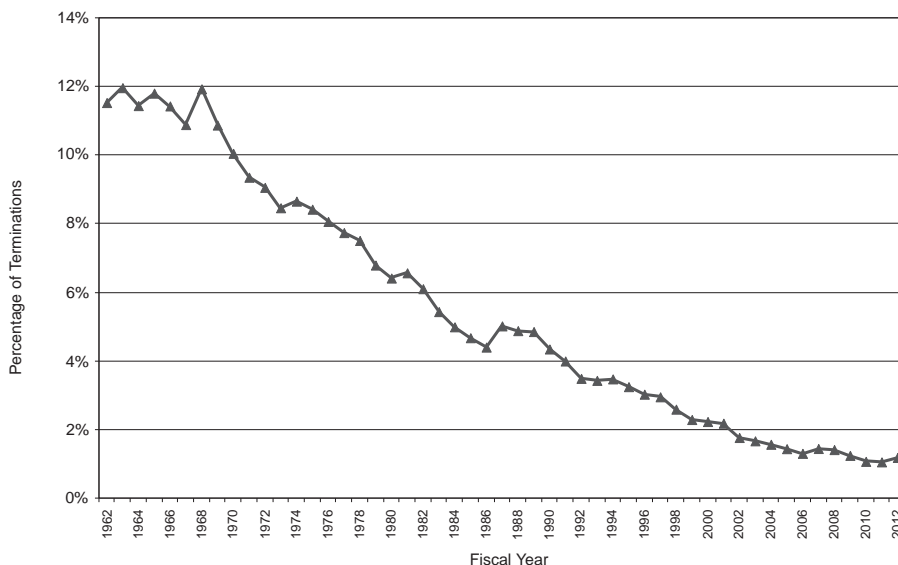
The count of federal trials displayed in Figure 3 (as well as in all other federal data in this essay) is, in two separate ways, a very generous one. First, it is based on the Administrative Office of the U.S. Courts' very broad definition of a trial as "a contested proceeding before a jury or court [that is, a judge sitting without a jury] at which evidence is introduced."⁵ Second, the "during and after" number includes all cases that reach the trial stage, not just those that complete it. Many cases are settled in the course of trial. Figures for the years up to 2002 indicated that nearly one-fifth of cases in which a trial began were resolved during trial.⁶

Only a small fraction of litigation takes place in the federal courts. The state courts, the site of the great bulk of litigation, exhibit a pattern of declining civil trials that resembles that seen in the federal courts, but is somewhat different. For example, the steady fall in the absolute number of trials begins later in the state courts, in the early 1990s rather than the mid-1980s (when the fall in the federal courts began).

A series of studies of the nation's most populous counties conducted by the federal government's Bureau of Justice Statistics illuminates the changing composition

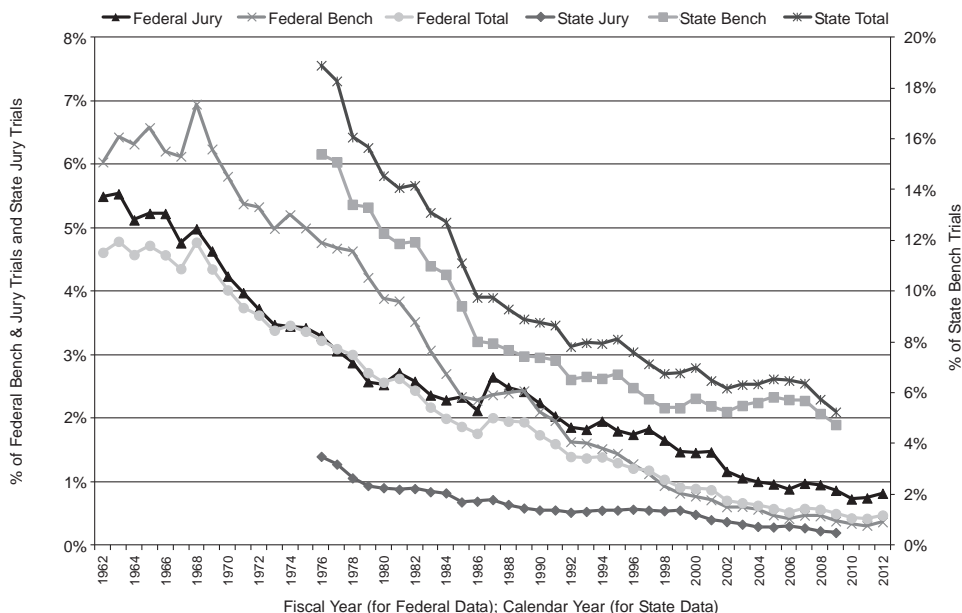
Figure 1
Percentage of Civil Terminations During or After Trial, 1962 – 2012

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Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962 – 2012).

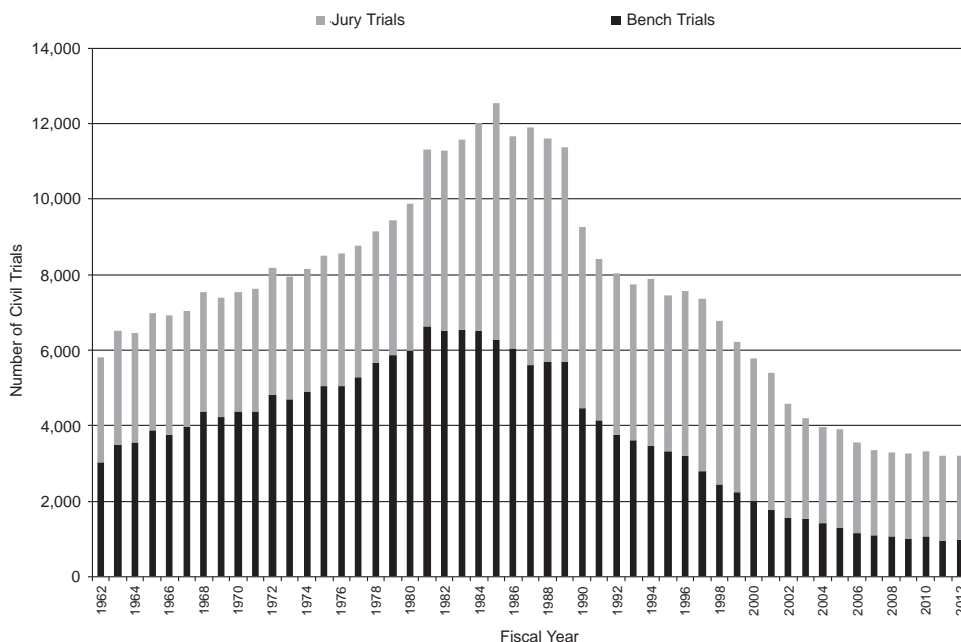
Figure 2
Percentage of Civil Terminations by Trial in U.S. District Courts (1962 – 2012) and
State Trial Courts in 15 States (1976 – 2009)



Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962 – 2012); National Center for State Courts (unpublished data).

The Figure 3
Continuing Decline & Displacement of Trials in American Courts

Number of Civil Trials by Bench and Jury, U.S. District Courts, 1962 – 2012



Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962 – 2012).

of the trial docket.⁷ As shown in Table 1, the absolute number of civil trials in these counties decreased 51.8 percent from 1992 to 2005. Trials on every subject declined over this period, but trials in some kinds of cases fell more dramatically than others. Premises liability and product liability saw declines of 59.7 percent and 65.8 percent respectively, while medical malpractice only declined 9.5 percent. In contracts, employment cases (9.83 percent) saw significantly less decline than fraud cases (47.04 percent), or buyer plaintiff cases (51.19 percent) and seller plaintiff cases (72.90 percent). Real property cases saw the greatest decline, at 77.11 percent.

Over this thirteen-year period, trials declined in every category of case, but at different rates, thus changing the makeup of

the trial docket. The big gainers were automobile torts and medical malpractice, which together made up 44 percent of all civil trials in 2005, up from 28 percent in 1992. But these “gainer” categories were still shrinking in absolute terms. There was not a single category of civil trials that was more frequent in 2005 than in 1992. Both the overall shrinkage and the changing composition of this litigation is displayed in Figure 4.

In the federal courts, the composition of the civil trial docket also underwent substantial changes in the course of the last half-century (see Figure 5). In 1962, nearly 55 percent of all federal civil trials were tort cases; in 2012, that portion fell to just 19 percent of civil trials. Over that same time period, civil rights became a significantly

Table 1

Number of Trials in State Courts of General Jurisdiction in Sample of Seventy-Five Most Populous Counties in Select Years, 1992 – 2005

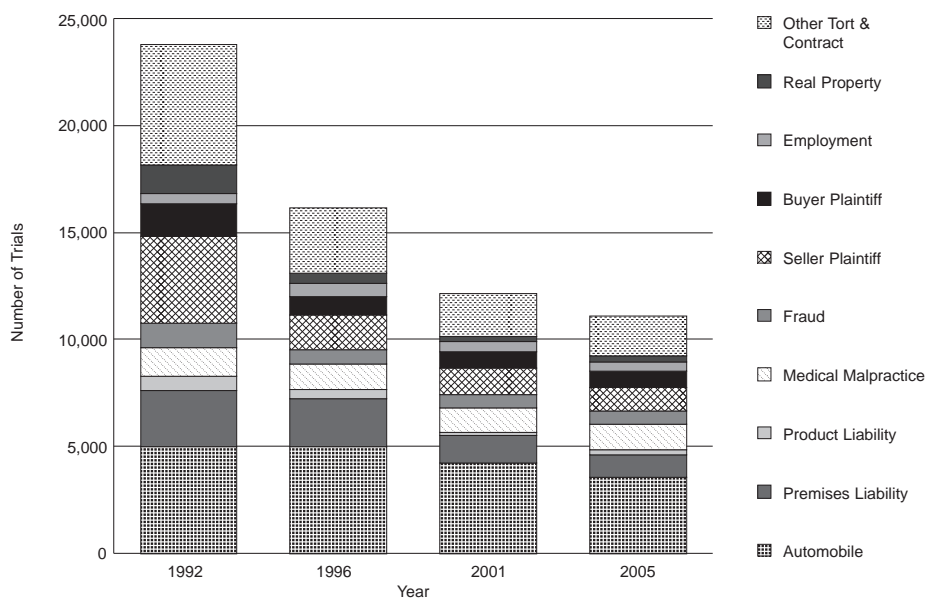
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	1992	1996	2001	2005	Change (1992 – 2005)
All	22,451	15,638	11,908	10,813	-51.84%
Tort	11,660	10,278	7,948	7,038	-39.64%
Automobile	4,980	4,994	4,235	3,545	-28.82%
Premises Liability	2,648	2,232	1,268	1,067	-59.71%
Product Liability	657	421	158	225	-65.75%
Medical Malpractice	1,347	1,201	1,156	1,219	-9.50%
Contract	9,477	4,850	3,698	3,474	-63.34%
Fraud	1,116	668	625	591	-47.04%
Seller Plaintiff	4,063	1,637	1,208	1,101	-72.90%
Buyer Plaintiff	1,557	832	793	760	-51.19%
Employment	468	621	453	422	-9.83%
Real Property	1,315	510	262	301	-77.11%

The counties included in the sample changed slightly over the course of the four BJS studies. Source: Thomas H. Cohen and Lynn Langton, "Civil Bench and Jury Trials in State Courts" (U.S. Department of Justice Bureau of Justice Statistics, 2005).

Figure 4

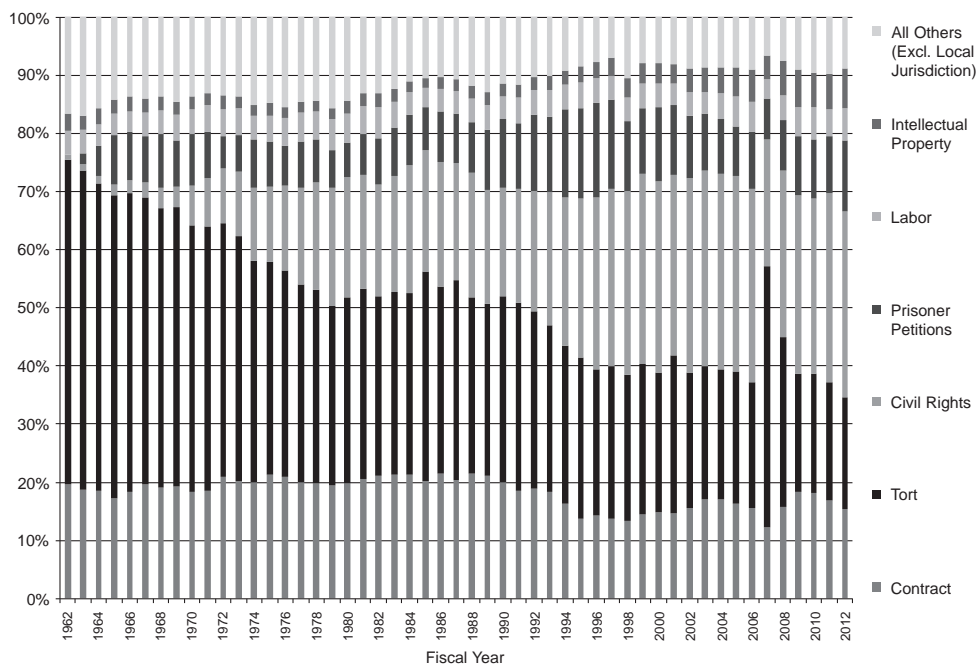
Number of Civil Trials in Courts of General Jurisdiction by Case Type in Sample of Seventy-Five Most Populous Counties in Select Years, 1992 – 2005



The counties included in the sample changed slightly over the course of the four BJS studies. Source: Thomas H. Cohen and Lynn Langton, "Civil Bench and Jury Trials in State Courts" (U.S. Department of Justice Bureau of Justice Statistics, 2005).

The Continuing Decline & Displacement of Trials in American Courts

Figure 5
Makeup of Civil Trials by Major Case Type, U.S. District Courts, 1962 – 2012



Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962 – 2012).

larger share of trials, increasing from a fraction of 1 percent in 1962 to 32 percent in 2010. Given the enactment of landmark civil rights legislation in the 1960s, more litigation in this category in the late 1960s and early 1970s is not unexpected. The growth in the category as a percentage of trials was steep from the late 1960s until the late 1970s when civil rights began to make up 19 – 22 percent of trials. The portion increased notably again in the mid-1990s, within a few years of the passage of the Americans with Disabilities Act (ADA). In 2002 (two years post-ADA), civil rights trials were 20.7 percent of all civil trials; five years later, the portion had increased to 30.5 percent and has not dropped below 30 percent since that time.⁸ Prisoner petitions and intellectual property cases have

also seen increases in their portions since 1962.

The three categories that make up roughly 60 percent of trials in recent years – torts, civil rights, and prisoner petitions – are suits instituted by individuals complaining of injury and seeking recovery from insurers, corporations, or institutions. The other 40 percent is largely composed of claims by these institutions and corporations against individuals or against one another. The composition of the docket means that trials today are very much contests between parties of contrasting experiences and resources.

In the federal courts, we see a dramatic decline in tort trials, both absolutely and as a portion of all trials. In the state courts

(represented by the seventy-five most populous counties), torts decline moderately in absolute terms. But since virtually everything else fell even more, torts actually become a larger portion of trials. Medical malpractice has followed a distinctive path, rising from one of every nine tort trials to more than one out of every six over the course of the four BJS surveys. Since tort cases, although diminished in number, are a growing percentage of all trials, medical malpractice trials now make up almost one of every eight civil trials. Again, these shifts should be read against the overall declines. Malpractice trials have not actually increased; they have decreased slightly (some 9 percent from 1992 to 2005), while other tort categories have undergone massive declines.

The decline is more precipitous in some places than in others. There is no part of the country where the number of trials is increasing or has remained steady over the past quarter century.

It is important to understand that these patterns do not reflect trade-offs between trial time for civil and criminal cases. As Figure 6 shows, the decline in civil trials cannot be accounted for by a corresponding rise in criminal trials, which have also been declining in both state and federal courts.

In the federal courts, the decline in the rate of criminal cases that reach trial begins somewhat later than the decline in the rate of civil trials (see again Figure 1). Jury trials have been predominant and remain so. Figure 7 shows that the trial rate in criminal cases was much higher than the trial rate in civil cases from the late 1960s on, but has fallen more rapidly, such that the two are converging at present.

In federal as in state courts, the decline of civil trials is quite general and not confined to cases of any particular type. Since the mid-1980s, the number of civil trials has fallen in every major category (see Figure 8).

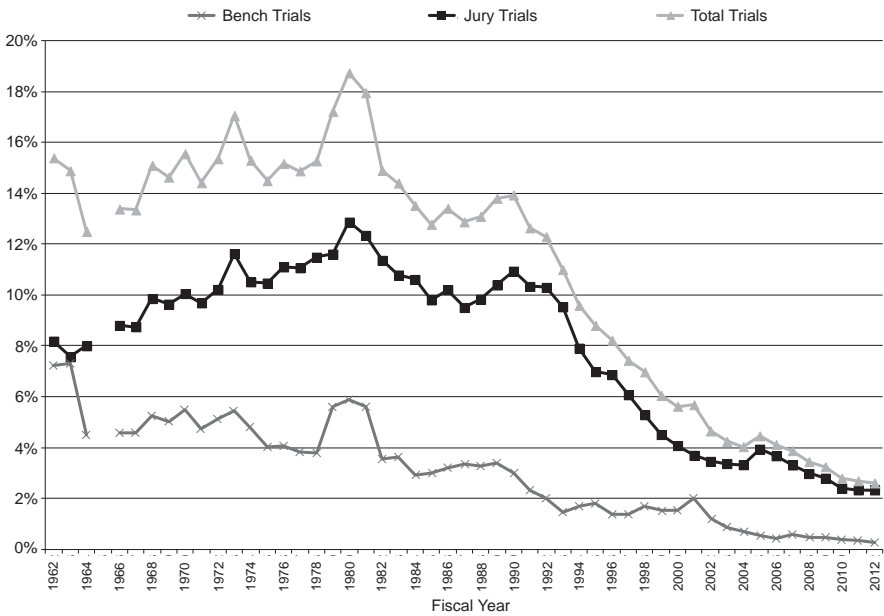
In the federal courts, the decline is steepest in torts and contracts, which have become a smaller portion of all trials. As a result, a growing portion of trials are in civil rights cases and prisoner petitions, even though these categories, too, are declining in absolute numbers.

The more abundant federal data enable us to mark the massive change in the modality of adjudication starting in the mid-1980s. Not only do fewer cases reach the trial stage, but the portion terminating without any court action whatsoever has shrunk dramatically (“no court action” means that cases were filed and then settled or withdrawn without any action or hearing by the court). The onset of judicial proactivity is neatly displayed in Figure 9, as dispositions “before pre-trial” (that is, before the stipulated pre-trial conference) displace dispositions with “no court action.”

In addition to the continuing long-term decline in the *percentage* of cases that reach trial (see Figure 1), we see an *absolute* decline that has been proceeding without interruption for about a quarter-century. Although the rates of decline vary from one case type to another, there is no major category of cases that is exempt. From these data, we conclude that the decline has become institutionalized in the practices and expectations of judges, administrators, lawyers, and parties.

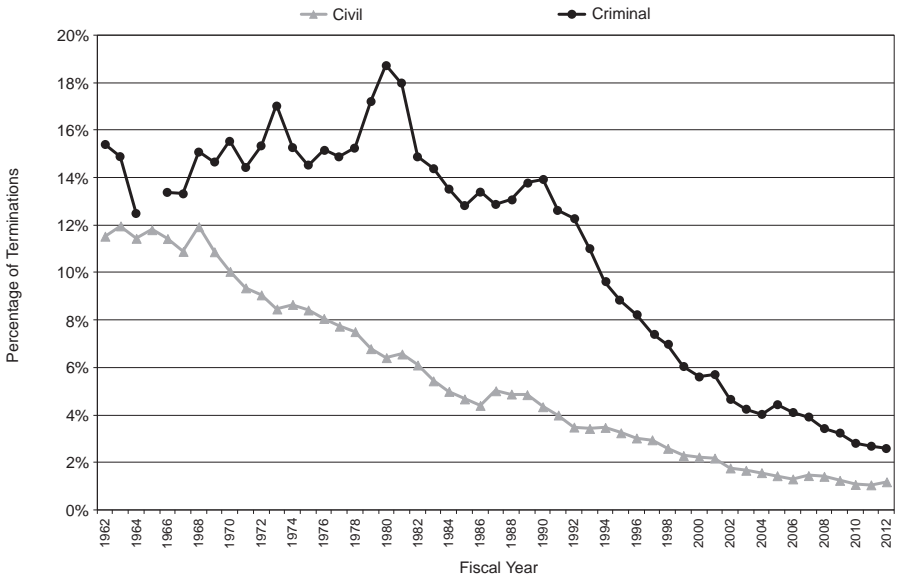
This decline is accompanied by an ideology that explains and promotes the absence of trials to judges, administrators, lawyers, clients, and policy-makers. Some elements of this ideology are that the role of judges is to manage and resolve disputes; that adjudication is only one – and not always the optimal – way to do that; that trials are expensive and wasteful; that ordinarily disputes are preferably resolved by mutual concessions; that settlement benefits parties and the courts themselves; and that outsourcing disputes to alternative dispute resolution (ADR) institutions

The Figure 6
Continuing Decline & Displacement of Trials in American Courts
Percentage of Criminal Defendants Terminated by Trial in U.S. District Courts, 1962 – 2012



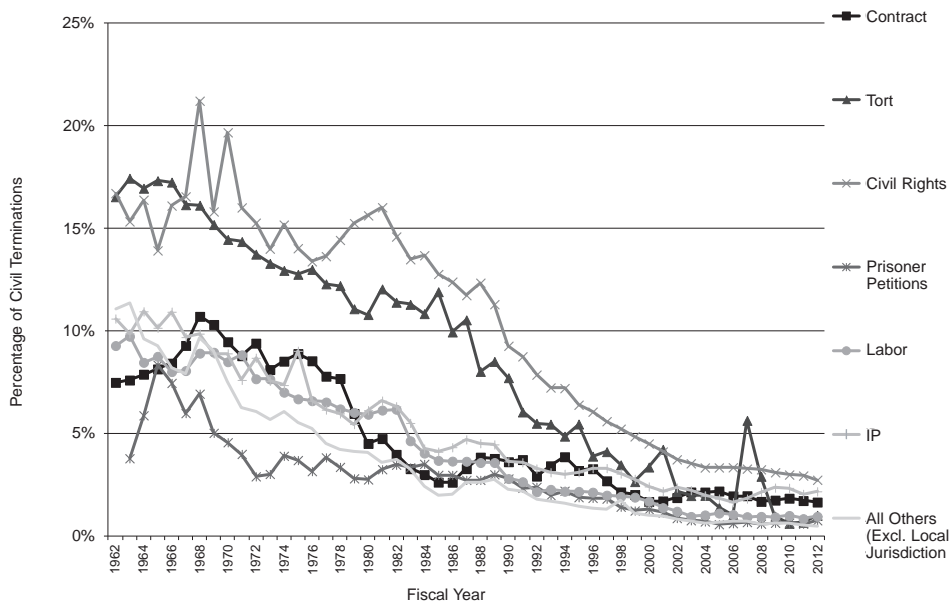
Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table D-4 (1962 – 1964, 1966 – 2012).

Figure 7
Civil and Criminal Trial Rates in U.S. District Courts, 1962 – 2012



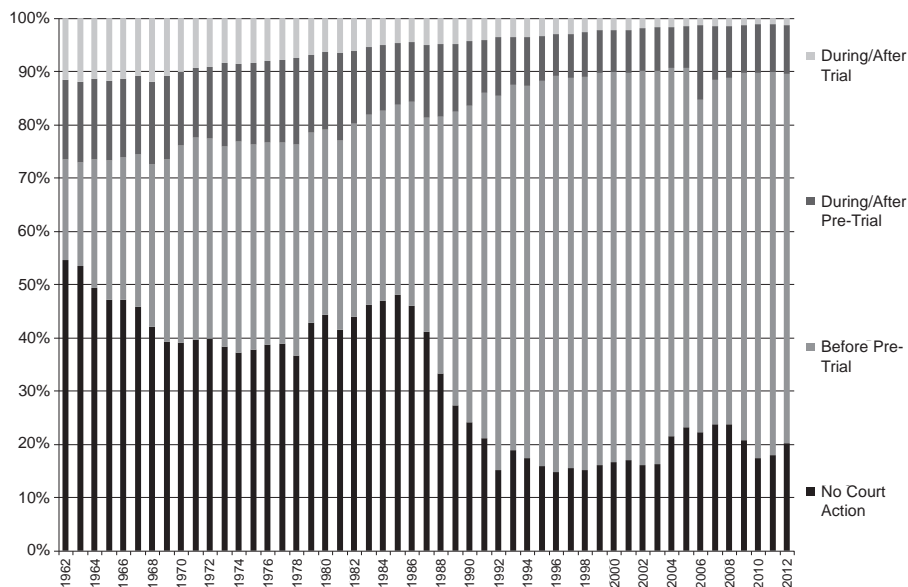
Base civil data are the number of “civil cases terminated,” whereas base criminal data are the number of “criminal defendants disposed of.” Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962 – 2012); and Administrative Office of the U.S. Courts, Annual Report of the Director, Table D-4 (1962 – 1964, 1966 – 2012).

Figure 8
Percentage of Civil Cases that Reach Trial in Each Major Case Category,
U.S. District Courts, 1962 – 2012



Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962 – 2012).

Figure 9
Percentage of Cases Terminated at Each Stage, U.S. District Courts, 1962 – 2012



Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962 – 2012).

benefits courts without detriment to parties. The trial-avoidance justified by this wisdom fits the interests of judges in keeping abreast of dockets and the interests of lawyers – both corporate lawyers who wish to minimize the risk of loss that might discredit them with clients, and plaintiffs’ lawyers who seek to avoid the pro-defendant tilt of the appellate process.⁹

This shift in practice and culture means that the decline becomes self-perpetuating. There are fewer lawyers with extensive trial experience and new lawyers have fewer opportunities to gain such experience. As lawyers ascend into decision-making positions having less trial experience, the discomfort and risk of trials looms larger in their decisions. Judges, too, accumulate less trial experience and, in many cases, have less of an appetite for trials.

Figure 10 depicts the rate of trial activity by federal judges, which fell from about forty trials annually in the era before the arrival of “managerial judging” – with its heavy investment of judicial effort in the early stages of cases¹⁰ – to about ten cases annually for the past decade. Figure 10 overstates the number of cases tried by “active” (non-retired) district court judges, because “retired” senior judges conduct many of the trials in these courts. Indeed, we know that hundreds of senior district judges do a great deal of the work in the federal courts: “senior status” district judges conducted an average of 18.1 percent of all trials during the 1990s. During the 2000s, the average portion rose to 19.9 percent of all trials, with a sharp increase in 2008 and 2009, when they conducted 25.1 percent and 26.0 percent of all trials.¹¹ So in calculating the actual trial activity of sitting federal judges in recent years, we must reduce the number of trials by roughly one-fifth to one-quarter to account for these active “senior status” judges. Thus, the total number of trials, civil and criminal, conducted by the aver-

age district judge in recent years would be approximately eight. A similar reduction of trial participation is occurring with many state judges. A recent study traces the number of civil jury trials per sitting judge in Massachusetts at five-year intervals from 1925 to 2000.¹² That study finds that jury trials were 11.19 percent of civil filings in 1925, but 2.65 percent in 2000. Verdicts per Massachusetts Superior Court justice fell from ninety-four in 1925 to seven in 2000. The number of sitting Massachusetts state court judges rose from thirty-two to eighty-two, while the number of trials fell from 3,022 to 571.

While the number of trials shrinks, the American legal system as a whole continues to grow larger in many dimensions. There are more lawyers, more laws and regulations, more enforcement activity, and more expenditure on law. These dimensions of legality have more than “kept up” with the growth of the U.S. economy and population, but the trial has not: there are fewer trials per capita and per unit of GDP. Each of these measures began to decline in the 1980s, when the absolute number of trials began to fall.

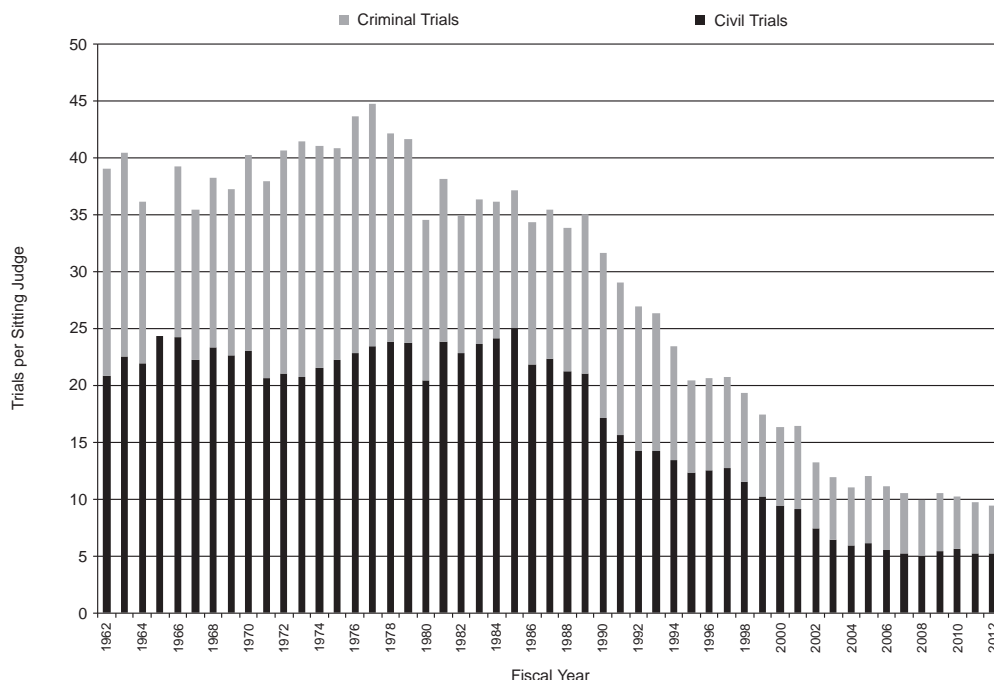
The data present a puzzle. The trial is shrinking institutionally at a time when law and legal institutions play a larger role in public consciousness, not least in the form of news coverage and fictional depictions of trials in television, movies, and books. Legends about increased litigiousness, a “litigation explosion,” irrational juries, and monster awards gained wide currency in the years surrounding the decline in the number of jury trials.¹³

The combination of media attention to trials with folklore about litigation seems to have concealed the shrinking number of trials from the wider public. The public perception of legal institutions is increasingly through the media rather than through personal experience. The popula-

Figure 10

Number of Trials, Civil and Criminal, per Sitting Judge, U.S. District Courts, 1962 – 2012

Marc
Galanter &
Angela M.
Frozena



Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962 – 2012); Administrative Office of the U.S. Courts, Annual Report of the Director, Table D-4 (1962 – 1964, 1966 – 2012); and Administrative Office of the U.S. Courts, Annual Report of the Director, Article III Judgeship Tables (1962 – 2012).

tion of trials in the media, reportorial and fictional, has not tracked the implosion of real-life courtroom trials. Exposure to media trials – overwhelmingly criminal rather than civil – may have actually increased. Thus, cultural expectations of definitive adjudication are reinforced at the same time that its presence in real life shrinks.

With juries present less frequently and with the intensified management of cases, judges' range of decision and discretion has broadened. Their role as gatekeepers is enlarged, especially (in the federal courts, at least) by the elaboration of summary judgment (which now accounts for far

more terminations than trials). This broad discretionary power may be further enlarged by recent Supreme Court decisions, empowering judges to reject cases at an early stage if they determine that the claims pleaded are not "plausible."¹⁴

In a setting in which trust in government is low, courts have managed to deflect most of the anti-government sentiment. As judges' work shifts away from adjudication toward administration and case management, it remains to be seen how this will affect public regard for them. To be perceived as just another part of the government, instrumentally pursuing policies and

dealing in compromise and tradeoffs, may jeopardize the aura that the courts have so far maintained.

We don't know to what extent that aura is generated by the trial as an institution. The trial, unlike dismissals and negotiated settlements, is a site of deep accountability in which the leeways and reciprocities present in most social settings are unavailable. It is an unanswered empirical question how much Americans regard judicial proceedings, especially trials, as fundamentally different from politics and administration. Do they see trials in courts as differing in quality and authoritativeness from proceedings in administrative tribunals or in arbitration?

The occurrence of trials in courts is increasingly rare and exceptional, but many trial-like things happen in forums that resemble courts (but are not quite). Herbert Kritzer documents the widespread occurrence of trial-like events in a variety of governmental settings outside the courts.¹⁵ Lauren Edelman and Mark Suchman describe the rise of trial-like proceedings within organizations.¹⁶ And, with the enthusiastic encouragement of the Supreme Court, there has been an increase in arbitration, especially claims against corporations, channeled by mandatory arbitration clauses in consumer and other boilerplate contracts.¹⁷ These developments invite us to reconceptualize the decline of trials in the courts not as the disappearance of trial-like proceedings, but as their displacement or migration to a variety of other locations. In many of these settings, the proceedings are more perfunctory – with lower investments in evidence-gathering, lawyering, and deliberation. In short, courts and trials are parting ways. Courts are less focused on trials, and trial-like proceedings are far more numerous in settings other than courts, such as administrative agencies, arbitration tribunals, and forums within organizations. The judges in these

trials are for the most part more specialized than the generalist judges in the courts. Public participation – as jurors, spectators, and consumers of media accounts – is eliminated. Many of the cases in these non-court forums involve contests between individuals and corporate or government entities. And in many instances, the forum is explicitly or implicitly sponsored or managed by that entity. The quality of factual presentation and legal argument in these forums remains unstudied and no doubt varies in quality.

Curiously, there are virtually no depictions of these trial-like occasions in settings other than courts (with the singular exception of court martials). All these proceedings before administrators, tribunals, and arbitrators are culturally invisible: they are not the subject of dramas, movies, jokes, stories, or news accounts. They give rise to no shared public knowledge. The media portrayal of courts – mostly but not exclusively criminal courts – reflects or generates expectations of solemnity, thoroughness, impartiality, and fairness. It is unknown whether administrative courts and arbitrators are associated with comparable expectations.

If courts are not conducting trials, what are they doing? With ever more elaborate rules and procedures, they preside over a movement toward trial that provides the frame for bargaining or summary disposition. Even if it doesn't occur frequently, the trial is a ghostly presence. It is present not as the culmination of the proceedings but as a doomsday machine – a demanding and risky thing, unwelcome to all the players (including the judge), that will occur if the matter is not resolved by settlement or dismissal. On the criminal side, the riskiness of trial is amplified by the tendency of many judges to impose heavier penalties on defendants who reject offered plea bargains and insist on trial – the so-called “trial penalty.”¹⁸ Judicial aversion to trial

may be another product of the intensified concern about dockets and judges' quantitative output. It may also be the case that as judges preside over fewer trials, each additional trial seems a weightier addition.

The continuing steady decline of the number of court trials is reminiscent of the famous disappearance of the Cheshire Cat in Alice in Wonderland:

[A]nd this time it vanished quite slowly, beginning with the end of the tail, and ending with the grin, which remained some time after the rest of it had gone.

'Well! I've often seen a cat without a grin,' thought Alice; 'but a grin without a cat! It's the most curious thing I ever saw in all my life!'¹⁹

Perhaps the abundance of trials in the media is the lagging grin of the trial cat. The question is whether trial in court is

inevitably fated to extinction. The challenge is to imagine what might bring about a resurgence of trials. Our guess is that it would take a major impact from outside the system to initiate a turnaround. In the meantime, we may get no better guidance than from a further exchange between Alice and the Cat:

"Would you tell me, please, which way I ought to go from here?"

"That depends a good deal on where you want to get to," said the Cat.

"I don't much care where – " said Alice.

"Then it doesn't matter which way you go," said the Cat.

" – so long as I get somewhere," Alice added as an explanation.

"Oh, you're sure to do that," said the Cat, "if you only walk long enough."

ENDNOTES

- * Contributor Biographies: MARC GALANTER, a Fellow of the American Academy since 2003, is the John and Rylla Bosshard Professor Emeritus of Law and South Asian Studies at the University of Wisconsin, Madison. His many publications include *Competing Equalities: Law and the Backward Classes in India* (1991), *Tournament of Lawyers: The Growth and Transformation of the Big Law Firm* (with Thomas M. Palay, 1994), and *Lowering the Bar: Lawyer Jokes and Legal Culture* (2005).

ANGELA M. FROZENA is a non-practicing attorney working in the private sector. She received her Juris Doctor from the University of Wisconsin Law School, her Master of Business Administration from the University of Wisconsin-Whitewater, and an Honors Bachelor of Science in Applied Mathematical Economics from Marquette University.

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- ² Brian J. Ostrom, Shauna Strickland, and Paula Hannaford, "Examining Trial Trends in State Courts: 1976 – 2002," *Journal of Empirical Legal Studies* 1 (2004): 755.
- ³ Adjustments have been made to the 2007 and 2008 data to account for a large number of mis-reported cases related to oil refinery explosions in the Middle District of Louisiana.
- ⁴ Because it is the year for which we are able to obtain the earliest comparable data, 1962 is the baseline.
- ⁵ Administrative Office of the U.S. Courts, Form JS-10.
- ⁶ Marc Galanter, "The Vanishing Trial," *Journal of Empirical Legal Studies* 1 (2004): 459, 462, figure 3.

- ⁷ Thomas H. Cohen and Lynn Langton, "Civil Bench and Jury Trials in State Courts" (U.S. Department of Justice Bureau of Justice Statistics, 2005), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=554>.
- ⁸ Unfortunately, the C-4 Table does not provide much detail as to the type of civil rights cases terminated. In 1982, the civil rights category was divided into two sub-categories: "Civil Rights, Employment" and "Civil Rights, Other." Additional breakdown was not provided until 2008, when the "ADA, Employment" and "ADA, Other" subcategories were added.
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- ¹⁶ Lauren B. Edelman and Mark C. Suchman, "When the 'Haves' Hold Court: Speculations on the Organizational Internalization of Law," *Law & Society Review* 33 (4) (1999): 941 – 991.
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- ¹⁹ Lewis Carroll, *Alice in Wonderland*, chap. 6.

The Courts in American Public Culture

Susan S. Silbey

Abstract: In American public imagination, courts are powerful but also impotent. They are guardians of citizens' rights but also agents of corporate wealth; simultaneously the least dangerous branch and the ultimate arbiters of fairness and justice. After recounting the social science literature on the mixed reception of courts in American public culture, this essay explains how the contradictory embrace of courts and law by Americans is not a weakness or flaw, nor a mark of confusion or naïveté. Rather, Americans' paradoxical interpretations of courts and judges sustain rather than undermine our legal institutions. These opposing accounts are a source of institutional durability and power because they combine the historical and widespread aspirations for the rule of law with a pragmatic recognition of the limits of institutional practice; these sundry accounts balance an appreciation for the discipline of legal reasoning with desires for responsive, humane judgment.

SUSAN S. SILBEY is the Leon and Anne Goldberg Professor of Humanities, Anthropology, and Sociology and Professor of Behavioral and Policy Sciences at the Sloan School of Management at the Massachusetts Institute of Technology. She is the author of *The Common Place of Law: Stories from Everyday Life* (with Patricia Ewick, 1998). Her recent publications include "J. Locke, op. cit.: Invocations of Law on Snowy Streets," in *Journal of Comparative Law* (2010); "The Sociological Citizen: Pragmatic and Relational Regulation in Law and Organizations," in *Regulation & Governance* (2011); and "Organizational Challenges to Regulatory Enforcement and Compliance," in *Annals of the American Academy of Political and Social Science* (2013).

What is the place of courts in American public culture? History provides us with two dominant – and contradictory – claims. First, we have Alexander Hamilton's famous defense of the Supreme Court's constitutional authority in Federalist No. 78. Because courts had power over neither purse (as does Congress) nor sword (as does the President), he assumed the court would be the weakest of the three branches in the new republic. Possessing "neither force nor will," the judicial branch, according to Hamilton, "will always be the least dangerous to the political rights of the Constitution because it will be least in a capacity to annoy or injure them." On the other hand, forty years later, Alexis de Tocqueville provided us with an opposing, though equally famous claim: that Supreme Court Justices are "all-powerful guardians" whose authority is both "enormous" and essential for holding the union together and maintaining the federal government's supremacy. Rather than possessing the least capacity of the three branches of government to threaten the constitutional balance of power, the Supreme Court is in some ways the most powerful: "the Constitution would be a dead letter ... without the justices' cooperation." The jus-

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tices' power is so great, de Tocqueville argued, that if "the Supreme Court is ever composed of imprudent men or bad citizens, the Union may be plunged into anarchy or Civil War."¹ If Hamilton expected the Court's power to be limited by its minimal resources, de Tocqueville expected a more direct popular check on the Court's power. In the final analysis, he wrote, the Court "is clothed in the authority of public opinion." But what is the public's opinion of the courts and law more generally?

The relationship between the authority and legitimacy of courts in an aspirationally democratic republic has occupied philosophers, legal scholars, and social scientists for a very long while, not only during the founding and early years of the U.S. Constitution. In order to help illuminate this relationship, sociologist Patricia Ewick and I conducted extensive research on the place of law in the everyday life of Americans for nearly a decade during the 1990s. We gathered stories from over four hundred people, and in so doing found a variety of commonly circulating, yet inconsistent conceptions of law and courts.² In the American public imagination, courts are powerful but also impotent. They are guardians of citizens' rights but also agents of corporate wealth; simultaneously the least dangerous branch and the ultimate arbiters of fairness and justice. To Americans, "all judges are political – except when they are not."³ How can this be? And do these contradictory understandings sustain or undermine the legitimacy of law and courts?

Our research provided an answer, showing how aspirational ideals and acceptance of imperfect realities combine to form a resilient public embrace of the rule of law. If courts were understood only in terms of idealized conceptions, and if all judges were expected to be always objective, wise, and fully informed, the legitimacy and authority of law would be all the more frag-

ile. For example, the abundant empirical evidence that courts are not always fair or impartial – that O.J. Simpson can get a better defense than Jane Q. Citizen, or that giant Microsoft can create a more secure market position than upstart Netscape – would only highlight the courts' failure to live up to these idealized aspirations, and support for the courts and law could easily evaporate.

But idealized promises are not the only story of law that circulates in popular culture. Americans recognize and acknowledge the practical exigencies of institutionalized legal processes. They know that some judges do not read all the documents, that some lawyers are not well prepared or fail to show up in court, and that the "haves" often come out ahead.⁴ This cynicism can actually inoculate Americans against disillusionment from encounters with the real world of the law that might otherwise delegitimize it in their minds. The Janus-faced understanding of law in American culture – as both an ideal and an imperfect reality – ensures that delegitimizing and potentially negative encounters with the law do not diminish Americans' belief in courts as guardians of the public good. The articulated cynicism about the justness of judges and the fairness of courts is counterbalanced by a good measure of confidence in the ability of courts and judges to provide principled and responsive decisions in the majority of cases. In short, people in the United States are willing to place their trust in the long-run rule of law.

Notably, most dispute resolution and problem-solving activity are pursued in the shadows of law, outside the purview of official legal agents and often without formal invocation of legal doctrine or recourse to courts. Our research showed that when confronted with a problem – which we defined for respondents in our study as "something that was not as you thought it should be" – most people (31 percent) do

nothing or solve the problem by themselves, an equal number (31 percent) confront the other party, and the remaining 28 percent turn to third parties; only half of those individuals (so 14 percent of all respondents) turn to legal actors or agencies.⁵ Furthermore, even when people hire an attorney and file suit, very few legal matters – less than 3 percent – actually go to trial; of all criminal and civil cases decided, less than 5 percent reach appeal. This is true for criminal law, regulatory administration, and civil litigation. The cases at trial and appeal represent the minuscule top of a giant pyramid of legal engagements.

Nonetheless, the empirical evidence suggests that Americans do turn to law to handle many of the routine as well as extraordinary affairs of their daily lives, and American culture is filled with signs of law. Every package of food, piece of clothing, and electrical appliance contains a label warning us about its dangers, instructing us about its uses, and telling us whether we can complain if something goes wrong. Every time we park a car, dry-clean clothing, or leave an umbrella in a cloakroom, we are informed about limited liabilities for loss. Newspapers, television, novels, plays, magazines, and movies are saturated with legal images, and these very same cultural objects individually display their claims to copyright. This pervasiveness of law – its semiotic profusion in visual and discursive culture – is not a new phenomenon. As de Tocqueville also observed, in America, all issues eventually become legal matters. As Stephen Yeazell writes in his contribution to this volume, Americans have been bringing their problems to court for nearly two hundred years.⁶ Although rates of litigation vary from state to state, and the premises of cases as well as arguments grounding the disputes have changed over time,⁷ court dockets have remained relatively constant, and the public (with its diverse interpretations of legal culture)

continues to rely on courts to manage all sorts of struggles.⁸

The principal burden of this essay, then, is to explain how the contradictory embrace of courts and law by Americans is not a weakness or flaw in the public culture, nor a mark of confusion or naïveté. Rather, the public's contradictory interpretations of courts is the foundation of its allegiance to and confidence in the rule of law. Opposite accounts are a source of institutional durability and power because they combine universal aspirations for the rule of law (so actively voiced in armed struggles around the world today) with pragmatic recognition of the limits of institutional practice; they balance an appreciation for the discipline of legal reasoning with desire for responsive, humane judgment. First, I ask what evidence political scientists and public opinion experts have collected about the public's interpretations of courts. Second, I consider how courts have responded to the jumble of public perceptions with public relations campaigns aimed at "teaching" citizens about how the judiciary "really" functions. I argue that these PR efforts are born from anxiety about the threat posed by conflicting public beliefs. As understandable as this anxiety may be, I conclude this essay by explaining how the public's paradoxical image of the law actually works to sustain, rather than undermine, the authority of our courts. Although the courts' muscular efforts at public outreach are laudable in many ways, these efforts are rooted in a misunderstanding of how judicial legitimacy is developed and maintained.

Public opinion polls on the judiciary regularly report strong confidence in the courts, alongside slightly weaker expressions of direct approval. The judiciary is viewed more positively and accorded greater respect than other branches of the U.S. government. Public opinion surveys regularly

describe a deep reservoir of goodwill and diffuse support for the courts, especially the U.S. Supreme Court, which is “an especially well regarded institution.”⁹ Time and again, “polls show that Americans have more confidence in the Court than either the president or the Congress. . . . Most Americans think that [the Court] is exercising about the right amount of political power, and more often than not they believe that the Court is doing a good job.”¹⁰ For example, a 2007 study¹¹ found that 66 percent of Americans trust the Supreme Court “a great deal” or “a fair amount” to operate in the best interests of the American people.¹² In addition, the study reported that 60 percent of the respondents also trusted their state courts to operate in the best interests of the American people.¹³ In comparison, 32 percent of the survey respondents trusted the president to operate in the best interests of the people, and more recently, a scant 11 percent of the American population voiced approval for the way Congress does its job.¹⁴

If we take a longer view, data collected between 1973 and 2011 also repeatedly show the American public’s reliable and strong support for the courts. During these forty years, 77–100 percent of those polled by Gallup (with a median of 87 percent) reported some or a great deal of confidence in the courts. Surveys conducted by Harris Interactive (from 1966 to 2011) and by the National Opinion Research Center (NORC) at the University of Chicago (from 1973 to 2011) produced comparably strong positive results: 73–90 percent of those surveyed (with medians of 86 and 85 percent, respectively) reported some or great confidence in the courts. And from 1973 to 2011, no more than 26 percent of those polled by Gallup, NBS/*Wall Street Journal*, AP/Roper, and CBS/*New York Times* ever claimed to have little or no confidence in the Court.¹⁵

However, a recent poll offers a different story, and in so doing illustrates the crucial

distinction social scientists make between *approval* and *system support*, as well as the limitations of using polling data to fully understand public interpretations and appreciation of courts. That survey, conducted in July 2013, suggests an almost all-time low in approval for the Court, with 43 percent of the respondents saying that they “approved of the way the Supreme Court is handling its job,” down 3 percent from September 2012.¹⁶ Slightly more Americans (46 percent) disapprove of the Court than approve, which has happened only one other time since Gallup first asked this question in 2000. Yet even with this decline, the Court remains far more highly esteemed than any other branch of the federal government (Congress’s aforementioned 11 percent approval rating being the most glaring example).¹⁷

Some observers interpreted these poll results as an indication of the fragility of public support for the legal system, but these data are better understood as an illustration of the need to augment polling with more and different data if we are to use it as an indicator of public culture. The key to the results is an important shift in the wording of the question that some commentators failed to notice. The July 2013 Gallup poll asked respondents, “Do you approve or disapprove of the way the Supreme Court is doing its job?” while the forty years of polling prior to 2013 had asked the public to indicate “how much confidence [they had]” in the Court.¹⁸ The distinction between confidence in the Court and approval of the way it is doing its job is fundamental for social scientists. Without further conversation with respondents, we cannot know whether they understood “confidence” to be a reflection of deeper, longer-term commitment and “approval” to be more specific, time-dependent, and responsive to particular cases and decisions.

Without locating the poll responses within a theoretical framework specifying

the concepts within hypothesized relationships, we cannot know what any particular indicator signifies, however reliable and repeatable the results may be. According to political scientist David Easton, political systems rely on both diffuse and specific support for their immediate resilience and viability, as well as long-term durability. Specific support refers to the populace's assessment, often instrumental or ideologically valenced,¹⁹ of the actions and performances of a particular government or set of political elites.²⁰ In this canonical framing, diffuse support names a deep-seated set of orientations toward politics and the operation of the political system that is relatively impervious to specific officeholder changes; diffuse support expresses the public's tacit commitments to the political system as a whole, rather than a particular set of officeholders or government elites. Political scientist Mitchell Seligson locates diffuse support along "a continuum which runs from allegiance at the positive end to alienation at the negative end."²¹ Political scientist Jack Citrin and his colleagues have described this continuum of diffuse support as follows:

To be politically alienated is to feel a relatively enduring sense of estrangement from existing political institutions, values and leaders. At the far end of the continuum, the politically alienated feel themselves outsiders, gripped in an alien political order; they would welcome fundamental changes in the ongoing regime. By contrast, the politically allegiant [supportive] feel themselves an integral part of the political system; they belong to it psychologically as well as legally. Allegiant [supportive] citizens evaluate the system positively, see it as morally worthy, and believe it has a legitimate claim to their loyalty.²²

Clearly, then, expressions of support for the courts, as for any of our political institu-

tions, are part of the complex tapestry we call the public culture, with positive and negative interpretations addressing immediate particular actions of government officials as well as various forms of identification with the nation-state. Public opinion polls conducted by academic, journalistic, and commercial organizations tap the range of the public's interpretations of the courts with varying probes in the wording of the questions. It is up to political scientists, however, to make sense of the data, debating the significance of different measures while working to substantiate competing theories of the role of the judiciary and of the constitutional order.

If one set of data supports a generally positive valence and makes the 2013 poll seem aberrational, ample competing evidence points toward public skepticism and critique of courts. Recent judgments, as well as public opinion polls, have prompted a growing litany of dire predictions that the legitimacy of the courts in American society and government are under attack and seriously threatened. In a 2008 *Dædalus* essay, communication scholars Kathleen Hall Jamieson and Bruce W. Hardy worried that among the consistent indicators of diffuse support for the courts, there are disturbing suggestions of longer-term hazards that could undermine "public willingness to protect the prerogatives of judges and the courts"; further, they argue that public ignorance combined with partisan elections of judges threatens courts' legitimacy. In the same volume of *Dædalus*, entitled "On Judicial Independence," Massachusetts Chief Justice Margaret Marshall describes in greater detail

[A] convergence of potent developments... exerting significant pressure on our form of government: attacks by politicians and others on the constitutional role of our courts to be free from political interference, the mas-

sive influx of special interest money into judicial selection and retention procedures, and the loosening of ethical constraints on what judicial candidates may and may not say about cases likely to come before them.²⁴

The peril is real and especially consequential, Chief Justice Marshall suggests, if we consider that 95 percent of all U.S. litigation takes place in state courts. In 2008, 93 million cases were tried in state courts, and in 2005, 28 percent of the Supreme Court's cases originated at the state level.²⁵

Doubtless, judges are concerned – as they should be – with public perceptions of their independence and legitimacy. Judges further worry that the public is uninformed or misinformed, and that public opinion is thus based on misperceptions. The sources are myriad, built right into the foundation of the judiciary itself. Judge John M. Walker, Jr., U.S. Appeals Court, Second Circuit, has suggested that confirmation hearings for Supreme Court Justices are themselves sources of misinformation about the judicial role, overemphasizing the judges' individual discretion while ignoring the extensive institutional and doctrinal constraints that confine judges' role performances.²⁶ Circuit judge Joanne F. Alper agrees that citizens remain “uninformed about the role of the judge as an impartial arbiter with the responsibility of enforcing the laws.”²⁷ “Caught in the middle of a highly politicized and emotional atmosphere”²⁸ sustained by sensationalist media and self-interested politicians, courts have stepped into the breach to communicate with the public directly with both informal and formal public information campaigns.²⁹ These education efforts on the part of the bench are conducted through lobbying organizations (such as Justice at Stake) as well as federal, state, and private entities supporting the work of courts (such as the Federal Judi-

cial Center and the National Center for State Courts).³⁰ Susan S. Silbey

But the purported crisis of the courts relies on a misunderstanding of how public acceptance of the judiciary is actually developed and sustained in American culture. To the extent that the judiciary and affiliated organizations misconceive public culture, their outreach programs, laudable as they are, may nonetheless be equally flawed. First, we need to acknowledge that claims of courts in crisis are endemic in American history, with periods of anti-court sentiment coming and going in generational intervals. Legal scholar Charles Geyh has described the process whereby these public image crises occur:

Typically, cycles begin with courts that decide one or more cases in ways that anger politically powerful segments of the public or their elected representatives. Those factions incite some combination of legislators, governors, presidents, the media or votes to excoriate allegedly rogue judges and threaten them and their courts with a variety of retaliatory actions that may include impeachment, budget cuts, curtailment of subject matter jurisdiction, changes in methods of judicial selection, disestablishment of judicial offices, judicial discipline, court packing, or defeat at the ballot box. Court defenders then mobilize to oppose the anti-court crusade.³²

To the extent that these cycles respond to unfavorable decisions, one might reasonably claim that the current threats to the courts' independence and integrity are self-inflicted wounds³³ born of the Supreme Court decisions in *Bush v. Gore*, *Citizens United v. Federal Election Commission*, and *Republican Party of Minnesota v. White*, which follow three decades of active mobilization against *Roe v. Wade*.³⁴ With a 5–4 decision in *Bush v. Gore*, the Court ended the recount of Florida's votes in the 2000 Presidential election, giving the election to George W. Bush.³⁵ In this case, the Justices'

doctrinal arguments were at odds with dominant precedents, previous opinions of the Justices in the majority, and the actual popular vote. In *Citizens United*, the Court expanded the legal fiction of the corporation, transforming it from a device to encourage economic investment while limiting investor liability to the sanctification of citizenship with constitutionally protected participation in the political system.³⁶ Although corporations are fictive legal persons existing only by virtue of paper agreements, the Court ruled that these “persons” have the same First Amendment protection of free speech as do human beings; as such, Congress cannot restrict corporate participation in elections through financial contributions, publications, and advertising. The Justices did not say that corporations could vote, however. *Citizens United* may have been prefigured by the Court’s earlier ruling in *Republican Party of Minnesota v. White*, where the Justices, in a 5–4 vote, struck down a provision of the Minnesota judicial code of ethics that prohibited candidates for election to judicial office from announcing their views on potentially controversial issues or matters that might come before the courts as a violation of the First Amendment’s protection of free speech.³⁷ In other words, because the majority of the Court uses an absolutist conception of speech that disregards the significance of different speakers’ ontological position, capacities, and modes of speech, they have made decisions that fertilize the ground for increasing politicization of the judiciary and financial influence in judicial elections. Anxious observers claim that these recent decisions threaten to transform judges into ordinary politicians and thus herald the suppression of independent courts.

From a macro-sociological perspective, the contemporary challenges to judicial status derive from cultural and institutional sources no different than those propel-

ling the disrupting of traditions of congressional courtesy and increasing polarization of American politics more generally. These sources include transformations in the most common forms of communication; advances in the sciences and technologies of political participation, including campaign polling, financing, mobilization of single interest groups, gerrymandering, and professional lobbying; and marked shifts in the demographic and class composition of the nation’s population. We are living in a period of profound ideological and communicative mobilization. Claims that these institutional changes are undermining confidence in courts should be tested.

In his work *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy*, political scientist James Gibson has undertaken to do just that: test predictions of a constitutional crisis in the making.³⁸ Exploring the influence of campaign activities on citizens’ perceptions of fairness and impartiality of judges, Gibson refutes the predictions that electoral campaigning is undermining public support for the courts. However, the results once again present a picture of heterogeneous public expectations.³⁹ For example, for some respondents, judicial candidates taking positions on policy issues causes little harm to the legitimacy of courts; likewise with attack ads, so long as the attack is motivated by a policy disagreement rather than by personal qualities or identity. Gibson suggests that in the view of approximately 20 percent of the population, the courts are already just like other political institutions, and thus campaigning, advertising, and fundraising have little influence on these citizens’ assessments of the courts. A larger portion of the population, however, perceives courts as insulated – or believes they should be insulated – from electoral politics and moneyed interests, as fundamentally different from other political institutions;

thus, blatant electoral activities by judges diminish the legitimacy of the judiciary in the eyes of this group. More interesting, perhaps, are the particular preferences of the vast majority of the population. For example, 72.9 percent of those surveyed expect a good justice to “protect people without power,” over 70 percent say that “judges should follow the law,” 46.5 percent believe a good justice should “represent the majority of citizens,” and 43.7 percent say that a good justice should “give my ideology a voice.” Once again, the public culture displays a rich mix of legal and political views about courts, which therefore raises the larger question of “how a politicized judiciary continues to be accepted as an authoritative legal arbiter.”⁴⁰

Americans’ paradoxical stance on law and courts is the subject of *The Common Place of Law: Stories from Everyday Life*, which I coauthored with Patricia Ewick when, some years ago, we set out to understand how the law and its agents were understood and interpreted by ordinary American citizens.⁴¹ However, unlike many of the polls surveying the public mood about courts with preset multiple-choice answers for standardized probes, we engaged in lengthy conversations with ordinary people about the circumstances of their everyday lives. Through these conversations, we worked to access the representations and interpretations of law and courts that circulate spontaneously among citizens. To hear the ways in which citizens talked about law (including courts, judges, lawyers, and police), we asked a random sample of people in one eastern state to tell us about problems they experienced in their lives and what they did about them.⁴² We listened for the moments when they invoked the law and legal categories to make sense of events, and the moments when they pursued other non-legal means of accommodation or redress. We were as

interested in the silences – the times when law could have been a possible and appropriate response but was not mentioned – as we were in the times when law was mentioned, appropriately or not.

The situations we asked about were intentionally varied and comprehensive, intended to create rather than foreclose opportunities for respondents to report diverse experiences and interpretations. We sought their unvarnished and unscripted interpretations and did not want to assume an understanding of the place of law or courts in their lives, but rather discover it as it emerged in the stories they told us. The list of probes included the sorts of events for which it is not unusual for people to seek a legal remedy (such as vandalism, property disputes, and work-related accidents). It also included situations that seem less obviously connected to traditional legal categories. Although many of the situations we asked about do not always (or even often) culminate in a legal case (for example, medical care or curricular issues in school), they all are situations in which people *can* assert a legal right, entitlement, or status, and, if they so choose, generate cases that appear on the dockets of state or federal local courts. Many people have experienced such situations, although most do not treat them as legal matters.⁴³ If our interviewees claimed to have experienced a problem, we asked how they responded to the situation, what actions they took, and which alternatives they considered but did not pursue. We did not ask explicitly about formal legal actions or agents until the very end of the interview. We waited to see whether, where, and how the law and its agents (such as courts, lawyers, police, and government officials) would emerge in our respondents’ accounts.

The interview was specifically designed to document the symbols, meanings, and associated social practices of American

legal culture by accessing citizens' interpretations of law and legal actors. Rather than collecting public opinions via preformulated (albeit normalized) scales, the study treats culture as inseparable from signs, symbols and performances, exchanged and circulating meanings and actions. In the words of political scientist and historian William H. Sewell, our study isolates "the meaningful aspect of human action out of the flow of concrete interactions . . . [by disentangling], for the purpose of analysis, the semiotic influences on action from the other sorts of influences – demographic, geographical, biological, technological, economic, and so on – that they are necessarily mixed with in any concrete sequence of behavior."⁴⁴ Culture is not only a system of communicative signals but a "repertoire" of "strategies of action," a collection of tools for the performance of social action. In our understanding of the place of courts in the public sphere, culture is never a coherent, logical, or autonomous system, but is rather a diverse collection of semiotic resources that are deployed daily in the performance of action. Therefore, in our research, variation in the meaning of symbols and resources and conflict concerning their use were expected.

Although the cultural system of signs may not be as coherent, logical, or autonomous as historically posited, this does not mean that it lacks systematicity – that is, networks of referential associations. It is possible to observe patterns in the signs and practices so that we are able to speak of a "culture" or "cultural system" at specified scales and levels of social organization. (For example, citizens express approval of judges making public statements about policy opinions in states where there are judicial elections; they express disapproval for judges voicing political opinions in states where judges are appointed.) As a system of semiotic resources deployed in transactions, "culture is not a power,

something to which social events, behaviors, institutions, or processes can be causally attributed; it is a context, something within which [events, behaviors, institutions, and processes] can be intelligibly – that is, thickly – described."⁴⁵

Our 430 respondents described more than 5,900 events. From these thousands of stories, we were able to construct three accounts that encompass the range of cultural materials with which Americans experience and talk about law and courts. Drawing upon different cultural images – for example, a bureaucracy, a game, and pragmatic coping strategies such as "making do" – each account describes a familiar way of acting and thinking, and associates it with the law. The three stories each represent different normative bases for legal authority, different constraints on legal action, different sources of legal agency, and different locations of law in time and space.

In the first narrative, the law is remote, impartial and objective, something to be invoked for solemn and collective purposes that transcend the messiness and partiality of individual lives. Although it is enacted by legal functionaries, it is often described as standing apart from the words or deeds of particular persons. Borrowing from Kafka's parable, we call this first story *before the law*. The law is here described as a formally ordered, rational, and hierarchical system of rules and procedures operating in carefully delimited times and spaces. Respondents conceived of legality as something relatively impervious to individual action, a separate, discontinuous, distinctive yet authoritative sphere. In this account the law appears as sacred, in the Durkheimian sense of the word, meaning that it is set apart from the routines of daily life. People describe the normative grounds for invoking law in terms of general, public needs and obligations. Thus, as one woman explained her refusal to take legal action when injured in an automobile accident, "I

learned when I was young, in my family, that you handle these things yourself.” She contrasted this unwillingness to sue when injured to her energy in pursuing a complaint against a supermarket chain when she tripped on a smashed banana. In the latter incident, others beside herself were threatened with injury: “Older folks, children, anyone could have been badly injured.” Because legality is characterized by its universal, objective norms, it is constrained by both the rules that seek objectivity in decision-making and those that enable action through chains of coordinated responsibility at a distance from the decisions of any particular individual. In the words of another respondent, the courts can “handle the problems of ordinary people fairly well.” “Judges are generally honest in dealing with each case,” he added; they are predictable. “Courts are expensive,” he continued, “but not so much that one would not sue if truly necessary.” “You see,” he explained, “I was afraid at one point when I first started going to court. I was nervous about it. . . . It was a new experience, you know, so I was a little nervous. Court is always looked upon as this force.” But with experience, this social worker-turned-private detective explained to us, one discovers that “[i]t’s a place you go to get justice. It is for you to get justice.” Emphasizing a sense of the justice system’s layered hierarchical organization, he added that courts are at least “a good place to start.”

Not only do these respondents consider the law’s agents to be objective, but they also consider the objectivity of law’s substance – what the law should or should not do – when deciding whether to engage it. Citizens police the boundary separating the public world of law from the private worlds of self-interest and individual action by disqualifying their lives from the realm of the legal and refusing to invoke the law. When asked whether she would

call the police in response to a neighborhood conflict, a middle aged mother of two teenage boys living in suburban New Jersey readily rejected the idea, claiming, “I don’t use my police that way.” On one level, her statement seems contradictory, expressing both identification (“my police”) and distance (her refusal to call the police). Yet when we unpack her meaning, putting it in the context of other experiences she told us about, it becomes clear that the two statements are less oppositional than interdependent. In point of fact, this woman takes ownership of the police precisely because they do not attend to the messiness of everyday neighborhood conflicts.

Many people expressed this lack of connection between law and ordinary life. For these individuals, encountering the law in the course of their lives – whether it involved being stopped by a police officer, being audited by the IRS, or serving on a jury – represented a disruption. Furthermore, in deciding whether to mobilize the law, people often thought of it as rupturing normal relationships, routine practices, and comfortable identities. When asked what action he had taken in response to what he described as the deterioration of his neighborhood, one man disavowed the possibility of doing anything out of the ordinary: “I’m not a person who goes down and pickets or creates a disturbance like that. I’m a normal taxpaying person, I work, come home, pay my bills, pay my taxes, and you know, try to keep a low profile.” For people who understand the law in this way, a decision to mobilize or use legal forms often is preceded by the crucial interpretive move of framing a situation in terms of some public, or at least general, set of interests. Similarly, a female minister and licensed practical nurse living in Camden, New Jersey, explained to us the conditions under which she would, as she said, “bother” the police about a neighborhood

conflict: "I might go to the police, but then again I might not. If they were destructive or fighting, or you know, then I might. I'd call the police . . . if there are gunshots or something like that, then, 'cause everybody's threatened then." Notably, in this statement, it was not only the severity of the action (the gunshots) that she gave as a reason for bothering the police, it was the collective nature of the harm it posed.

In a second account we call *with the law*, legality is understood to be a game of skill, resource, and negotiation wherein persons can seek their own interests in a competition with others. In this rendering, law appears as an arena for strategic interactions, sometimes engaged playfully and sometimes seriously, but always simultaneously alongside and within everyday life. Describing a world of legitimate competition, respondents are less likely to reference the law's objectivity or power and more likely to refer to the power of the individual to successfully deploy and engage the law. When articulating this understanding of the judicial system, people were wise to the fact that "the haves come out ahead"; that resources, experience, and skill matter in who wins this law game. As one of our respondents explained with some defiance, "There is no justice. You either win or you lose. As long as you can accomplish your objectives, you win. I'm not concerned about justice."

Cynicism is expressed in the view that the law is an arena for pursuing self-interest, in which deceit and manipulation prevail. Opponents could lie, bluff, or manufacture a story, and smart and wily players should be prepared for that. One respondent stated simply, "I learned you need proper representation because people tend to tell lies when they go to court." Importantly, this statement and others like it are not intended as a general assessment of human nature and the propensity to lie. The pointed reference to lying "when they

go to court" suggests that the tendency to lie is linked to a particular place and time where deceit is expected and permitted.

Virtually all of our respondents agreed that in this game of skill, resources, manipulation, and deceit, the most crucial resource one can mobilize is a lawyer. No matter how competent these respondents are and no matter how much experience or knowledge they might have of the law, they acknowledge their amateur status relative to lawyers. Lawyers represent the professional players in the game of law. A contractor told us that because he did not hire a lawyer, he was unable to defend himself in criminal court against charges of illegal dumping, which he vehemently denied. At the time of our interview, he acknowledged that he "should've had a lawyer," but at the time of the incident he did not think that it was necessary "because I didn't feel I was guilty of a crime." His initial belief that lawyers are necessary only for the guilty was undermined by his experience in court. "They had pictures of my truck with everything in it," but not at the dump. "When this lawyer [the prosecutor] asked me, 'Is that your truck?' I said 'Yeah.' And they said, 'Okay.' And they got me. I should never have admitted that that truck was mine. If I had had a lawyer they would really have no evidence. You know, lawyers are much smarter than the average person. So they sucked me into it."

The account of legality as game-playing is not entirely independent from the notion of the objective, disinterested, and rule-constrained system of the first narrative. Rather, the second story emphasizes the room for personal agency and intervention in the system. A third conception, however, acknowledges both the first two accounts of law and denies their entirety as an account of law and courts. In this third narrative, law is presented as a product of unequal power. Rather than objective and fair, law is understood to be arbitrary and

capricious. Unwilling to stand before the law and without the resources to “play” its game, people often experience themselves as *up against the law*. Here, citizens describe the law as an arbitrary power against which they feel impotent. The courts pretend to offer justice but are unavailable; judges promise principled decisions but respond primarily to the powerful.

People revealed their sense of being up against the law, and unable to play by its rules. Bess, an elderly black woman, had had difficulty obtaining medical treatment for what turned out to be breast cancer. After months of doctor’s appointments and applications she finally obtained Social Security Insurance. Recounting the experience, she told us, “I know if I had money or had been familiar, I probably would have gotten on it earlier, like the system is now. That’s what they have to do. If people want to get on [SSI], and they know themselves that they are sick, they go to this lawyer, Shelly Silverberg. ... People say ‘Well, why don’t you go to a lawyer, Bess? Why don’t you go to Shelly Silverberg?’ Bess can’t go, because Bess don’t have no money.” Thus, being without resources, Bess understood that she had little or no choice but to submit to the lengthy round of appointments, forms, diagnoses, and hearings.

Finding themselves in such a position of powerlessness, people often described to us their attempts at “making do,” using what the situation momentarily and unpredictably makes available – materially and discursively – to fashion solutions they would not be able to achieve within conventionally recognized schemata and resources. For example, one respondent reported lying about her age to a hospital in order to receive emergency room treatment. Because she was only seventeen at the time, the first hospital she visited would not treat her without her parents’ permission. Although she had been living independently for two years, having had no

contact with her abusive parents, she realized that to the hospital’s understanding of its legal obligations, she was a dependent minor. Since she couldn’t change her family situation in order to conform to hospital rules, she went to a different hospital and changed her age, matter-of-factly telling them she was eighteen. An elderly Hispanic man living in a run-down and dangerous area of Newark told us that his calls to the police for help with neighborhood vandals were repeatedly ignored. Finally, he decided to change his voice to sound like that of a woman when calling. When he mimicked a woman, he told us, he got a “quick response.”

Recognizing themselves as the “have-nots” facing some more legally, economically, or socially endowed opponent, people use what they can to get what they need. Small deceptions, omissions, foot-dragging, humor, and making scenes are typical forms of resistance for those up against the law.⁴⁶ These feints, tricks, and opportunistic ploys are rarely illegal. Most often, resistance of this sort does not so much transgress the rules as evade them. While the three stories woven through citizens’ accounts can be analytically distinguished from each other, they cannot be separated in practice, as each constitutes and enables the others.

How do these thicker accounts of law, developed from thousands of stories, relate to the anxieties that drive the judicial PR blitz? At their core, these are not three separate narratives of law or courts. They are a cultural ensemble, circulating signs and symbols that play off each other. Together, the accounts create a durable structure of support and allegiance because they simultaneously provide the potential for variation and change as well as consistency.⁴⁷ Given the more than five thousand stories collected from more than four hundred people, *The Common Place of Law* em-

pirically demonstrates the connection between individual expressions and interpretations of the courts and judges and the collective, macro institutions of law by revealing the common templates that appear in and across the stories.

The American public's commitment to the rule of law is actually strengthened by the oppositions that exist within and among the multiple representations: ideals and practices, normative aspirations and grounded understandings of practical action, god and gimmick, sacred and profane. For instance, challenges to courts' legitimacy for being only a political game can be rebutted by invoking their universal, transcendent purposes. Similarly, criticisms of judges for being remote, isolated, and irrelevant to ordinary people and mundane matters – occupying a rarified realm of abstract reasoning – can be countered by references to the accessibility of lawyers and game-like availability of legal processes. Simply stated, support for courts and the rule of law is much weaker and more vulnerable where it is more homogeneously or singularly conceived. If the public's interpretations were ideologically consistent, trimmed of their complexities and contradictions, support would be quite fragile. If the public were to see the court as solely god or entirely gimmick, this conception would eventually self-destruct in the face of the plurality and diversity of actually experienced phenomena. If the only thing people knew about the law, whether through experience or commonly circulating stories, was its profane face of crafty lawyers and outrageous tort cases, it would be difficult to sustain the support necessary for legal authority.⁴⁸ Conversely, a law unleavened by familiarity and the cynicism it breeds would in time become irrelevant.

Thus, we come full circle to our original alternative accounts of the role of courts in American society. Rather than eschewing one or the other, seeking ideological con-

sistency or cultural homogeneity, we conclude by celebrating the diversity of American public culture. It provides a durable and powerful commitment to law and courts. Although the dual depictions of law and courts as godlike (remote, transcendent, objective, and magisterial) and game-like (rule-bound, self-interested, and resource-dependent) seem to challenge one another, they are complementary. However, the judiciaries' campaigns to purify the public's assessment of law and courts fail to recognize the leavening that realism provides for idealism, and they misconceive the constitution of the public culture, ultimately weakening rather than strengthening the public's embrace of and commitment to the law and courts. Each thread of the complex tapestry of public assessment emphasizes different normative values and provides a different account of the social organization of law; together they cover the range of conventional experiences of legality. Any particular experience can find expression within the heterogeneity of the whole. The law and its agents are rendered neither irrelevant to everyday life (by virtue of being remote) nor subsumed by it (because of their familiarity). Rather, the courts become a common, inescapable, and reliable feature of American life.

ENDNOTES

Susan S.
Silbey

Author's Note: This essay has benefited from the insightful comments of the editors, Linda Greenhouse and Judith Resnik, as well as from generous readings and critique by Tom Burke, Keith Bybee, and Austin Sarat. Of course, any mistakes are entirely my own.

- ¹ His prediction was confirmed in 1860, and the Supreme Court's decision in *Dred Scott v. Sandford* is often cited as an important provocation. Alexis de Toqueville, *Democracy in America*, vol. 1, chap. VIII: The Federal Constitution, part IV.
- ² Patricia Ewick and Susan S. Silbey, *The Common Place of Law: Stories From Everyday Life* (Chicago: University of Chicago Press, 1998).
- ³ Keith J. Bybee, *All Judges Are Political – Except When They Are Not* (Stanford, Calif.: Stanford University Press, 2010).
- ⁴ Patricia Ewick and Susan S. Silbey, "Common Knowledge and Ideological Critique: The Importance of Knowing Why the 'Haves' Come Out Ahead," *Law & Society Review* 33 (4) (2003): 1025 – 1042. See also Herbert M. Kritzer and Susan S. Silbey, eds., *In Litigation: Do the 'Haves' Still Come Out Ahead?* (Stanford, Calif.: Stanford University Press, 2003).
- ⁵ Susan S. Silbey, Patricia Ewick, and Elizabeth Schuster, "Differential Use of Courts by Minority and Non-Minority Populations in New Jersey," New Jersey Supreme Court Task Force on Minority Concerns (Administrative Office of the Courts of New Jersey, 1993). In our survey, 430 residents of New Jersey described to us 5,803 incidents that could have become matters of formal legal complaint. Only 14 percent of the reported problems led to legal action (calling police, contacting a lawyer, or complaining to a government agency). Even fewer led to litigation beyond the inquiry stage.
- ⁶ See Stephen C. Yeazell's essay in this volume.
- ⁷ See, for example, Lawrence Friedman, *Contract Law in America* (Madison: University of Wisconsin Press, 1965). See also Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society," *UCLA Law Review* 31 (1) (1983): 4 – 71.
- ⁸ Sally E. Merry and Susan S. Silbey, "What Do Plaintiffs Want? Reexamining the Concept of Dispute," *Justice System Journal* 9 (2) (1984): 151 – 178.
- ⁹ Gregory A. Caldeira and Kevin T. McGuire, "What Americans Know about the Courts and Why It Matters," in *The Judicial Branch*, ed. Kermit L. Hall and Kevin T. McGuire (New York: Oxford University Press, 2005), 264.
- ¹⁰ *Ibid.*
- ¹¹ Kathleen Hall Jamieson and Bruce W. Hardy, "Will Ignorance and Partisan Election of Judges Undermine Public Trust in the Judiciary?" *Daedalus* 137 (4) (2008): 11.
- ¹² 2007 Princeton Survey Research Associates International for the Annenberg Foundation Trust at Sunnyslands, *Annenberg Public Policy Center Judicial Survey*, 2007, http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Survey_Questions_10-17-2007.pdf.
- ¹³ *Ibid.*
- ¹⁴ "Congress and the Public," Gallup, 2014, <http://www.gallup.com/poll/1600/congress-public.aspx>
- ¹⁵ Between 1981 and 2012, eighteen surveys by NBC/*Wall Street Journal*, AP/Roper, and CBS/*New York Times* report ranges between 10 and 26 percent for respondents feeling "little or no confidence," with a median of 17.5 percent.
- ¹⁶ <http://www.gallup.com/poll/163586/americans-approval-supreme-court-near-time-low.aspx>.

- 17 “Congress and the Public,” Gallup, 2014, <http://www.gallup.com/poll/1600/congress-public.aspx>
- 18 The Harris and NORC surveys asked specifically: “As far as people in charge of running the U.S. Supreme Court are concerned, would you say you have a great deal of confidence, only some confidence, or hardly any confidence at all in them?”
- 19 This is usually aligned with party affiliation.
- 20 Russell Dalton, “Citizens and Democracy: Political Support in Advanced Industrial Democracies,” paper presented at the conference *Confidence in Democratic Institutions: America in Comparative Perspective*, Washington, D.C., August 1997.
- 21 Mitchell A. Seligson, “On the Measurement of Diffuse Support: Some Evidence from Mexico,” *Social Indicators Research* 12 (1) (1983): 1–24.
- 22 Jack Citrin, et al., “Personal and Political Sources of Political Alienation,” *British Journal of Political Science* 5 (1) (1975): 1–31. Cited in *ibid*.
- 23 Jamieson and Hardy, “Will Ignorance and Partisan Election of Judges Undermine Public Trust in the Judiciary?”
- 24 Margaret H. Marshall, “Threats to the Rule of Law: State Courts, Public Expectations and Political Attitudes,” *Daedalus* 137 (4) (2008): 123. See also Herbert M. Kritzer and John Voelker, “Familiarity Breeds Respect: How Wisconsin Citizens View Their Courts,” *Judicature* 82 (1998–1999): 64.
- 25 Marshall, “Threats to the Rule of Law,” 125.
- 26 John M. Walker, Jr., “Politics and the Confirmation Process: Thought on the Roberts and Alito Hearings,” in *Bench Press: The Collision of Courts, Politics, and the Media*, ed. Keith Bybee (Stanford, Calif.: Stanford University Press, 2007), 123–130.
- 27 Joanne F. Alper, “Selecting the Judiciary: Who Should Be the Judge,” in *Bench Press*, ed. Bybee, 132.
- 28 *Ibid*.
- 29 Christopher J. Davey, “The Future of Online Legal Journalism: The Courts Speak Only Through Their Opinions?” *Information Society Journal of Law and Policy* 8 (2013): 572
- 30 “Judicial Outreach Resource Network,” Justice at Stake, http://www.justiceatstake.org/resources/judicial_outreach/; and <http://www.ncsc.org/Topics/Court-Community/Public-Trust-and-Confidence/Resource-Guide.aspx>.
- 31 Charles Gardner Geyh, *When Courts and Congress Collide: The Struggles for Control of America’s Judicial System* (Ann Arbor: University of Michigan Press, 2008).
- 32 Charles Gardner Geyh, “Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism,” in *Bench Press*, ed. Bybee, 21–51. For a discussion of the overblown campaign concerning judicial independence and Justice O’Connor using “too broad a brush in identifying what might be called ‘external’ threats to the independence of the judiciary,” see also Arthur D. Hellman, “Justice O’Connor and ‘The Threat to Judicial Independence’: The Cowgirl Who Cried Wolf?” *Arizona State Law Journal* 39 (2007): 845.
- 33 James L. Gibson, Gregory A. Caldeira, and Lester Kenyatta Spence, “The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?” *British Journal of Political Science* 33 (4) (2003): 535–556; and Edwin Meese III, “Construing the Constitution,” *UC Davis Law Review* 19 (1985): 22. In *Dred Scott v. Sandford* (60 U.S. 393 [1857]) the U.S. Supreme Court, under the leadership of Chief Justice Roger B. Taney, read black Americans out of the Constitution, ostensibly in order to invalidate Congress’ attempt to limit the spread of slavery. This is often read as a self-inflicted wound helping to bring on the Civil War. See also Herbert M. Kritzer, “The Public’s Assessment of the Rehnquist Court,” *Judicature* 89 (3) (2005): 168–176; and recall de Tocqueville’s prediction above.

- ³⁴ See *Bush v. Gore*, 531 U.S. 98 (2000); *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); and *Roe v. Wade*, 410 U.S. 113 (1973). For more on *Roe v. Wade*, see Linda Greenhouse and Reva Siegel, eds., *Before Roe v. Wade: Voices That Shaped the Abortion Debate Before the Supreme Court's Ruling* (New York: Kaplan Publications, 2010); and Linda Greenhouse and Reva Siegel, "Before (And After) *Roe v. Wade*: New Questions about Backlash," *Yale Law Journal* 120 (2011): 2028. Susan S. Silbey
- ³⁵ *Bush v. Gore*, 531 U.S. 98 (2000).
- ³⁶ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), is a U.S. Supreme Court case in which the Court held that the First Amendment prohibits the government from restricting independent political campaign expenditures by corporations, associations, or labor unions. The conservative lobbying group Citizens United wanted to air a film critical of Hillary Clinton and to advertise the film during television broadcasts in apparent violation of the 2002 Bipartisan Campaign Reform Act (commonly known as the McCain–Feingold Act or BCRA). In a 5–4 decision, the Court held that portions of BCRA section 203 violated the First Amendment.
- ³⁷ *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002; Ginsburg, J. dissenting). See also Howard Gillman, *The Votes That Counted: How the Court Decided the 2000 Presidential Election* (Chicago: University of Chicago Press, 2003).
- ³⁸ James L. Gibson, *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy* (Chicago: University of Chicago Press, 2012).
- ³⁹ A recent issue of *Judicature* (March/April 2013), with essays by leading students of judicial behavior and public opinion, debates how we should address recent experiments that have attempted to assess so-called significant threats to the legitimacy of and public trust in the judiciary.
- ⁴⁰ Gibson, *Electing Judges*.
- ⁴¹ Ewick and Silbey, "Common Knowledge and Ideological Critique."
- ⁴² Patricia Ewick and I describe our method as follows: "The interview was designed to capture a picture of legality unmoored from official legal settings and actors.... We did not want our questions to imply or enforce a conventional definition of law and legality. We did not want to ask people about their legal problems or needs, since it was the respondents' own understandings and definitions of these concepts – as they might be expressed in their words, revealed in their actions, or embedded in their stories and accounts – that we wanted to hear about. How then were we to focus the interview to be able to elicit talk about these issues without projecting our own hypotheses regarding legality and its construction? Our solution to this problem was to design an unusually lengthy interview consisting of three parts distinguished from one another in terms of how focused and structured they were. In this way, we hoped to reach a large number of diverse respondents and yet create opportunities for the respondents to shape the discussion. We told respondents the interview was about community, neighborhood, work, and family issues. Given our theoretical perspective this description seemed to describe accurately our approach, while it also served the practical purpose of decoupling legality from formal institutional law. The initial part of the interview consisted of a series of questions concerning the respondent's community and neighborhood. We asked how long they had lived there; what they liked most and least about their neighborhood; and how they saw themselves in relation to their neighbors. We also inquired about the number and strength of social ties they had in the community: how many friends and family members lived nearby and how often and in what capacity they interacted with others. This turned out to be an effective way of beginning.... These first questions about neighborhoods, friends and family seem to have eased the transition from formal interview to open conversation because the questions were obviously non-threatening and because they allowed the respondents to name the topics and issues of interest to them. Although we were asking the questions, respondents were setting the boundaries of privacy and exposure. Interestingly,

people would often use these opening questions to initiate stories that were elaborated and enriched as the interview continued. . . . We had a script we followed, a sequence of topics and questions, but we allowed our respondents to set the pace and emphases; we encouraged diversions. This portion of the interview was followed by a series of open-ended questions that asked respondents about a wide-range of events and practices that might have 'troubled or bothered' them at some point. If a respondent asked what we meant by trouble or bother, we defined these as '[a]nything that was not as you would have liked it to be, or thought it should be.' In presenting the topics for discussion to the respondents we avoided any allusion to these events or problems as legal or legally related, hoping instead to discover their definitions of the situations. Whenever a respondent mentioned that they had experienced a particular problem, they were asked to describe the situation in greater detail: when and how often it occurred, who was involved, how they experienced it and how they responded to it, and how, if at all, it ended." See Ewick and Silbey, *The Common Place of Law*, 24 – 26.

- 43 Consistent with most studies, only 14 percent of possible legal matters were referred to a legal actor (government agency, policy, or attorney).
- 44 William H. Sewell, "The Concept(s) of Culture," *The Logics of History* (Chicago: University of Chicago Press, 2005), 152 – 174, 160.
- 45 Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973), 14.
- 46 Patricia Ewick and Susan S. Silbey, "Narrating Social Structure: Stories of Resistance to Legal Authority," *American Journal of Sociology* 109 (1) (2003): 1328 – 1372.
- 47 Scott Barclay and Susan S. Silbey, "Understanding Regime Change: Public Opinion, Legitimacy, and Legal Consciousness," *Oxford Handbook of Law and Politics*, ed. Keith E. Whittington, R. Daniel Keleman, and Gregory A. Caldeira (New York: Oxford University Press, 2008), 663 – 678.
- 48 Ewick and Silbey, "Narrating Social Structure."

(Anti)Canonizing Courts

Jamal Greene

Abstract: Within U.S. constitutional culture, courts stand curiously apart from the society in which they sit. Among the many purposes this process of alienation serves is to “neutralize” the cognitive dissonance produced by Americans’ current self-conception and the role our forebears’ social and political culture played in producing historic injustice. The legal culture establishes such dissonance in part by structuring American constitutional argument around anticanonical cases: most especially “Dred Scott v. Sandford,” “Plessy v. Ferguson,” and “Lochner v. New York.” The widely held view that these decisions were “wrong the day they were decided” emphasizes the role of independent courts in producing them and diminishes the roles of culture in creating them and of social movements in overcoming them. This essay argues for approaching these decisions as ordinary products of political culture rather than extraordinary products of judicial malfeasance. Doing so honors those who struggled for progress and may invigorate our political imagination in the present.

JAMAL GREENE is Professor of Law at Columbia Law School. He has published articles in such journals as the *Columbia Law Review*, the *Yale Law Journal*, and the *Harvard Law Review*, and has contributed to volumes such as *The Health Care Case: The Supreme Court’s Decision and Its Implications* (ed. Gillian Metzger, Trevor Morrison, and Nathaniel Persily, 2013) and *Research Handbook in Comparative Constitutional Law* (ed. Rosalind Dixon and Tom Ginsburg, 2011; with Vicki C. Jackson).

Cadiz, Ohio isn’t “the proudest small town in America” for nothing.¹ Cadiz has just 3,500 residents, but it has produced more than its share of American heroes. Edwin Stanton, the former U.S. Attorney General and Abraham Lincoln’s Secretary of War, lived and practiced law in Cadiz. The town was a one-time home to George Custer, who, prior to his infamy at Little Bighorn, helped secure Robert E. Lee’s surrender at Appomattox. And Cadiz was the hometown of John Bingham, the Republican senator, prosecutor of Lincoln’s assassins, and principal drafter of section one of the Fourteenth Amendment. If the Civil War and Reconstruction inaugurated America’s “second founding,”² these sons of Cadiz were among its second founders.

The most popular tourist attraction in Cadiz honors none of these men: it is, rather, a museum of the reconstructed birthplace of Clark Gable. Gable is most famous, of course, for his portrayal of Rhett Butler, the charming, iconoclastic antihero of the film adaptation of Margaret Mitchell’s novel *Gone with the Wind*. It is ironic but not surprising that Cadiz is known and celebrated less for its famous Civil War

and Reconstruction architects than for its connection to the popular literary masterpiece of the Lost Cause movement.

The hold that Lost Cause ideology retains on America's Civil War narrative has been well described by historians like David Blight and Eric Foner.³ It was not until the heyday of the civil rights era that the so-called Dunning School fell out of favor and was replaced by "revisionists": that is, those who refused to defend the Ku Klux Klan or to represent Reconstruction as, in Mitchell's telling, "half a nation attempting, at the point of a bayonet, to force upon the other half the rule of negroes, many of them scarcely one generation out of the African jungle."⁴ As Blight writes in his *Race and Reunion*, "[t]he memory of slavery, emancipation, and the Fourteenth and Fifteenth Amendments never fit well into a developing narrative in which the Old and New South were romanticized and welcomed back to a new nationalism, and in which devotion alone made everyone right, and no one truly wrong, in the remembered Civil War."⁵

Less appreciated is the role that our perception of courts has played and continues to play in the narrative of benign continuity that Blight so carefully reconstructs. Courts hold a high place in American life. The U.S. Supreme Court in particular enjoys what political scientists call "diffuse support" from the American people: a degree of reverence that is relatively insensitive to how people feel about specific decisions.⁶ Thanks to this support, the Court maintains consistently higher approval ratings than Congress and the President, even in the low days after the Court's decision in *Bush v. Gore*.⁷ Constitutional scholars in the United States have long wrestled with what legal scholar Alexander Bickel termed the "countermajoritarian difficulty": the democratic deficit created by an unelected court overturning a legislative decision. The very notion of a counter-

majoritarian difficulty, long disputed by positive political scientists,⁸ presupposes that courts stand courageously (if unaccountably) apart from society, as a "they" rather than a "we."

This tendency to view courts as external to society may be succinctly termed the canonization of courts. There are many explanations for this phenomenon⁹ – and they are not mutually exclusive – but one in particular organizes the remainder of this essay: aggrandizement of courts, both for good and for ill, helps to enable a process of collective neutralization of historic injustice, and racial injustice most particularly. The term *neutralization* comes from the criminological literature and refers to strategies that guilty persons employ to overcome or ameliorate cognitive inconsistency between the norms they believe in and those their actions support.¹⁰ The rhetorical structure of constitutional argument in controversial cases is often organized around what I and others have termed an "anticanon" of cases that both constitutional lawyers and ordinary citizens understand to be wrongly decided;¹¹ *Dred Scott v. Sandford* (1857), *Plessy v. Ferguson* (1896), and *Lochner v. New York* (1905) are easily the most prominent examples.¹² Our collective insistence that these cases were wrong the day they were decided implies that ad hoc decision-making by judges, rather than the culture of which those judges are part, underlies actions we now believe to be unethical or immoral.

This rhetorical practice neutralizes the contribution that culture, and in particular our hydra-headed culture of white supremacy, has made to constitutional law. Within the universe of constitutional rhetoric, the main beneficiary of this process is historical argument proceeding from the authority of the original framers or from deep American traditions. The persuasiveness of this form of argument depends on maintaining an identity between constitu-

tional drafters and the present generation, which – in the absence of a successful neutralization strategy – cognitive dissonance does not permit. Canonization of courts through anticanonization of cases therefore harbors a conservative and jurispathic bias: one that supports a single and deterministic rather than a dynamic and fluid understanding of constitutional meaning.

Opening constitutional law to progressive contestation requires, counterintuitively, that we destabilize the notion that *Dred Scott*, *Plessy*, and *Lochner* were wrong the day they were decided. The possibility that these decisions were wrong because successive generations worked hard to make them wrong renders the judges that made and unmade these decisions neither heroes nor antiheroes, but simply judges.

Constitutional law is haunted by the past, but selectively so. The *Dred Scott*, *Plessy*, and *Lochner* decisions in particular are assumed by opinion-writers and legal audiences to be irredeemably wrong and are cited in modern cases precisely for this reason. Legal scholarship overwhelmingly identifies these cases as belonging to a constitutional law “anticanon”;¹³ constitutional law casebooks tend to give these cases substantial treatment even though they are discredited and no longer good law;¹⁴ and they continue to appear in modern opinions even though they do not contain reliable propositions of law.¹⁵ Nominees to federal courts are unusually candid about their views on these cases, indicating that their negative status is settled law. For example, at his confirmation hearing for Chief Justice, then-Judge John Roberts stated categorically that he would not “agree or disagree with particular decisions,” but then went on to testify over the course of the hearing that he disagreed with four decisions: *Dred Scott*, *Plessy*, *Lochner*, and arguably the other member of the anticanon, *Korematsu v. United States*.¹⁶ The

typical structure of judicial argument from the anticanon is thus: my opponent is wrong because the proposition he or she states is consistent with, as the case may be, *Dred Scott*, *Plessy*, or *Lochner*.

Each of these decisions was supported by general propositions of constitutional law or judicial method, such as textualism, originalism, or *stare decisis*, that are persuasive in other contexts. Indeed, it is their harmony with accepted approaches to constitutional law that enables anticanonical cases to be so consistently invoked against one’s opponents.¹⁷ But each decision is also associated with a concept that the country has since rejected as unethical: chattel slavery (*Dred Scott*), Jim Crow (*Plessy*), or labor exploitation (*Lochner*). What it means, then, for these cases to have been wrong *ab initio* is that the judges who rendered them were rogue or incompetent, and that the norms they enforced in our name were their own corrupt personal norms, not those of the American people or the Constitution. Anticanonicity as a rhetorical exercise casts judges as villainous outsiders rather than as products of a constitutional culture that has since become foreign to us.

Consider, first, *Dred Scott*. In modern discussion, the significant errors of Chief Justice Taney’s opinion for the Court were twofold. First, its holding that black Americans could not be citizens of the United States is said to be both racist and simply wrong as a matter of original understanding.¹⁸ But if the *Dred Scott* decision is wrong for these reasons, then the Fourteenth Amendment – which purported to make citizens of native-born blacks and to confer substantive rights of citizenship upon them – merely restored the Constitution’s original meaning. The notion that Reconstruction was, in Foner’s terms, a *revolution*, rings hollow if its most significant legal developments did little more than correct the pretensions of Roger Taney. If this is

the case, perhaps the Lost Cause movement is right that black emancipation in the South was simply a matter of time, that Southerners would have come to a different and better racial reconciliation had they only been permitted to do so in their own way.

Chief Justice Taney's second significant error is said to be his holding that the Constitution's Fifth Amendment required slavery to be permitted in federal territories, which was unnecessary to decide the case and may have precipitated or accelerated the march to war. But the notion that *Dred Scott* is wrong because it hastened the Civil War implies that the war was unnecessary or should have been delayed. This is not the place to defend the necessity of the Civil War, except to say that its lack of necessity is hardly obvious – no more obvious, it seems, than the rightness of Neville Chamberlain's actions in Munich. The view that the war's onset was lamentable is consistent with the Lost Cause view that "everyone was right, and no one truly wrong" in the conflict. That *Dred Scott* is wrong feels self-evident from the perspective of black freedom, but the more we argue that Taney made a major legal error in departing from the Constitution, the more we diminish the emancipatory achievements of the Reconstruction generation.

The anticanonicity of *Plessy* and *Lochner* similarly places the American people and their collective attitudes and norms at the margins rather than at the center of unethical behavior. There is debate as to whether *Plessy v. Ferguson*, which upheld the "separate but equal" racial segregation of rail cars in Louisiana, is consistent with the original understanding of the Fourteenth Amendment. But *Plessy* is easily accommodated within the settlement over Reconstruction symbolized by the Compromise of 1877. Under that agreement, House Democrats handed the disputed 1876 presidential election to Republican Rutherford B.

Hayes in exchange for the withdrawal of the remaining federal troops from southern states and the de facto end to Reconstruction. After 1877, Southern states were typically ruled by so-called Redeemer governments free from northern oversight or concern – which eventually instituted Jim Crow laws, such as the 1890 Separate Car Act at issue in *Plessy*. *Plessy*'s overwhelming 7–1 margin reflected an emerging consensus among large segments of the white population that Reconstruction was a misstep, or at least should be so regarded under the terms of reconciliation. "It was quite common in the 'eighties and 'nineties," historian C. Vann Woodward reports in *The Strange Case of Jim Crow*, "to find in *The Nation*, *Harper's Weekly*, the *North American Review*, or the *Atlantic Monthly* Northern liberals and former abolitionists mounting the shibboleths of white supremacy regarding the Negro's innate inferiority, shiftlessness, and hopeless unfitness for full participation in the white man's civilization."¹⁹ Woodward writes that these attitudes "doubtless did much to add to the reconciliation of North and South."²⁰ Viewing *Plessy* instead as a detour by the Court in the steady march to racial justice absolves the post-Reconstruction generation of responsibility for its regressive racial politics.

The history of Alabama's anti-miscegenation laws is illustrative. Under section 3602 of the Alabama Code of 1867, blacks and whites were prohibited from intermarriage, adultery, or fornication. The penal code also punished fornication or adultery between people of the same race,²¹ but it prescribed a lighter punishment. In *Ellis v. State* (1868), the Alabama Supreme Court upheld section 3602 as consistent with the Civil Rights Act of 1866, a statutory precursor to the Fourteenth Amendment, notwithstanding its differential punishment scheme.²² The author of that opinion, Chief Justice Abram Joseph Walk-

er, was elected to Alabama's high court by a Confederate legislature at the end of the war and was head of the committee that drafted the Code of 1867. Reconstruction produced a new Alabama Constitution in 1868, resulting in a new slate of justices popularly elected under universal male suffrage. Those justices overruled *Ellis* in an 1872 case called *Burns v. State*.²³ But Alabama Democrats retook the statehouse in 1874 through a combination of old-fashioned political violence against blacks and scalawags and a state Republican party splintered by divisions over issues of "social equality."²⁴ The 1874 election led to a new Constitution, a new penal code that reinstated the law invalidated in *Burns*, and three new Democratic justices on the Alabama Supreme Court. Those justices overruled *Burns* in 1877.²⁵

Six years later, the U.S. Supreme Court itself upheld the state's interracial adultery punishment scheme in *Pace v. Alabama*, using the same formalist logic as *Plessy*: a law punishing interracial adultery more harshly did not violate the Equal Protection Clause so long as it punished whites and blacks equally. *Pace* was a unanimous decision joined even by the sainted John Marshall Harlan, who dissented so famously in *Plessy*. *Pace* was less the result of rogue judges than of a rogue nation, unable to summon the political will necessary to preserve the gains of Reconstruction in the Deep South. So, too, *Plessy*, which would have been a far more remarkable decision at the time had it come out the other way. Tellingly, the headline in the *New Orleans Daily Picayune* on May 19, 1896, the day after the *Plessy* decision, read: "Equality, but not Socialism."

Which brings us to *Lochner*. The *Lochner* decision overturned a New York law passed unanimously in both chambers of the legislature that regulated the hours of bakery workers. It did so on the grounds that the state had not sufficiently demonstrated that

bakers' work was so unhealthy or that bakers were so in need of legislative protection as to reasonably justify state intervention into the labor market. *Lochner* bespeaks the startling speed with which the Fourteenth Amendment was transformed from a provision primarily protective of freed slaves to one primarily protective of corporations seeking to avoid state regulation. The *Slaughter-House Cases*, decided in 1873 (five years after the Fourteenth Amendment was ratified), rejected a claim that the Amendment prevented the state from regulating the market for butchers, and in so doing stated the indispensable purpose of the Reconstruction Amendments to be "the freedom of the slave race ... and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."²⁶ *Plessy* symbolized a collective abandonment of that lofty goal, and *Lochner* represented a commitment to a new one entirely.

Judges and lawyers overuse *Lochner*, however, and in the process obscure the fact that the case represents the triumph of a distinctive political ideology but only a pedestrian judicial one. The main criticism from the right is that *Lochner* wrongly protected unenumerated constitutional rights; that it specially protected the right to contract is incidental to its broader misstep. The main criticism from the left is that *Lochner* protected the wrong unenumerated constitutional rights: the right to contract rather than, say, the rights to privacy, family autonomy, or sexual freedom. This set of criticisms leaves the irreducible sin of *Lochner*, the error that underwrites its anticanonicity, as its recognition of the right to contract. The New Deal Settlement that abandoned *Lochner* places this right under the banner of "social and economic" rights, to be judicially recognized only if infringed through completely irrational laws.²⁷

This is a deeply conservative outcome. The failure of American courts, particularly at the federal level, to entertain the justiciability of social and economic rights leaves core questions of economic justice entirely to political processes ill-suited to protect the interests of the poor. Rights to education, health, welfare, and housing that are recognized with various degrees of vigor in other Western democracies are typically relegated to the margins, or worse, of U.S. constitutional protection.

Anticanonicity is path-dependent, and *Lochner*'s particular path to infamy shapes its rhetorical meaning. As legal scholar David Bernstein has shown, *Lochner* did not speak for its era until the 1960s and 1970s, when conservatives used the case to attack *Griswold v. Connecticut* and its progeny.²⁸ Liberals distinguished *Lochner* as protecting economic rights because at that historical moment, the rights they sought to defend concerned private decision-making and were decidedly non-economic. The distinction, for example, between use and sale of contraceptives, later abandoned as constitutionally irrelevant, was vitally important to the rhetorical mission of the right-to-privacy cases: they were precisely *not* about those arm's-length transactions that are the bread and butter of government social policy.²⁹

Other strategies were available, if less obvious. Rather than viewing *Lochner* as a case about the perils of judicial protection for economic rights, one might instead view it as a case about a judicial preference for the economic rights of the strong over those of the weak. Recall that both sides in *Lochner* sought to protect economic rights. The bakeries wished to protect their rights to enter into coercive labor contracts, and the government wished to protect the rights of bakers to reasonable living standards. Likewise, minimum wage laws (such as those invalidated in *Lochner*-era decisions, including *Adkins v. Children's Hos-*

pital [1923] and *Moorehead v. New York ex rel. Tipaldo* [1936]) are directed at the economic rights of workers to fair pay. Cases like *Coppage v. Kansas* (1915) and *Adair v. United States* (1908), which protected the right of employers to enter into yellow-dog contracts with workers, overturned government policies that sought to protect collective bargaining rights.³⁰ From a progressive perspective, the problem with the *Lochner* opinion is not that it protected the wrong liberty rights – liberty of contract rather than privacy – but that it protected the wrong *economic* rights.

The alternate universe in which *Lochner*'s social meaning is fully consistent with the justiciability of economic rights is one in which judges may address claims of health or housing or education rights on their merits rather than reject them at the threshold. In *Dandridge v. Williams* (1970), for example, in which the Court rejected a Fourteenth Amendment challenge to Maryland's cap on welfare benefits, Justice Stewart wrote for the Court: "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."³¹ Astute observers will recognize in this formulation the continuing *in terrorem* effect of *Lochner* and the generation of cases it represents. But if we view *Lochner* as wrong but not anticanonical, our rejection of *Lochner* may be consistent with our *dissent* from *Dandridge*. The New York bakers' law sought to realize a protestant conception of economic rights as proceeding from popular and legislative as well as judicial understandings. *Lochner* is not, in this view, a case about arrogant judges finding rights where none exist; it is rather a case about politically attuned judges using the courts to enforce the rights of some against the rights of others.

The outcome of that contest in *Lochner* reflected the might of a laissez-faire political culture that is no less a part of our his-

tory for our having renounced it. And viewing the renunciation of *Lochner* in *West Coast Hotel v. Parrish* (1937) and subsequent cases not as the inevitable regression of law to its proper, sublimated place but rather as the triumph of a particular political project, contingent on the efforts of social movements to capture political and legal elites, respects rather than ignores the role of popular agency in constructing legal meaning.

The modern view of *Dred Scott*, *Plessy*, and *Lochner* as both wrong the day they were decided and uniquely instructive for constitutional judges abides a process of neutralization that is far bigger than the Court and its docket. The concept of neutralization finds its roots in social psychologist Leon Festinger's work on cognitive dissonance.³² Festinger's two-pronged hypothesis, which we now take to be nearly axiomatic, was as follows. First, inconsistency within a person's normative universe or between his views and his actions is "psychologically uncomfortable" and "motivate[s] the person to try to reduce the dissonance and achieve consonance."³³ Second, individuals do not merely reduce dissonance but also "actively avoid situations and information which would likely increase the dissonance."³⁴ Strategies for reducing dissonance include, for example, changing one of the dissonant beliefs by seeking out others who can affirm one's disagreement with it, soliciting additional information that reduces the dissonance, and avoiding information that enlarges it.³⁵

Writing contemporaneously with Festinger, criminologists Gresham Sykes and David Matza studied the ways in which juvenile delinquents deflect or overcome internal and social disapproval. Sykes and Matza outlined five "techniques of neutralization," but we need only concern ourselves here with their first: "denial of responsibility." As Sykes and Matza described: "In effect, the delinquent approaches

a 'billiard ball' conception of himself in which he sees himself as helplessly propelled into new situations." The deviant, they argued, "learn[s] to view himself as more acted upon than acting."³⁶ Viewing the protection and abetting of slavery, Jim Crow, and labor exploitation as the work of rogue or countermajoritarian courts fits a similar pattern of collective self-alienation. As legal scholar Jack Balkin has written, "We say that a case like *Plessy* was wrong the day it was decided in order to avoid concluding that we are the type of people whose Constitution would say such a thing. The case does not reflect our nature or who we are."³⁷

I do not mean to ascribe delinquency or social deviance to those who deploy the rhetoric of anticanonicity. Indeed, it is the opposite. My suggestion is that the inconsistency between modern legal and ethical assumptions and past collective behavior creates a collective sense of dissonance that is normal rather than exceptional. Based on study of young, liberal Germans in the 1990s coping with the Holocaust, criminologist Moshe Hazani concluded that techniques of neutralization, including denial of responsibility, are not just the tools of delinquents but "universal modes of resolving cognitive inconsistency."³⁸ This kind of group neutralization is not the same as revisionism; it need not involve a conscious, reflective reevaluation of the past. The idea, rather, is that the subconscious need to reduce cognitive dissonance – reflected in Blight's work on the Civil War's aftermath – precedes and motivates elements of legal culture, including the social meaning of anticanonical cases. We enlarge the role of courts in part to deny our collective moral responsibility.

Other distinctive features of American constitutional law could not exist in their current form without the neutralization of past injustice that court canonization helps enable. The persistence of ethical-histor-

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ical approaches to constitutional argument is one such feature. An ethical-historical constitutional argument is one that advances a proposition of constitutional significance by reference to historical figures or traditions that “vouch” for the proposition. (“Ethical” is thus used here in the classical sense of an appeal to the character of the speaker, a definition consistent with scholar Philip Bobbitt’s work on constitutional argument.³⁹) The argument, for example, that the Establishment Clause was originally understood to forbid government funding of religion because Madison’s “Memorial and Remonstrance” was directed at this practice is a form of ethical-historical argument.⁴⁰ It recruits a prominent Framers in order to defend and legitimate a proposition regarding the history of the First Amendment.

Ethical-historical argument overlaps, but is not coextensive with, the family of interpretive theories known to constitutional scholars as originalism. Originalism is the view that a constitutional provision has what its drafters or ratifiers took to be its meaning or scope at the time of enactment. Originalism is a theory of interpretation, whereas ethical-historical argument is a rhetoric of justification. Except to the degree of its overlap with ethical-historical argument, originalism does not significantly drive the work of U.S. federal courts. (Anyone with any doubt on this score might note that in the blockbuster 2012 term of the Supreme Court, a faithful originalist would likely have upheld both section four of the Voting Rights Act and section three of the Defense of Marriage Act, an outcome not favored by a single Justice.) By contrast, ethical-historical argument has substantial purchase both within and outside of judicial practice. Arguments that use the Framers or their traditions to grant authority to modern practices and limitations hold a central place within the constitutional culture of the United States.

This is a contingent phenomenon. Consider the case of South Africa. One of the most recognized influences on the government of apartheid-era South Africa is the work of the British theorist A. V. Dicey. Dicey is famous for his aggressive defense of parliamentary sovereignty, a concept invested with white-supremacist character in an apartheid state in which only whites may vote. In particular, as the post-apartheid Truth and Reconciliation Commission Report found, South African lawyers and judges relied on Diceyan principles to defend practices of legislative deference during the apartheid era.⁴¹ In the South African constitutional law and culture of today, citing Dicey to defend acquiescence to parliamentary authority would be viewed with considerable suspicion, even as Dicey’s skill as a theoretician remains unquestioned.⁴²

We do not regard Jefferson, Madison, and Washington in this way. All were Virginian slaveholders instrumental in creating a brutal slavocracy and yet all are recruited to speak for constitutional propositions far more readily than Bingham, Charles Sumner, Jacob Howard, or other heroes of the second founding. South Africans view their renunciation of apartheid as a genuine rupture. The preamble to the Interim Constitution refers directly to “a need to create a new order,” and no one believes that the terms of reconciliation permit the suggestion that the pre-1994 order was anything other than indefensibly illegitimate. This fact, more than any other, precludes a strong role for ethical-historical argument in the constitutional law and culture of South Africa. Multiple, inter-related, and largely successful strategies of neutralization help to preserve a role for such arguments in the United States.

Ethical-historical argument, although it is partly external to constitutional law, is nonetheless potent enough to impose a soft limitation on constitutional evolution.

As legal scholar Robert Post has detailed at some length, constitutional law proceeds in continuous dialogue with the values and beliefs of non-judicial actors.⁴³ Constitutional law both regulates constitutional culture,⁴⁴ as when judges and lawyers help to determine the social meaning of *Dred Scott*, *Plessy*, and *Lochner*; and is bound by that culture, as when interpreters understand certain social and economic rights as matters of political discretion. It is difficult not to notice that social and economic rights receive explicit judicial protection in South Africa.⁴⁵

Would a constitutional culture that understands Reconstruction in revolutionary terms permit the Supreme Court to invalidate a federal voting rights law on *account of* its extraordinary success in enfranchising black Americans? Would a constitutional culture that has internalized the costs of our departure from Jim Crow produce a Court that challenges the University of Texas – the defendant in *Sweatt v. Painter*⁴⁶ – for discriminating against white applicants? Would a constitutional culture that regards *Lochner*’s repudiation as a *triumph* for economic rights be consonant with a Court that scolds Congress for seeking to guarantee health insurance to every American? These questions nearly answer themselves. Deflecting responsibility for *Dred Scott*, *Plessy*, and *Lochner* onto the Courts that decided those cases is integral to a legal narrative that helps construct a very different constitutional culture than the one described above.

It has become a favorite criticism of Supreme Court – centered scholarship to note that the nine Justices are a they rather than an it. The numerous inconsistencies in the Court’s jurisprudence, so easily identified as to be uninteresting, are often attributable to a single swing Justice, or else to an eclectic coalition whose incomplete overlap of views constitute a “holding” that

none agreed to individually. More should be made of the fact that the Supreme Court, and judges more generally, are a “we” rather than a “they.” Judges may not be like us, but they are *of* us. They live – in a thick sense – in the world they help to govern, their views about that world evolve and regress as all of ours do, and they adopt ideologies and accept social meanings that they do not themselves generate. As legal scholar Robert Cover reminded us, judges can be powerful instruments of social control, but they do not create law: *we* do.⁴⁷

We have good, if not noble, reasons to forget that. If we the people are a coherent (though pluralistic) constitutional subject – a view we might reject but rarely do – then we are authors of great injustices tolerated and facilitated by law. *Dred Scott*, *Plessy*, and *Lochner* are said to be anticanonical in part so that we do not forget what we once were, but the way they operate within the constitutional culture accomplishes quite the opposite. Professional discourse identifies their unforgivable errors as obvious legal mistakes, the result of judges reading their own immoral politics into the law. In this conception the Court sits at the center of great wrongs, awaiting a bold overruling that will place the law back on its proper course.

Claiming ownership over our history requires deconstruction all the way down. We must accept *Dred Scott* and *Plessy* and *Lochner* as we accept a chromosomal condition. Seeing these cases as part of who we are is psychologically difficult, but it enables us to recognize our agency in overcoming the limitations they place on our normative priors. We owe it to Mr. Bingham, and to ourselves, to internalize the real lesson of anticanonical cases, which, after all, is that they may have been right.

- ¹ The “proudest small town” title was conferred upon Cadiz following a newspaper contest in the 1930s. See Tyler Reynard, “Small-Town Cadiz Produced Big-Time Residents,” *The Intelligencer/Wheeling News-Register*, March 26, 2013, <http://www.theintelligencer.net/page/content.detail/id/583125/Small-Town-Cadiz-Produced-Big-Time-Residents.html?nav=6312>, accessed July 29, 2013.
- ² Barry Friedman, “Reconstructing Reconstruction: Some Problems for Originalists (And Everyone Else, Too),” *University of Pennsylvania Journal of Constitutional Law* 11 (2009): 1205.
- ³ David W. Blight, *Race and Reunion: The Civil War in American Memory* (Cambridge, Mass.: Harvard University Press, 2001); and Eric Foner, *Reconstruction: America’s Unfinished Revolution, 1863–1877* (New York: Harper & Row, 1988).
- ⁴ Margaret Mitchell, *Gone with the Wind* (New York: Macmillan, 1936), 914.
- ⁵ Blight, *Race and Reunion*, 4.
- ⁶ Gregory A. Caldeira and James L. Gibson, “The Etiology of Public Support for the Supreme Court,” *American Journal of Political Science* 36 (1992).
- ⁷ James L. Gibson, Gregory A. Caldeira, and Lester K. Spence, “The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?” *British Journal of Political Science* 33 (2003): 555.
- ⁸ Robert A. Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,” *Journal of Public Law* 6 (1957).
- ⁹ For an excellent treatment in the new institutionalist tradition in political science, see Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton, N.J.: Princeton University Press, 2007).
- ¹⁰ Gresham M. Sykes and David Matza, “Techniques of Neutralization: A Theory of Delinquency,” *American Sociological Review* 22 (1957): 667.
- ¹¹ Jamal Greene, “The Anticanon,” *Harvard Law Review* 125 (2011); and J. M. Balkin and Sanford Levinson, “The Canons of Constitutional Law,” *Harvard Law Review* 111 (1998): 1018–1019.
- ¹² *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896); and *Lochner v. New York*, 198 U.S. 45 (1905).
- ¹³ Greene, “Anticanon,” 391.
- ¹⁴ *Ibid.*, 395–396.
- ¹⁵ *Ibid.*, 397–398.
- ¹⁶ *Korematsu v. United States*, 323 U.S. 214 (1944); and Greene, “Anticanon,” 392 n. 66.
- ¹⁷ *Ibid.*, 463.
- ¹⁸ Jack M. Balkin and Sanford Levinson, “Thirteen Ways of Looking at Dred Scott,” *Chicago-Kent Law Review* 82 (2007): 70–71.
- ¹⁹ C. Vann Woodward, *The Strange Career of Jim Crow* (New York: Oxford University Press, 1955), 70.
- ²⁰ *Ibid.*
- ²¹ Alabama Code, sec. 3599 (1867).
- ²² *Ellis v. State*, 42 Ala. 525 (1868).
- ²³ *Burns v. State*, 48 Ala. 195 (1872).
- ²⁴ Foner, *Reconstruction*, 552–553.

- ²⁵ *Green v. State*, 58 Ala. 190 (1877).
- ²⁶ *Slaughter-House Cases*, 83 U.S. 36 (1873): 71.
- ²⁷ *United States v. Carolene Products*, 304 U.S. 144 (1938): 152.
- ²⁸ David E. Bernstein, “*Lochner v. New York*: A Centennial Retrospective,” *Washington University Law Quarterly* 83 (2005): 1518 – 1521.
- ²⁹ See *Carey v. Population Services International*, 431 U.S. 678 (1977): 687 – 688.
- ³⁰ *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923); *Moorehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936); *Coppage v. Kansas*, 236 U.S. 1 (1915); and *Adair v. United States*, 208 U.S. 161 (1908).
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- ³² Leon Festinger, *A Theory of Cognitive Dissonance* (Stanford, Calif.: Stanford University Press, 1957).
- ³³ *Ibid.*, 3.
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- ³⁵ *Ibid.*, 21 – 22.
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- ³⁷ Jack M. Balkin, “Wrong the Day It Was Decided: *Lochner* and Constitutional Historicism,” *Boston University Law Review* 85 (2005): 710.
- ³⁸ Moshe Hazani, “The Universal Applicability of the Theory of Neutralization: German Youth Coming to Terms With the Holocaust: An Empirical Study With Theoretical Implications,” *Crime, Law, & Social Change* 15 (1991): 144.
- ³⁹ Philip Bobbitt, *Constitutional Interpretation* (Oxford; Cambridge, Mass.: B. Blackwell, 1991), 20.
- ⁴⁰ *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) (Souter, J., dissenting): 868.
- ⁴¹ Truth and Reconciliation Commission of South Africa, *Truth and Reconciliation Commission of South Africa Report*, vol. 4 (1998), para. 41 – 42, <http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf>.
- ⁴² Katharine G. Young, *Constituting Social and Economic Rights* (Oxford: Oxford University Press, 2012), 146.
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- ⁴⁵ *Government of the Republic of South Africa v. Grootboom*, (1) SA 46 (Constitutional Court of South Africa, 2001); and *Minister of Health v. Treatment Action Campaign*, (5) SA 721 (Constitutional Court of South Africa, 2002).
- ⁴⁶ *Sweatt v. Painter*, 339 U.S. 629 (1950).
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Justice & Memory: South Africa's Constitutional Court

Kate O'Regan

Abstract: In a society such as South Africa in which the past has been deeply unjust, and in which the law and judges have been central to that injustice, establishing a shared conception of justice is particularly hard. There are four important strands of history and memory that affect the conception of justice in democratic, post-apartheid South Africa. Two of these, the role of law in the implementation of apartheid, and the grant of amnesty to perpetrators of gross human rights violations, are strands of memory that tend to undermine the establishment of a shared expectation of justice through law. Two others, the deep-rooted cultural practice of justice in traditional southern African communities, and the use of law in the struggle against apartheid, support an expectation of justice in our new order. Lawyers and judges striving to establish a just new order must be mindful of these strands of memory that speak to the relationship between law and justice.

The new Constitutional Court building is built on a hill in Johannesburg.¹ It stands on the site of four notorious prisons. The first and oldest is the Fort, originally built, as its name suggests, as a fort by President Paul Kruger in the years immediately before the Anglo-Boer War, or what in Afrikaans is called the Second Freedom War, to defend the city of Johannesburg. Not long after the war, as is the way with many forts, it became a prison. Mahatma Gandhi and then, some decades later, Nelson Rolihlahla Mandela were both imprisoned there. Around the Fort, three other prisons sprang up: the women's jail to the west, and to the north, the native jail and the awaiting trial prison. Three of the four prisons still stand on the hill: brick-and-mortar memorials of the role that law has played in South Africa's history.

The fourth, the awaiting trial block, was demolished to make way for the new court building. Its bricks, however, were preserved, and have been used throughout the court building, most notably in the courtroom itself, where packed into a dry stone curving wall they serve as a reminder both of the prison

KATE O'REGAN, a Foreign Honorary Member of the American Academy since 2009, served as a Judge of the Constitutional Court of South Africa from 1994 through 2009, when her fifteen-year term ended.

walls they once were and of the early Mapungubwe civilization of this region.

Justice is a complex and contested concept in most societies. In societies that are in transition from an oppressive or brutal past, this is particularly so, as is nowhere more evident than in South Africa. Justice is a normative concept constructed politically and socially in each society. In that construction, history and memory play a significant role.² In this essay, I consider the role of history and memory in the construction of a democratic conception of justice, and the establishment or “invention” of the new Constitutional Court in post-apartheid South Africa.

In a society in which the past has been deeply unjust, and in which the law and judges have been central to that injustice, establishing a shared conception of justice is particularly difficult. There is a need to remember the injustice, to analyze and understand it where possible. But we need to be cautious about the purpose to which we put these memories.

Memory must assist us in the present, urgent task with which we are engaged: the building of a better future. A history of evil presents particular challenges, as Friedrich Nietzsche reflected:

Men and ages which serve life by judging and destroying a past are always dangerous and endangered men and ages. For since we are the outcome of earlier generations, we are also the outcome of their aberrations, passions and errors, and indeed of their crimes: it is not possible wholly to free oneself from this chain. If we condemn these aberrations and regard ourselves as free of them, this does not alter the fact that we originate in them. The best we can do is to confront our inherited and hereditary nature with our knowledge and through a new, stern discipline combat our inborn heritage and implant in ourselves a new habit, a new instinct, a second nature, so that our first nature withers away.³

There are at least four strands to the conception of justice in modern South Africa that draw directly on our memory, and that affect how justice is conceived today. All four of them play their part in the establishment of South Africa’s new Constitutional Court, and I outline each here. Then I briefly illustrate how these strands of memory were considered and addressed in the building of the Court and in the establishment of its practices and procedures, mindful of the need to develop a democratic conception of justice that is compassionate and principled and that makes the best sense of both the past and the constitutional vision for our future.

The first strand of history and memory relevant to constructing a shared conception of justice in South Africa is the fact that apartheid was maintained through a plethora of unjust, discriminatory laws. Every day, ordinary South Africans were arrested and imprisoned in terms of apartheid laws. For example, between 1968 and 1971, according to the South African Institute of Race Relations Survey,⁴ more than six hundred thousand people were arrested annually on pass law offenses – this at a time when the population was approximately twenty million. Those convicted would generally be sentenced to imprisonment for ninety days, which often involved prison labor. In addition to pass laws, apartheid was underpinned by a host of other laws: the Immorality Act,⁵ the Mixed Marriages Act,⁶ the Separate Amenities Act,⁷ the Group Areas Act,⁸ the Land Act,⁹ and many others. Nearly all these pieces of legislation contained criminal provisions that resulted in people being arrested, prosecuted, and convicted for manifestly unjust purposes.

Each of these six hundred thousand annual arrests was a stone dropped in a pond. The ripples can still be felt. Let us stop and think of each arrest for a moment. A police

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van pulls up at the corner of a suburban street. Two (probably young) police officers jump out and accost the woman they have seen passing in the street. “Dompas,” they shout.¹⁰ The woman, who has no “dompas” on her, may demur or seek to explain; perhaps she thinks momentarily of flight, perhaps not. She is placed in the back of the van. That evening, her family or friends who were expecting her will find that she does not arrive. They may assume she has been arrested, and then spend some days searching police stations and prisons to find her. They will be angry or anxious or resigned and will have seen the law and its enforcement processes for what it was, unjust.¹¹

The young policemen will probably not think much of this arrest at all. They will drive to the police station, lay the charge, and commit the arrested woman to the cells. The next morning, probably, she will be taken to a court staffed by a magistrate, a court orderly, a prosecutor, and an interpreter. There will, in all probability, be no defense lawyer. The process of conviction will be extremely quick and efficient, and the sentence will probably be something like 90 Rand or ninety days’ imprisonment. It is unlikely that the convicted woman will be able to pay a fine, and so she will go to prison.

Each prosecution and conviction involved policemen, prosecutors, interpreters, and magistrates – many thousands of people working to enforce unjust laws. When I look at the bricks from the old awaiting trial prison in our courtroom today, I think that each one of those bricks must represent dozens of people who were held within that very prison, having been arrested on the basis of the pass laws. But each brick also represents one or more of the lawyers who prosecuted or convicted or drafted the wicked laws that gave effect to apartheid.

The manner in which law supported apartheid raises an important question:

what are the implications of the arrest and imprisonment of so many South Africans, for deeply unjust reasons over so many years, for our modern attempt to establish a shared conception of justice in a constitutional democracy founded on the rule of law? Those implications must, at least in part, be the absence of a deep, value-based commitment to respect for law in our society and deep skepticism about the possibility of justice. The enforcement of unjust laws, with the effect of sending hundreds of thousands of people to jail over many years, must have weakened any sense that law-breaking or imprisonment are in and of themselves wrongful. Establishing a communal commitment to respect for law and a sense of confidence in the possibility of justice will take time. Laws, and the process of law enforcement, need to earn the respect from which confidence in justice will grow.

The second strand of history and memory that I want to discuss relates to the mandate of the Truth and Reconciliation Commission (TRC), which was to establish “as complete a picture as possible of the causes, nature and extent of the gross violations of human rights . . . including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations by conducting investigations and holding hearings.”¹² “Gross violations of human rights” were in turn defined as “the killing, abduction, torture or severe ill-treatment of any person.”¹³

The Truth and Reconciliation process in South Africa has been much examined.¹⁴ Today there are three aspects of it that I consider relevant to this strand of our memory and to the construction of a democratic conception of justice. The first is that “gross violations of human rights” did

not capture the “daily violence” of apartheid imposed through the enforcement of its laws, which I have already discussed.¹⁵ The definition of gross human rights violations in the TRC legislation focused on the “extraordinary” violence of the apartheid era. In a real sense, this focus meant that the TRC missed engaging fully with the full evil of apartheid: its devastating impact on ordinary people in their everyday lives. This impact was, to use Hannah Arendt’s phrase, the banality of evil.

Second, the primary focus of the TRC legislation was to establish the truth about the past. The scheme, simply stated, was to encourage those perpetrators of gross human rights violations to come forward and tell their story. Full and frank disclosure entitled a perpetrator to apply for amnesty within the scheme of the Act. Amnesty, of course, meant that a perpetrator escaped prosecution, conviction, and punishment. The absence of punishment means vengeance is not exacted. Although we might be uncomfortable with the notion of vengeance, it is in one sense “a deeply moral response to wrongdoing. . . . Through vengeance, we express our basic self respect. . . . Vengeance is also the well-spring of a notion of equivalence that animates justice.”¹⁶

The principles of criminal law and punishment recognize that retribution, which to some extent serves a similar purpose to vengeance, is just. As Martha Minow notes:

Retribution can be understood as vengeance curbed by the intervention of someone other than the victim and by principles of proportionality and individual rights. Retribution motivates punishment out of fairness to those who have been wronged and reflects a belief that wrongdoers deserve blame and punishment in direct proportion to the harm inflicted.¹⁷

In affording amnesty to those who confessed to gross human rights violations and

described them in full detail, the Act fore- swore retribution in favor of truth. Moreover, the extent to which those who were not prosecuted were leaders particularly in the apartheid state, the message sent by amnesty or the absence of prosecution was the message of impunity – the reverse of accountability.

Third, the legislation underpinning the Act operated on a basis of equivalence between those gross human rights violations that had been perpetrated in support of apartheid and those violations that had been perpetrated to overthrow apartheid. This equivalence, of course, was a product of the political compromise, and did not reflect the moral or ethical differences between those who sought to maintain apartheid and those who sought its end. This artificial equivalence also governed the amnesty rules and sits uneasily with our recognition that apartheid was an unjust, oppressive system, and that seeking to dismantle it was a morally just cause.

The third strand of memory that relates to justice is the history of indigenous law and justice in many South African communities. Although there are differences from community to community, the traditional pattern of dispute resolution is public and participatory, and it focuses on restoring harmony. The administration of justice in traditional African communities often takes place in the open under a tree. In a recent study of traditional courts in Limpopo province, a court operating in the Berlyn settlement is described as follows:

The messenger announces the court date and time by walking through the settlement and blowing a horn, calling out the particulars of the meeting, which is always on a Sunday morning in Berlyn. The court starts early to give people a chance to attend church services later in the day. When men and women are seated outside the head-

man's house in separate groups under and near a tree, the headman and his committee enter and everybody stands up. . . . The seating arrangements symbolise the status differences in the social hierarchy. . . . The complainant talks first, then the defendant, then the witnesses that were brought and then the members of the community. . . . When the matter draws to a close, someone sums up the matter and then the headman gives his decision.¹⁸

This simple account of a traditional court procedure makes it clear that a principle of open, participative justice is deeply etched in our memory and practice. Indeed, it is a living aspect of justice in modern South Africa.

On the days when a case of importance to a community is heard in the Constitutional Court, the tradition of public and participative justice is reenacted in part. The courtroom is packed. People often travel overnight in buses to attend the hearing of the Court. The purpose of attendance is not to view the hearing in a non-participative way, but to demand accountability of the judges. Through silent participation, community members remind judges that their constitutional task is to do justice. This is not a new phenomenon. During the 1980s, while I was serving as an attorney for rural communities and workers, my clients insisted on their day in court because they wanted the judges to see them and know that the decision they handed down was of importance to the people in front of them. And through their silent participation, they reminded the judges that the decision should be a just one.

This strand of our memory is important. A legal system is unlikely to be just in the absence of an expectation that it will be just. The long tradition of indigenous public and participative justice, therefore, is an important strand of memory in the construction of a democratic conception of justice in post-apartheid South Africa.

The fourth strand of memory that is relevant to the construction of a conception of justice is the extent to which legal strategies were adopted by those seeking to oppose apartheid. In the last decades of apartheid, legal strategies were pursued for a variety of purposes: to promote the rights of workers,¹⁹ to defend communities from forced removals from their land and homes,²⁰ to defend those prosecuted of political offenses,²¹ to limit the operation of the pass laws,²² to undermine the consolidation of the grand apartheid program of Bantustans,²³ and to defend those opposing conscription.²⁴ The strategic use of law to promote just ends was often the topic of fierce debate. In the context of worker rights, for example, the fear was that the use of law would undermine workers themselves by affording power to lawyers in a manner that would weaken shop-floor militancy.²⁵

In his fascinating account of the era, *Politics by Other Means: Law in the Struggle against Apartheid*, Richard Abel concludes that law did make a difference.²⁶ However, he notes that the use of law does have severe restrictions. "Law," he comments, "is far more effective in defending negative freedom than conferring positive liberty; it can restrain the state but rarely compel it."²⁷ He concludes:

The recognition that South Africa in the 1980s was exceptional and law alone was not decisive should not mislead us to deprecate its importance. Human rights lawyers, like other progressives, too often frame the issue dichotomously. Law either makes all the difference or no difference at all. . . . [M]ost paralyzing is the anxiety that limited victories will co-opt the masses. Some activists argue that only progressive immiseration can stiffen resistance. All the evidence contradicts this. Hope is necessary for struggle. Legal victories, far from legitimating the regime, demonstrate its vulnerability and erode its will to dominate.²⁸

The use of law to undermine the functioning of the apartheid state was not an unmitigated success, yet it did provide insights and lessons that remain important today. Perhaps the most important lesson drawn from the era was the lesson that law can, and often does, serve as a constraint on the abuse of power.

As E. P. Thompson concluded in a memorable passage at the end of his famous examination of the Waltham Black Act of 1723, an act that created offenses aimed at curbing poaching and hunting in Waltham Forest²⁹:

There is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretensions of power continue to enlarge, a desperate error of intellectual abstraction. . . . It is to throw away a whole inheritance of struggle about law, and within the forms of law, whose continuity can never be fractured without bringing men and women into immediate danger.³⁰

Why did E. P. Thompson's account of a recondite piece of eighteenth-century English legislation come to be widely read by South African human rights lawyers? Many opponents of the apartheid state, often schooled in Marxism, expected that the use of law to oppose the apartheid state could never succeed. What happened in the 1980s, however, did not match this prediction. Law did at times produce just outcomes; not as often as human rights lawyers would have liked, but not as rarely as the theoretical assertion that the law is the tool of the ruling class could accommodate. The experience of South African

human rights lawyers, thus, echoed the conclusions that E. P. Thompson had drawn from his historical analysis of the eighteenth-century legislation. Thompson's statement that "[t]he forms and rhetoric of law acquire a distinct identity which may on occasion inhibit power and afford some protection to the powerless"³¹ struck a chord with human rights lawyers in South Africa and came to be widely discussed and acknowledged.

I do not suggest that these are the only memories of justice and injustice that will inform our constitutional project. There will be others. These four, however, are important, and each will contribute to our modern conception of justice. The first two, by and large, weaken the project of constructing a sense of justice, while the latter two, again by and large, strengthen it. In inventing both the practice and procedure of the Constitutional Court, as well as its physical building, these four strands of memory and history could not be ignored. Instead, we had to build on those aspects of our memory that are conducive to a new shared conception of justice, while leaving behind with "stern discipline" those aspects of our history that imperil the possibility of justice.

The constitutional negotiations that culminated in the first democratic elections in April 1994 brought one major change to the judicial system: the establishment of a new Constitutional Court with the mandate to protect and enforce the values of the new constitutional order. All other courts remained unaffected, and all existing judges remained in office; but the newly established Constitutional Court was placed at the apex of the system with respect to constitutional matters.

The eleven members of the Constitutional Court met for the first time in Johannesburg in October 1994. Of the first bench, six had been judges under the old

order, although all six were recognized for their commitment to human rights and the rule of law. The other five judges, including myself, were drawn from the ranks of the legal profession and the academy. In all, seven judges were white, four were black; nine were male, and two were female. In a judiciary that at the time had approximately 150 judges of whom 146 were white and male, the new Court was noticeably diverse. Today, the Court's race diversity has increased markedly. Now, in early 2014, there are eight black judges and three white, but it is a matter of deep concern, given the express constitutional commitment to racial and gender diversity on the bench,³² that there are still only two female judges.

As a new court, the agenda for that first week-long meeting was extraordinary. Nearly everything had to be decided and initiated: modes of dress and address, rules of procedure, jurisprudential register and style, a building found or built, arrangements for the inauguration of the Court and the swearing in of the judges, and working methods, including the use of information technology and the decision whether to introduce a system of law clerks in judicial chambers.

The recurrent theme in addressing the various items on the agenda was the question of justice, or the possibility of justice in the light of our deeply unjust history and the fragility of our perceptions of justice. Again and again in the discussion that ensued, questions arose as to how best to foster the belief in the possibility of justice through adopting practices and processes that would resonate with the strands of memory that held out the possibility of justice.

So in designing the logo or official seal of the Court, in recognition of the importance of the practice of justice in communities throughout South Africa, the Constitutional Court chose the representation

of a tree with people clustered under it, rather than the more commonly used symbols of a set of scales or of the figure of "blind justice." This image is now widely used throughout South Africa to represent not only the Court but the Constitution. It is an apt image of shelter and protection that draws on the memory (and present practice) of traditional justice.

Implicit in the metaphor of the tree are the principles of openness, civic participation, and simplicity, principles that inform the best practices of traditional justice that so many South Africans would understand. The metaphor of the tree, and the principles of openness, civic participation, and simplicity, came to be the informing principles of the new court building, which was finally completed in 2004.³³

The design of the Court is the antithesis of the grand neoclassical architecture that characterizes so many courts. Neoclassical architecture is whole and strong, asserting a confidence in the association of power and justice that is, for the reasons I have described above, absent in South Africa. Our building is fragmented, a low cluster of beautiful modern buildings that a citizen can enter without experiencing a sense of submission to authority or power. The Court stands adjacent to the old native jail, preserved as a historic site, and the juxtaposition of the two buildings is a constant dialectical reminder of the different possibilities of law.

The courtroom, too, is simple. Its walls are constructed from the unadorned bricks of the demolished awaiting trial prison, as I have described. Members of the public who enter the courtroom sit on raked benches, so that they are at eye level with the judges or looking down on them. There is no sense in the courtroom of the "majesty" of the law. Instead, it is a tentative room, almost incomplete. The brick wall is hemmed by a narrow glass window that permits those in the courtroom to see the

passing feet of citizens in the street outside. The main decoration in the courtroom is a large South African flag on the wall behind the bench, made in traditional bead work.

Throughout the building, the metaphor of the tree is reproduced: in the judges's meeting room, the wooden table is large and round, made of strips of wood to represent the rings of a giant tree; the foyer of the court is held up by pillars at unusual angles, representing the idea of a clearing in a woodland; both the court and the foyer are lit by irregular skylights that produce a dappled and changing light as the sun passes overhead.

The principles that inform the metaphor are also principles that inform the practice and procedure of the Court. The text of the Constitution seeks to establish procedures that facilitate the use of litigation to ensure that law does indeed serve the ends of justice. Many of these procedures are built on the learning from anti-apartheid litigation in the 1980s, in which civic-minded institutions and individuals sought to ensure that law was just. Many, too, are drawn from the experience of constitutional and public law litigation in the United States. For example, the Constitution contains a broad standing provision that permits a wide range of individuals and institutions to come to court to obtain effective relief where they establish a threatened or actual infringement of a constitutional right.³⁴ From the start, the Court also permitted *amici curiae* (friends of the Court), and interveners, to participate in constitutional litigation to help the Court understand more fully the implications of the cases it was deciding.³⁵ This practice had not been widely used in South Africa before 1994, but has become an important part of constitutional litigation. The Court has also been slow to accept that a case should not be decided because the matter has become moot,³⁶ or on the

other hand, is not ripe. The view has been that it is important to address serious constitutional questions that arise in order to provide guidance to citizens and the government on the interpretation and application of the Constitution.

The Court has also repeatedly affirmed the principle of open justice,³⁷ asserting the importance of public access to observe court hearings, both in person and by way of radio and television broadcast. The principle draws on the practice of traditional justice in which community members observed, and at times participated, in the process of the administration of justice.

The law of costs has been revised to ensure that those who genuinely raise constitutional points of substance should not fear that, if unsuccessful, they will be forced to pay the costs of the state who opposed them.³⁸ All these aspects of our constitutional practice have been designed to enable the use of litigation to promote the possibility of justice in our new constitutional order.

Substantively, of course, the text of our Constitution engages directly with justice. First, the Constitution espouses explicit values that reject the injustice of the past. Those values, found in section 1 of the Constitution, are human dignity, the achievement of equality, and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the Constitution and the rule of law; and a multiparty system of democratic government, to ensure accountability, responsiveness, and openness. Human rights are given specificity in chapter 2 of the Constitution, which contains the Bill of Rights. The Constitution makes plain that it seeks a transformed democratic society, in which the divisions of our past are healed. It is emphatically not a "business as usual" Constitution.

The Constitution thus responds sharply to the strand of injustice in our memory by making clear that law must be founded on

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democratic values and may not be used for unjust purposes. It is South Africa's emphatic assertion of "never again," and courts are empowered through the supremacy clause to be guardians of the values established in the new Constitution.

South Africa's Constitution holds the vision or promise of a transformed society based on democratic values, social justice, and fundamental human rights. That vision cannot be achieved without acknowledging the complexity of our memories of justice and injustice. The task of establishing a just society in the aftermath of injustice is not easy, as Nietzsche warned. Ariel Dorfman, the Chilean author, made a similar admonition in the afterword to his remarkable play *Death and the Maiden*:

A multitude of messages of the contemporary imagination, specifically those that are channelled through the mass entertainment media, assure us, over and over, that there is an easy, even facile, comforting answer to most of our problems. Such an aesthetic

strategy seems to me not only to falsify and disdain human experience but in the case of Chile or of any country that is coming out of a period of enormous conflict and pain, it turns out to be counterproductive for the community, freezing its maturity and growth. . . . How does memory [both] beguile and save and guide us? How can we keep our innocence once we have tasted evil? How to forgive those who have hurt us irreparably? How do we find a language that is political but not pamphletary?³⁹

These are the questions that we must bear in mind if we are to move forward and find a conception of justice consonant with our constitutional vision. To establish that new conception will require hard work and discipline. It is not an easy process, nor is its outcome assured. But if, as lawyers and judges, we commit ourselves to a habit of doing justice, it is just possible that a compassionate and principled conception of justice will be wrought, mindful of our history and founded in our constitutional recognition of the equal worth of every person.

ENDNOTES

- ¹ The first section of this essay is adapted from an address given by the author at the Nelson Mandela Foundation in Johannesburg on April 2, 2009. That address was entitled "For Life and Action: Justice, Reconciliation, and the Work of Memory." The text of that address was published in the South African legal magazine *Without Prejudice* in the same year.
- ² For more on the construction of the conception of justice in periods of political transition, see Ruti Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), 3–4 and throughout the book.
- ³ Friedrich Nietzsche, "On the Uses and Disadvantages of History for Life," in *Untimely Meditations* (Cambridge: Cambridge University Press, 1997), 76.
- ⁴ Muriel Horrell, *A Survey of the Race Relations in South Africa*, vols. 24–26, 28, South African Institute of Race Relations, Johannesburg.
- ⁵ Immorality Act 23 of 1957.
- ⁶ Prohibition of Mixed Marriages Act 55 of 1949.
- ⁷ Reservation of Separate Amenities Act 49 of 1953.
- ⁸ Group Areas Act 36 of 1966.
- ⁹ Natives Land Act 23 of 1913.

- ¹⁰ In terms of the influx control legislation enforced by the apartheid government, African people had to carry a “pass book” or “dompas” containing their personal details and a photograph; the pass book was meant to indicate whether a person was lawfully entitled to be in an urban area. The hated pass laws were repealed only in 1986.
- ¹¹ In this regard, see the comments by former Chief Justice PN Langa in his submission to the Truth and Reconciliation Commission (the TRC), reproduced in the *South African Law Journal* 115 (1998): 38. For a full discussion of the TRC’s investigation of the role of judges under apartheid, see David Dyzenhaus, *Judging the Judges: Judging Ourselves* (Oxford: Hart Publishing, 1998).
- ¹² Section 3(1)(a) of the Promotion of National Unity and Reconciliation Act 34 of 1995.
- ¹³ *Ibid.*, sec. 1(1)(xix).
- ¹⁴ See, for example, Alex Boraine, *A Country Unmasked: Inside South Africa’s Truth and Reconciliation Commission* (Cape Town: Oxford University Press, 2000); Kader Asmal, Louise Asmal, and Ronald Suresh Roberts, *Reconciliation through Truth: A Reckoning of Apartheid’s Criminal Governance*, 2nd ed. (Cape Town: David Philip Publishers, 1996); Daan Bronkhorst, *Truth and Reconciliation: Obstacles and Opportunities for Human Rights* (Amsterdam: Amnesty International, 1995); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998); and Dyzenhaus, *Judging the Judges*.
- ¹⁵ David Dyzenhaus’s term; see *ibid.*, 6.
- ¹⁶ Minow, *Between Vengeance and Forgiveness*, 10.
- ¹⁷ *Ibid.*, 12.
- ¹⁸ C. S. van der Waal, “Formal and Informal Dispute Resolution in Limpopo Province, South Africa,” in *The Shade of New Leaves Governance in Traditional Authority: A Southern African Perspective*, ed. Manfred Hinz (Berlin: Lit Verlag, 2006), 141 – 142.
- ¹⁹ See D. du Toit et al., *The Labour Relations Act of 1995*, 2nd ed. (Durban, South Africa: Butterworths, 1998), 9 – 11.
- ²⁰ Christina Murray and Kate O’Regan, *No Place to Rest: Forced Removals and the Law in South Africa* (Oxford: Oxford University Press, 1990).
- ²¹ Richard Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980 – 1994* (New York: Routledge, 1995).
- ²² *Ibid.*
- ²³ *Government of Lebowa v. Government of the Republic of South Africa* 1988 (1) SA 344 (A).
- ²⁴ *End Conscription Campaign and Another v. Minister of Defence and Another* 1989 (2) SA 180 (C).
- ²⁵ See, for example, Bob Fine, Francine de Clercq, and Duncan Innes, “Trade Unions and the State: The Question of Legality,” *SA Labour Bulletin* 7 (1 – 2) (1981): 39 – 68; General Workers Union, “Reply to Fine, de Clercq and Innes,” *SA Labour Bulletin* 7 (3) (1981): 16 – 25; Fink Haysom, “In Search of Concessions: Reply to Fine et al.,” *SA Labour Bulletin* 7 (3) (1981): 26 – 41; and Hirsch and Nicol, “Trade Unions and the State: A Response,” *SA Labour Bulletin* 7 (3) (1981): 42 – 50.
- ²⁶ Abel, *Politics by Other Means*, 533.
- ²⁷ *Ibid.*, 538.
- ²⁸ *Ibid.*, 549.
- ²⁹ E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Harmondsworth, U.K.: Penguin, 1977).
- ³⁰ *Ibid.*, 266.
- ³¹ *Ibid.*

Justice & Memory: South Africa's Constitutional Court 32 Section 174(2) of the Constitution stipulates that “[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.”

33 See Bronwyn Law-Viljoen, ed., *Light on a Hill: Building the Constitutional Court of South Africa* (Parkwood, South Africa: David Krut Publishing, 2005).

34 Section 38 of the Constitution provides:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are —

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.”

35 Rule 10 of the Constitutional Court Rules. See *Ferreira v. Levin NO and Others; Vryenhoek and Others v. Powell NO and Others* 1996 (1) SA 984 (CC), para. 4; *Hoffmann v. South African Airways* 2001 (1) SA 1 (CC), para. 63; *In re Certain Amicus Curiae Applications: Minister of Health and Others v. Treatment Action Campaign and Others* 2002 (5) SA 713 (CC), para. 3 – 5; and *Richter v. Minister for Home Affairs and Others* [2009] ZACC 3.

36 See *President of the Ordinary Court-Martial NO v. Freedom of Expression Institute* 1999 (4) SA 682 (CC).

37 *South African Broadcasting Corp Ltd v. National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC); and *Independent Newspapers (Pty) Ltd v. Minister for Intelligence Services: In re Masetlha v. President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC).

38 *Affordable Medicines Trust and Others v. Minister of Health and Others* 2006 (3) SA 247 (CC), para. 38.

39 Ariel Dorfman, *Death and the Maiden* (London: Nick Hern Books, 1991), 49.

William Clift's mid-1970s photograph captures the dilapidated state of a courtroom in Missouri's Warren County Courthouse. The history of that building tracks the changing political contexts and the challenges faced by local courts during the course of almost two centuries.

In the 1830s, Warren County succeeded in becoming a seat of justice in Missouri. In 1839, county planners erected a courthouse in Warrenton as the town's centerpiece: only after it was sited were other town lots sold.

Within decades, that building was at risk. During the Civil War, Missouri secessionists sacked a neighboring courthouse in Danville to weaken the civil government in the state's Unionist counties. That vulnerability prompted Warrenton in 1866 to construct a fireproof structure, called the Circuit Court Building, for the storage of records.

In 1870, the town complemented its record depository by replacing the first courthouse with a yet-grander building on the same site. The two-story classic revival building – forty-five by fifty-five feet – had four cast-iron Corinthian columns, rounded-arched windows, and a slate roof. Upon entering, one found a smaller courtroom on the first floor and the main courtroom a flight up, on the second floor. The building cost \$40,000, plus an additional fee of \$350 paid to the architect, Thomas W. Brady, for his design.

One hundred years later, in 1974, the Warren County Courthouse gained a place on the National Register of Historic Places. Yet, as the photograph documents, the courthouse was by then in disrepair. Four bond issues were proposed in the 1960s and 1970s to support badly needed renovations, but none won approval.

Challenges to that building came from another direction in 1992, when a lawyer who was disabled brought a federal class action lawsuit against the county. He alleged that the courthouse – which had no elevator and bathrooms only in the basement – failed to comply with the 1990 Americans with Disabilities Act

(ADA), which required that buildings be made accessible to those with disabilities. (In the 2004 decision *Tennessee v. Lane*, the U.S. Supreme Court held that states could be required to pay damages to individuals unable to gain access to courthouses because of ADA compliance failures.)

The county estimated that renovations to bring the courthouse into compliance with the ADA would cost about \$180,000. Instead of seeking those funds, the county proposed and enacted a \$6.1 million bond issue to support a new "Justice Center." Some members of the class of disabled persons in the pending case protested; they argued that the historic courthouse should be preserved and made compliant with the ADA. Despite their efforts and those of preservationists, a federal judge approved the decision to end the lawsuit by demolishing the 1870 structure.

Thus, just as the 1839 courthouse had given way to a successor, so did the 1870 building, which was replaced by a three-story, 54,000-square-foot Justice Center. That building was a testament to the growth of the criminal docket. It housed county offices, the sheriff's department, a jail with capacity for one hundred prisoners, a ten-bed work-release dormitory, and three courtrooms.

By 2008, the Justice Center was pressed for space, and, in 2012, the county built a 36,000-square-foot administrative office building, costing some \$6.5 million. The additional building shifted many offices out of the courthouse. In 2013, the county, whose population then exceeded 32,000, qualified for a third judge, whose work included helping staff a new drug court, designed to provide alternatives to incarceration.

One piece of the 1870 courthouse remains. Preservationists purchased the court's eleven-foot-high cupola – "its crowning glory" – to display it at the Warren County Historical Society, behind the new Justice Center.

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Inside back cover : Crack, Jury Chairs, Warren County Courthouse, Warrenton, Missouri, 1974 – 1976.
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