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The Roles of Litigation in American Democracy

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THE ROLES OF LITIGATION IN AMERICAN DEMOCRACY

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ABSTRACT

Adjudication is usually understood as having two functions: dispute resolution and law declaration. This Article presents the process *of litigation as a third, equally important function and explains how in litigation, participants perform rule of law values. Performativity in litigation operates in five ways. First, litigation allows individuals, even the most downtrodden, to obtain recognition from a governmental officer (a judge) of their claims. Second, it promotes the production of reasoned arguments about legal questions and presentation of proofs in public, subject to cross-examination and debate. Third, it promotes transparency by forcing information required to present proofs and arguments to be revealed. Fourth, it aids in the enforcement of the law in two ways: by requiring wrongdoers to answer for their conduct to the tribunal and by revealing information that is used by other actors to enforce or change existing regulatory regimes. And fifth, litigation enables citizens to serve as adjudicators on juries. Unlike other process-based theories of the benefits of litigation, the theory presented here does not hinge on the sociological legitimacy of procedures or outcomes. The democratic benefits of these performances ought to be considered in the reform of procedural rules.*

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[*] Ellen Ash Peters Professor, University of Connecticut School of Law. I benefitted greatly from conversations with Richard Fallon, Richard Freer, Suzy Killmister, Pnina Lahav, Frank Michelman, Judith Resnik, and Scott Schapiro in writing this Article, as well as comments from David Marcus, James Rooks, Julia Simon-Kerr, and an anonymous reviewer of my forthcoming book *In Praise of Litigation* (Oxford, expected 2017). Thanks to the Pound Institute and the University of Connecticut School of Law for support of this project and to the editors of the *Emory Law Journal*.

INTRODUCTION

Litigation is usually understood as providing two useful ends. The default, and perhaps most hard-wired, conception of litigation is as a mechanism for dispute resolution. Under the dispute resolution model, access to courts is understood as necessary to civil society because in the event that individuals cannot resolve their disputes on their own, they may resort to violence.[1] A second, somewhat less dominant but still prevalent model of litigation is as a system for law declaration.[2] In the law declaration model, access to litigation is necessary for the law to evolve because by bringing cases litigants force the courts to interpret and develop the law, which information is then used by others to guide their own conduct.[3] Both of these approaches to litigation look at the ends of litigation: in the first model, resolution, and in the second model, law production and clarification. Both contribute to the regulatory function of litigation because individuals and organizations anticipate or learn from the results adjudication and adjust their behavior accordingly.[4]

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[1] *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 375 (1971) ("American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement."). Of course, it is possible to resolve disputes outside of litigation without violence, which the Supreme Court encouraged in *Boddie*. *Id.* ("[P]rivate structuring of individual relationships and repair of their breach is largely encouraged in American life, subject only to the caveat that the formal judicial process, if resorted to, is paramount."); *see also* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991). Examples of such dispute resolution mechanisms include mediation, arbitration, and negotiation around agreed upon background norms or contracts. A problem arises when people do not agree on the content of those norms, and this problem can be a significant one in a pluralist society.

[2] Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 671–72 (2012) (discussing dispute resolution and law declaration models of adjudication); *see* Meir Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 COLUM. L. REV. 1, 1–7 (1985) (using the terms "arbitration" and "regulation" to describe a similar dichotomy); *see also* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–85 (1976) (describing the traditional model of litigation as that of "settling disputes between private parties about private rights" as well as "clarif[ying] the law to guide future private actions").

[3] *See* Chayes, *supra* note 2, at 1285; *see also* Monaghan, *supra* note 2, at 671–72.

[4] *See* Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 377 (2007) (describing litigation as a form of *ex ante* regulation); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1166 (2001) (stating that "a primary reason to permit individuals to sue is that the prospect of suit provides an incentive for desirable behavior in the first instance" and also noting that in some cases the prospect of suit deters future conduct); Richard A. Posner, *Regulation (Agencies) Versus Litigation (Courts): An Analytical Framework*, *in* REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 11–25 (Daniel P. Kessler ed., 2011). *But see* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1355 (1995) (arguing that deterrence is less likely to be achieved by mass tort litigation because of the long latency period of disease, among other reasons). It is a bit challenging to separate the ends of litigation from its process in the context of the regulatory function of

This Article presents a third understanding of litigation as a process in which litigants perform self-government. By performativity I mean that through repeated performance of certain practices participants form a collective identity—and perhaps transform their identity.[5] The performances required by the process of litigation (although often ugly, ungainly, messy, and expensive) are democracy promoting, in addition to being a source for the resolution of disputes and resulting in law declaration and development. As Milner Ball wrote,

> If the advocate's presentation of his client's case is a form of theater which is played to the judge or jury and which contributes to judgment, there is also the theater of the courtroom itself—embracing all that goes on within—played to the public at large. It is the function of this drama to provide an image of legitimate society. In this sense, it is importantly an end in itself.[6]

The process of litigation promotes democracy by permitting participants to perform acts that are expressions of self-government. An obvious example of how the process of litigation promotes democracy is civil rights litigation, which allows individuals who are otherwise shut out of the democratic process to access a governmental official (the judge) who must listen to their claim.[7] But even the types of cases that are usually categorized as ordinary, private litigation—such as contract disputes or tort suits—enable individuals to engage in self-government by asserting their claims, presenting proofs and reasoned

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litigation because many times *anticipated* suit is what drives conduct, but anticipated suits drive conduct because of the anticipated outcome. Information obtained through the process of litigation as a means of regulation is discussed later in the paper. For a thorough treatment, see Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1058 (2015) (describing how some organizations use information obtained from litigation to adjust behavior going forward).

[5] This idea is derived from the work of Judith Butler, who argued that the performance of gender roles reinforces gender stereotypes and power relations. JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990). She recognized that repeated performances can also change the thing being performed, and thus the meaning of these actions is not necessarily stable. *Id.* I use the idea of performance in an optimistic sense in this Article—as a way to reinforce ideals through acting them out.

[6] MILNER S. BALL, THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS 62 (1981).

[7] Civil rights litigation in this context can be seen as the core case for litigation as a representation reinforcing mechanism, consistent with the view of some theorists concerned with judicial review. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (articulating the representation reinforcing theory of judicial review). The distinction between public-oriented litigation such as constitutional tort suits under 42 U.S.C. § 1983 and traditionally private law litigation is unstable, and it is hard to say why it would be that the right to be free of injury by police is so different from the right to be free of injury by fellow citizens that one type of claim would be privileged over the other in a theory of litigation.

arguments about their case, and forcing information that can be used by policy makers or institutions outside the court to regulate primary behavior. In sum, it is not only the decision in the case that promotes the rule of law in a democracy (although that is important) but also the process that individuals and groups engage in to get there.[8] Litigation is often conflated with dispute resolution and law declaration (or adjudication), but it has its own independent contribution to make to the American system of government.

This Article proceeds in three Parts. Part I considers three preliminary issues: the definition of democracy; the question of comparative institutionalism; and the fact that litigation, in addition to having benefits, also has costs which must be recognized at the outset. Part II describes five contributions which litigation makes to self-government: recognition, production of reasoned arguments, transparency, enforcement of the law, and direct participation in adjudication through jury service. Part III describes some challenges to the ability of this process to allow individuals to perform self-government, including recent judicial decisions that evidence a failure to understand litigation as a social good, and briefly considers changes that might be spurred by understanding litigation as it is presented here: a process that allows participants to perform democracy.

I. PRELIMINARY CONSIDERATIONS

Three preliminary issues should be considered before embarking on the central argument. First, it is important to define what I mean by self-government in the context of this discussion. Second, are there

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[8] The most prominent process-based theory of adjudication is that proposed by Jerry Mashaw. *See* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985). Mashaw, for example, bases his theory of dignitary due process on the idea of respect for persons. *Id.* at 158–253. For a critique of process-based theories, see Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 509–10 (2003). Bone writes that

> [t]he reason we have a system of adjudication is to decide cases and produce good outcomes. The idea is not to provide people with a chance to participate or to give them another opportunity in their lives to exercise autonomous choice; there are plenty of other ways to do this.

Id. at 510. This Article is, in part, a response to this criticism and also, in part, an articulation of why it may be that such a process is good for its own sake without resort to sociological legitimacy. I do not address this question from a comparative institutional perspective, but I think that whether other institutions compete with the performative role of litigation cannot be answered unless we establish first whether litigation is one institution that *can* have such a role. Then we can be in a position to compare litigation to other institutions and determine if one is better at serving this goal than others exclusively, or whether their interaction promotes a normatively attractive vision of democratic society.

possibilities of performing democracy in the contexts of other institutional arrangements (that is, not in the courts)? Finally, what are the costs, as well as the benefits, of litigation?

A. Deliberative Democracy

What kind of democracy we actually have and what kind of democracy we ought to have in the United States are contested questions. There are a number of competing definitions of the American system of government used by legal scholars and political theorists, ranging from a democracy grounded in popular sovereignty to republicanism.[9] A thorough analysis of the various strands is beyond the scope of this Article. I begin with the idea that democracy is self-government, and that the contest is over which procedures and structures of government can be considered legitimate forms of self-government.[10]

Self-government can be consistent with a variety of procedural and institutional structures, even within a single polity. The various institutions in a democracy may be structured differently within a democratic whole and make diverse contributions to self-government.[11] The view of democracy espoused here is focused on the courts as an institution and draws on the theory of deliberative democracy. Deliberative democracy rests on the idea that in order for decisions to be politically legitimate they must be justified by "reasons that should be accepted by free and equal persons seeking fair terms of cooperation."[12] The courts have been a particularly attractive institution to

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[9] On popular sovereignty in the United States, see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (arguing that the founding generation saw constitutional interpretation as the province of the people, not limited to an elite group of judges); EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988) (describing the historical origins of the concept of popular sovereignty). On republican government, see GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992) (describing the transformation of American society in the revolutionary period to a republican form of government emphasizing ideas of virtue and egalitarianism); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988). On the difference between a democracy and a republic and the relationship of these concepts to the idea of self-government, see Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 758 (1994) (discussing the similarities between a republic and a democracy). For a general discussion of types of democracy, see Amy Gutmann, *Democracy*, *in* A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 411, 411–21 (Robert E. Goodin & Philip Pettit eds., 1993).

[10] Gutmann, *supra* note 9, at 411 (stating that "the root meaning of democracy is simple—rule by the people' . . . [but] the ideal of democracy is complex and contested, as are its justifications and practical implications").

[11] AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 3 (2004).

[12] *Id.* Gutmann and Thompson point out that even if some institutions must be non-deliberative, the decision to create them should be justified by a deliberative process. *Id.*; *see also* AMY GUTMANN & DENNIS

deliberative democrats because the courts are committed to reasoned argument in the decision-making process. Some theorists, for example, have focused on the idea of the judicial opinion as an articulation of public reason.[13] What I hope to show is that litigation allows people (not only judges) to engage in deliberative democratic governance by developing, expressing, and debating reasons, proofs, and outcomes.

It is often noted that some types of adjudication provide a process that allows individuals to trump majority rule and, as a result, adjudication is sometimes anti-majoritarian.[14] To the extent that majoritarianism is synonymous with democracy, this renders adjudication also anti-democratic. Sometimes the results of adjudication are in conflict with the decisions of democratically elected legislatures or executive action and there is a great deal of important scholarship on the relationship between the different branches of government when this occurs. In that scholarly literature, the focus has been on judicial review—that is, on the results of adjudication and the relationship of judicial decisions to decisions made in other branches of government, as well as the relationship of judicial decisions to the idea of majority rule.[15] It is possible that shifting the focus to the process of litigation, as distinct from adjudication, may shed some light on these debates because the litigation phase involves acts by individual citizens—sometimes against the democratic whole, sometimes against atomized fellow-citizens—but this question is not analyzed here. I only note that while litigation promotes democracy, it can also impede some forms of democratic rule, particularly majoritarian decisions in cases where individuals or groups seek to overturn legislative enactments.

B. Comparative Institutionalism

I recognize at the outset that other institutions could be created to serve the democratic functions discussed in this Article and, to some extent, existing

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THOMPSON, DEMOCRACY AND DISAGREEMENT 95–127 (1996); HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY (2002); Joshua Cohen, *An Epistemic Conception of Democracy*, 97 ETHICS 26 (1986).

[13] *See, e.g.*, GUTMANN & THOMPSON, *supra* note 12, at 45 ("Many constitutional democrats focus on the importance of extensive moral deliberation within one of our democratic institutions—the Supreme Court. They argue that judges cannot interpret constitutional principles without engaging in deliberation, not least for the purpose of constructing a coherent view out of the many moral values that our constitutional tradition expresses.").

[14] *See generally* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998) (tracing the history of the countermajoritarian difficulty, the tension between democratic process and judicial review, in three eras).

[15] *Id.* at 343.

institutions already do. Arbitration, mediation, and other alternative dispute resolution systems provide alternatives for resolving disputes outside the courthouse, and, theoretically, these mechanisms could be structured to promote recognition, reasoned argument, and transparency.[16] Agencies promulgate rules that have the force of statutory law and provide notice-and-comment procedures that allow people to influence the rulemaking process.[17] In so doing, they provide a type of deliberation and reasoned argument. Agencies also have processes of adjudication that could be more or less democracy promoting depending on their design.[18]

This, however, is not a comparative institutional account. The argument that litigation promotes democracy does not require proving that litigation is always better than any other institution. My goal here is to show that litigation is one way of performing democratic norms, not that it is the only way to do so. A comparative evaluation would be useful, but it must wait for another day.[19]

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[16] *See, e.g.*, Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231 (2011); Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 757 (1984). For arguments that alternative dispute resolution is not structured to achieve these goals see, for example, Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015), http://www.yalelawjournal.org/article/diffusing-disputes; Myriam E. Gilles, *The End of Doctrine: Private Arbitration, Public Law and the Anti-Lawsuit Movement* (Aug. 28, 2014) (Cardozo Legal Studies Research Paper, Working Paper No. 436, 2014), http://ssrn.com/abstract=2488575.

[17] Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 701–706 (2012); *see* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414 (2005) (presenting findings that lay comments to administrative rulemaking point to relevant concerns and sometimes have an effect on the revision of administrative rules).

[18] Some of Jerry Mashaw's work could be characterized as about this question. *See generally* JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983) (describing three models of administrative justice, providing examples of types of agencies that may use each of these models, and ultimately concluding that the dominant model for disability decision-making is the bureaucratic rationality model); JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985) (discussing the model of appropriateness and the model of competence, but arguing instead for a theory of dignitary due process based on respect). For critiques of the democratic potential of administrative agencies, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 439 (1998) (stating that the Administrative Procedure Act (APA) "'democratizes' (traditional hierarchical) agencies at the cost of substantially paralyzing them"); Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 451 (2015) (describing the APA as a source of political entrenchment).

[19] In addition, I do not much address adversarial litigation as against other forms that litigation might take under a more inquisitorial or managerial regime. For the purpose of this Article, I assume that the litigation regime is adversarial. Later in this Article, I briefly address some of the problems that arise from an adversarial regime in which participants have unequal resources. For a discussion of adversarialism and inquisitorial justice in American law, see Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005); *see also*

C. The Costs of Litigation

I argue that litigation promotes deliberative democracy, but this does not mean that litigation is an unalloyed social good. Litigation can be abused. It can be costly.[20] Time, effort, and funds spent on litigation in some cases might be more fruitfully invested in more productive pursuits.[21] Lawyers have been known to make litigation even more expensive and unpleasant than it needs to be to achieve any of the three goals articulated above: dispute resolution, law declaration, or performing democracy.

I do not address here whether and how these costs ought to be weighed against the benefits litigation produces.[22] What would weighing the benefits of litigation in dispute resolution, adjudication, and the process itself against the well-recognized, albeit unknown, costs of litigation mean? A cost–benefit analysis could mean, for example, that changes to the system meant to alleviate the problems of expense and abuse must be considered in light of how they promote (or impede) democratic values.[23] Reforms might be considered not only with respect to how well they assist in resolving disputes or enabling law declaration but also in light of how well they promote the democratic goals discussed in this Article. In service of the main argument, I do not belabor the

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David Marcus, *From "Cases" to "Litigation" to "Contract": A Comment on Stability in Civil Procedure*, 56 ST. LOUIS U. L.J. 1231 (2012) (describing the stability of the current procedural system and legitimacy concerns from privatization and contract-based procedure); Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 932 (2012) (linking non-adversarial dispute resolution and privatization of court functions).

[20] Unfortunately, there is little good empirical evidence of how much litigation actually costs. There are some indicia that trials are very costly and that this cost outweighs the likely return in some cases, as trials are diminishing in number. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 517–18 (2004). On the other hand, studies of discovery costs (based on lawyer surveys) indicate that the cost of discovery—often thought to be very high—is generally proportional to the value of the case. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 28, 43 (2009).

[21] The lawsuit between Apple and Samsung over a patent dispute apparently cost a total of approximately one billion dollars, which is the rough equivalent of two weeks of iPhone sales. Dimitra Kessenides, *When Apple and Samsung Fight, The Lawyers Win*, BLOOMBERG (Dec. 9, 2013), http://www.bloomberg.com/bw/articles/2013-12-09/apple-samsung-patent-wars-mean-millions-for-lawyers. As Professor Mark Lemley of Stanford Law School told a journalist, "[I]t's not clear what good it does society to have them spend a billion dollars suing each other." *Id.*; *see also* Kurt Eichenwald, *The Great Smartphone War*, VANITY FAIR (May 31, 2014, 8:00 PM), http://www.vanityfair.com/news/business/2014/06/apple-samsung-smartphone-patent-war (describing the costs of this litigation).

[22] For an argument that the amount of process due should not be weighed as part of a cost–benefit analysis, see RONALD DWORKIN, A MATTER OF PRINCIPLE 72–103 (1985).

[23] *See also id.* (discussing the relationship between due process and cost–benefit analysis).

importance of costs, nor do I discuss how to weigh their relative import, so I underscore at the outset that costs are important and need to be considered in any policy discussion about specific procedural choices. It is also important to note that the question of how to do a cost–benefit analysis is complicated by the fact that the trade-offs in litigation do not always involve weighing costs and benefits. Sometimes, different and important values that are beneficial to litigants—such as speed of resolution and transparency, for example—may need to be traded off against one another. Another way of thinking about this is that the categories of cost and benefit are unstable.[24]

For some, the question of how to trade off between values in concrete situations may be the most important. On a policy level, it is no doubt true that to determine the desirability of any particular procedural reform, if costs are to be taken into account, there must be some balance struck and trade-off made between competing important values. At the same time, the argument here is in favor of there being another side of the ledger, that process has a value that should be considered in the calculus. Establishing that value is the purpose of this Article. This point is not self-evident today, at least to some crucial decision-makers in the legal system.

The fact that dispute resolution has become the near-exclusive value of litigation is illustrated by a case recently argued before the Supreme Court. In the October 2015 Term, the Supreme Court heard *Campbell-Ewald Co. v. Gomez*, in which a defendant corporation claimed it had made a full offer of settlement to an individual plaintiff.[25] The plaintiff had filed a lawsuit that he hoped to certify as a class action.[26] At the time the offer was made, the lawsuit had not been so certified—class certification is a long and intensive process because it requires proving each element of the class action rule.[27] As a result, the plaintiff did not yet formally represent a class. He rejected the offer of an individual settlement presumably because he wanted to pursue his lawsuit as a class action.[28] The defendant argued that the case was mooted by the

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[24] *See, e.g.*, A.A.S. Zuckerman, *Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments*, 14 OXFORD J. LEGAL STUD. 353 (1994).

[25] 136 S. Ct. 663, 667–68 (2016).

[26] *Id.* at 667.

[27] *Id.* at 667–68.

[28] *See id.* at 668. It is a generally recognized principle of contract law that an offer requires an acceptance in order to form a contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. LAW. INST. 1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."). One rationale for this principle is individual autonomy. But, of course, we do not let autonomy trump all other considerations. The question could have been whether a court can create a contract

settlement offer. Because the defendant had offered the plaintiff everything he asked for there was no longer an adversarial dispute for a court to decide.[29] In most cases, a rational plaintiff who is offered the full amount he requests in a lawsuit will settle. But is it unacceptable as a matter of law for a plaintiff who has been wronged to demand that he be permitted to pursue his suit, even if the opposing side has offered full compensation?[30] This was the question before the Court.

At oral argument, Chief Justice Roberts got to the core of the matter for understanding the dominance of the dispute resolution model of litigation:

> [T]here's another interest here, which is the—the court's interest. You're being given everything you want. . . . And yet you say, nonetheless, we're entitled to enlist the court and the court's time. And not only that, under Article III, we're entitled to get a legal ruling, even though there's no—there's nothing more that they can give you.[31]

In *Campbell-Ewald*, at stake was something more than what the plaintiff was offered because the offer did not include relief for a class of persons. But even if that were not the case, the Chief Justice's question assumes that the only purpose of litigation is to resolve disputes—and it is hard to argue with the general proposition that being offered complete relief should resolve a dispute. In a similar vein, Justice Breyer added, "Fine. Give him judgment on the

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out of an offer of settlement that the plaintiff had (in the court's view, irrationally) rejected, or whether this was a violation of plaintiff's autonomy to decide for himself. In other words, does the court's interest in efficiency trump plaintiff's autonomy interest in such a case? There is a dispute in the case about whether or not the defendant in fact offered plaintiff all he demanded, but, even assuming that the offer was complete, there is still a problem. *See Campbell-Ewald*, 136 S. Ct. at 670. The problem in *Campbell-Ewald* was that no court had acted; the defendant wanted an offer, without more, to moot the suit. *See id.* at 672; *see also id.* at 676 (Thomas, J., concurring). The plaintiff argued that even if he had been offered everything he asked for, this would not render the case moot; instead the court would need to enter a judgment on defendant's defense that he had made the plaintiff whole. *See* Transcript of Oral Argument at 4, 34–37, 41, *Campbell-Ewald*, 136 S. Ct. 663 (No. 14-857). In other words, the plaintiff argued that complete relief involves vindication—that is, a judgment from a court in his favor, and that the plaintiff is entitled to insist on this. *See id.* at 41. Perhaps the plaintiff was interested in pursuing a suit, but it is widely recognized by scholars that class action litigation is often driven by lawyers rather than class representatives (although there is no quantitative empirical evidence proving the truth of the matter). *See* Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1947–53 (2011) (discussing different views of the lawyer–client relationship in the class action context).

[29] *Campbell-Ewald Co.*, 136 S. Ct. at 668.

[30] *Id.* at 666.

[31] Transcript of Oral Argument, *supra* note 28, at 35–36. Justice Breyer pursued a similar line of questioning, asking if the defendant went to the court with full monetary relief, could the court enter a judgment ending the litigation. *Id.* at 48.

merits. Who cares?"[32] The lawyer for the respondent had difficulty explaining the reason that a judgment was superior to a settlement.

For some, the process of litigation is about more than dispute resolution—it is also about recognition from a government official. A settlement ordinarily cannot achieve this goal.[33] Furthermore, it is sometimes the case that individuals ought to be able to call their wrongdoer to account, not only to obtain payment but also to reveal a bigger history of misconduct and to have an impact on persons outside the litigation. These interests are not captured by the dispute-resolution rationale for litigation, nor are they completely captured by the law-declaration rational. Yet, they are important interests that provide societal benefits. The remainder of this Article attempts to explain why.

II. SOME CONTRIBUTIONS OF LITIGATION TO DEMOCRACY

The main argument this Article advances is that litigation is a process through which individuals in the polity perform self-government. This is done in five ways. First, litigation allows individuals, even the most downtrodden, to obtain recognition from a governmental officer (a judge) of their claims. Second, litigation promotes the production of reasoned arguments about legal questions and presentation of proofs in public, subject to cross-examination and debate. Third, litigation promotes transparency by forcing the information required to develop proofs and arguments to be revealed. Fourth, litigation aids in the enforcement of the law in two ways: by requiring wrongdoers to answer for their conduct to the tribunal and by revealing information that is used by other actors to enforce or change existing regulatory regimes. Fifth, litigation enables citizens to serve as adjudicators on juries. Each of these functions of the litigation process is limited in various ways, some of recent vintage, others longstanding. Those limitations and their sources are also addressed in this Part.

A. Recognition

Litigation provides participants with an official form of governmental recognition. Even if a party loses his case, the fact that he can assert his claim and require both a government official and the person who has wronged him to

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[32] *Id.* at 49.

[33] Except possibly in the rare instance where a settlement is approved by the court. *See* FED. R. CIV. P. 23(e) (requiring court approval of class action settlements).

respond is a significant form of recognition of his dignity.[34] To make a legal claim is to participate in a performance that has direct legal consequences. As Joel Feinberg explains, "The legal power to claim (performatively) one's right . . . seems to be essential to the very notion of a right. A right to which one could not make [a] claim (i.e. not even for recognition) would be a very 'imperfect' right indeed!"[35] The idea of recognition can be linked to liberal ideas of individualism; an individual comes before the court to have his claim to a right recognized. At the same time, the idea of recognition can also be linked to group rights and a more communitarian ethos, as it has been by political theorists who investigate the idea of recognition of groups as part of a larger conversation about identity politics.[36]

In the political sphere, the idea of recognition involves those with power and authority recognizing the autonomy and dignity of individuals or groups. Hannah Arendt, observing the masses of stateless and displaced people after the Second World War, argued that only one right precedes all other rights and is beyond the creation of the specific political community; she termed this right the "right to have rights."[37] The right to have rights is the ability to assert that one is entitled to respect as a moral agent with certain rights and obligations that accompany that status, a foundational form of recognition from the state.[38] Other philosophers have pointed to similar normative underpinnings. For example, Frank Michelman has argued that due process has associational aims, including the relational aims of revelation and participation. Michelman argues that some procedures "attach value to the individual's *being told why* the agent

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[34] *See* Joel Feinberg, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 243, 257 (1970); *see also* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005).

[35] Feinberg, *supra* note 34, at 251. Feinberg also notes that it is not enough to have rights, one must also know that one has rights but is not always obligated to exercise them. *See id.* at 250–51.

[36] Theorists such as Axel Honneth and Nancy Fraser have developed the idea that recognition is a crucial requirement for human flourishing, although they disagree on the finer points. For example, Honneth adopts a psychological idea of the need for recognition that is largely subjective whereas Fraser argues for a normative view of recognition that does not depend on the subjective psychological experience of the individual or group. NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL–PHILOSOPHICAL EXCHANGE (Joel Golb, James Ingram & Christiane Wikle trans.,Verso 2003) (2003); Mattias Iser, *Recognition*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2013), http://plato.stanford.edu/entries/recognition/; SIMON THOMPSON, THE POLITICAL THEORY OF RECOGNITION: A CRITICAL INTRODUCTION 135–43 (2006) (comparing the theories of Honneth and Fraser); *see also* Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Amy Gutmann ed., 1994).

[37] *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 294 (1951).

[38] *Id.*

is treating him unfavorably and to his *having a part in the decision*."[39] T.M. Scanlon has explained that "[t]he idea of a right to due process . . . involves the recognition of those subject to authority as entitled to demand justification for its uses and entitled to protection against its unjustified use but not necessarily as entitled to share in the making of decisions affecting them."[40] Ronald Dworkin emphasized the idea of equal concern and respect, which is a form of recognition to which each litigant is entitled.[41] Stephen Darwall, in his argument rooting moral obligation in interpersonal relationships, also focuses on the recognition of others as a core principle (albeit not in a legal sense).[42]

In his earlier work, Darwall helpfully (for our purposes) distinguishes between two forms of respect: "recognition respect," which is the idea that a person as such is deserving of consideration, and "appraisal respect," which is the idea that one holds in high esteem the specific moral qualities of the other person.[43] A judge need not hold the litigant in appraisal respect—that is, in many cases one can imagine a litigant who has moral qualities the judge does not esteem—yet the judge must still display recognition respect for the litigant. As we shall see, this line can be somewhat difficult in practice.

In sum, the idea that humans are moral agents deserving of recognition, even if this principle is derived from slightly different places, is a constituent theme of a number of different approaches to political and moral philosophy, as well as philosophy of law.[44] This idea is put into practice when a litigant comes before the court and is given recognition respect by the judge.

Recognition respect ought to be a core requirement of due process because it is the foundation of other generally recognized due process rights: the right to a neutral adjudicator[45] and to be heard "at a meaningful time and in a

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[39] Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* 18 NOMOS: DUE PROCESS 126, 127 (J. Roland Pennock & John W. Chapman eds., 1977) (emphasis in original). "The formal perspective is that of the isolated individual interested in getting what is his, while the nonformal perspective is that of a group member interested in his relationships with fellow members of the group." *Id.* at 130–31. Michelman is skeptical of the courts' ability to meet these associational demands. *See id.* at 150. I will turn to his criticisms later in this Article.

[40] T.M. Scanlon, *Due Process*, *in* 18 NOMOS: DUE PROCESS, *supra* note 39, at 93, 97.

[41] *See* DWORKIN, *supra* note 22, at 84–85.

[42] STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY 5–8 (2006).

[43] Stephen L. Darwall, *Two Kinds of Respect*, 88 ETHICS 36, 38–39 (1977).

[44] *See* Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II*, 1974 DUKE L.J. 527, 532–35.

[45] *See* BALL, *supra* note 6, at 59 ("Courts may not always or even frequently do justice, but their theatrical quality does contribute to their potential for doing justice by encouraging disinterestedness in the

meaningful manner."[46] This is because a judge who refuses to recognize the litigant as a potential rights holder is more likely to treat him with contempt, affecting his neutrality or perceived neutrality, as we shall see in a moment. That judge is less likely to think the litigant deserving of a meaningful opportunity to participate and to listen with an open mind because of the litigant's contemptible status.

Some types of litigants are likely to garner a judge's appraisal respect because they are perceived as morally upright. For these litigants, one would expect that the minimum process due would be provided. It is those litigants who judges find unworthy of esteem but nevertheless ought to be treated with recognition respect, who pose a challenge to the enforcement of due process norms. One way of investigating the power of recognition is to look at the treatment of the least powerful in society; because they are disfavored, they provide an important measure of the courts' success in recognizing litigants even when they are not considered worthy of appraisal respect. As Justice Frank Murphy wrote in the 1945 case *Bridges v. Wixon*, "Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land."[47] In *Bridges*, the social stigma was an alleged association with the Communist Party. The following analysis will explore two categories of litigants who are disfavored today: prisoners and pro se litigants.[48]

William Stuntz observed that "constitutional law chiefly protects the suspects, not the prisoners. Politicians are freest to regulate where regulation is most likely to be one-sided and punitive."[49] The treatment of prisoner litigation provides a good example of existing challenges to the idea of recognition

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decision-makers. As actors, the judge and jury are asked to play parts in a government of laws and not of people. Fulfillment of the roles enables judgments that rise above prejudice and that, therefore, will more likely be just."); *see also* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986) (arguing that the core of due process is adjudicatory independence).

[46] Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

[47] 326 U.S. 135, 166 (1945) (Murphy, J., concurring).

[48] *See* Richardson v. Ramirez, 418 U.S. 24 (1974) (upholding felon disenfranchisement laws); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147 (2004). *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012) (describing the systematic incarceration of black people in the United States).

[49] William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 783 (2006).

respect because prisoner litigation brings into conflict the "day in court"[50] ideal and the reality of the overburdened federal court system challenged by disfavored litigants bringing claims with sometimes low levels of merit, legal sophistication, or both.[51]

The set of cases in which the Supreme Court recognized the importance of providing prisoners access to the federal courts provides an example of recognition in action.[52] Nevertheless, often in these cases the Court will give with one hand (recognition) and take with another (a loss on the merits). In *Ex parte Hull*, for example, a prisoner who had been convicted of sexual assault multiple times wanted to file a writ of habeas corpus.[53] The prison officials refused to allow him to file on the grounds that any court filings must first be approved by the parole board; they confiscated his legal papers and only as a result of his father smuggling them out of the prison was Hull able to file his petition.[54] The Supreme Court held that the state could not impair Hull's access to the writ of habeas corpus, but it denied his petition on the merits.[55] In so doing, the Court affirmed the principle of recognition even for society's most despised outcasts. On the same principle, in 1992 the Supreme Court decided in *McCarthy v. Madigan* that a federal prisoner need not exhaust administrative remedies before bringing a case for money damages alleging denial of medical care.[56] In that case, echoing Arendt's concept of the right to have rights, Justice Blackmun wrote, "Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his

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[50] Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008) (discussing the "deep-rooted historic tradition that everyone should have his own day in court"). For an incisive critical discussion, see Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992).

[51] For critical discussions of prison-litigation growth rates (and the relationship between those rates and the incarceration rate), see Brian J. Ostrom, Roger A. Hanson & Fred L. Cheesman II, *Congress, Courts and Corrections: An Empirical Perspective on the Prison Litigation Reform Act*, 78 NOTRE DAME L. REV. 1525, 1531 (2003); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 939–64 (1984); Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015); Marissa C.M. Doran, Note, *Lawsuits as Information: Prisons, Courts, and a Troika Model of Petition Harms*, 122 YALE L.J. 1024, 1088 (2013). For a different point of view, see Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 527 (1996) (supporting the Prison Litigation Reform Act (PLRA) and stating that "[t]he challenge for courts is to avoid letting the large number of frivolous complaints and appeals impair their conscientious consideration of the few meritorious cases that are filed").

[52] *See, e.g.*, McCarthy v. Madigan, 503 U.S. 140 (1992), *superseded by statute*, 42 U.S.C. § 1997e; Bounds v. Smith, 430 U.S. 817 (1977), *overruled in part by* Lewis v. Casey, 518 U.S. 343 (1996); *Ex parte* Hull, 312 U.S. 546 (1941).

[53] 312 U.S. at 547.

[54] *Id.*

[55] *Id.* at 547, 549, 551.

[56] 503 U.S. at 149.

remaining most 'fundamental political right, because preservative of all rights.'"[57]

This principle is now under severe strain. The ruling in *McCarthy* was replaced by the 1996 Prisoner Litigation Reform Act, which limited prisoners' access to the court system in a variety of ways, including by requiring that prisoners exhaust administrative remedies.[58] When the exhaustion requirement came before the Supreme Court in a case where the prisoner needed to file within fifteen days in order to comply with administrative requirements, the Court held that by failing to file he had not exhausted his administrative remedies and had lost his right to sue.[59] Justice Stevens, dissenting in that case because the prisoner only had a few days to file his administrative grievance, began his opinion this way:

> The citizen's right to access an impartial tribunal to seek redress for official grievances is so fundamental and so well established that it is sometimes taken for granted. A state statute that purported to impose a 15-day period of limitations on the right of a discrete class of litigants to sue a state official for violation of a federal right would obviously be unenforceable in federal court.[60]

The Court held that such a statute of limitations could be imposed by prison grievance procedures to reduce prisoner suits.[61] The exhaustion requirement makes no distinction as between meritorious and meritless lawsuits, and it is unlikely that such a short period would serve as an accurate screen for merit.[62]

The right of access to assert claims is fundamental because giving persons access to a neutral adjudicator recognizes the person bringing suit as worthy of being a rights-holder, that he may make a claim. This is true even if, in the end, the claim is found to be wanting. The Court's (and Congress's) treatment of prisoners sends the opposite message—that this discrete class of disfavored litigants is unworthy of being rights-holders. That message is inconsistent with the idea that due process of law is a fundamental requirement for all persons; due process ought not be limited to those worthy of appraisal respect.

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57 *Id.* at 153 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

58 42 U.S.C. § 1997e (2012) (imposing an exhaustion requirement).

59 *See* Woodford v. Ngo, 548 U.S. 81, 83, 84, 86–87 (2006) (recognizing the exhaustion requirement).

60 *Id.* at 104.

61 *Id.* at 83–84.

62 *Id.* at 93–94 (describing the PLRA as intending to "reduce the quantity and improve the quality of prisoner suits").

The case of *Turner v. Rogers*[63] illustrates the import of recognition in the civil litigation context beyond prisoners and the dangers when courts deviate from this basic requirement. In that case a man named Michael Turner owed Rebecca Price child support for their daughter.[64] There does not seem to have been a question that Mr. Turner owed the money, but he claimed that he could not pay it because he was out of work.[65] The law in South Carolina required parents to pay child support on penalty of contempt.[66] If the parent was financially unable to pay, however, he could not be held in contempt and jailed.[67] As a result, the court was required to make an inquiry into the parent's financial situation.[68] The judge was supposed to fill out a form indicating whether Mr. Turner was employed or had the ability to pay—that is, the judge was required to check a box.[69] At his hearing, Turner tried to explain that he was unable to pay because he was out of work and had no assets or other source of income.[70] The judge did not inquire at that hearing about Mr. Turner's ability to pay, nor did he make any explicit findings on this question.[71] He did not even fill out the relevant parts of the required form.[72] Instead, he sentenced Mr. Turner to a year in prison for contempt, holding that if he paid his child support in full he could be released.[73]

When the case came before the Supreme Court, it was framed as a question about whether persons who face loss of liberty in contempt proceedings are entitled to state-appointed legal counsel. The argument was that to effectuate his rights, Mr. Turner needed a lawyer. In other words, the case was brought as an attempt to extend the ruling of *Gideon v. Wainwright*[74] to civil contempt proceedings and was part of a larger movement to establish a kind of civil *Gideon*.[75] Surely that is one thing *Turner v. Rogers* could be about. But it is

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63 131 S. Ct. 2507 (2011).
64 *Id.* at 2513.
65 *Id.*
66 *Id.* at 2512.
67 *Id.*
68 *Id.* at 2513.
69 *Id.* at 2512–13.
70 *Id.* at 2513.
71 *Id.*
72 *Id.*
73 *Id.*
74 *See* 372 U.S. 335, 339–40 (1963).
75 *See* DEBORAH RHODE, ACCESS TO JUSTICE 11–15 (2005); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 92–93 (2011); Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 506 (1998).

also a case about judicial contempt for litigants and a failure of the type of basic recognition that we expect from a court system under a government of laws. Because the judge in *Turner* did not esteem the litigant before him, he failed to give him recognition respect as well.

Several things the judge did raise concern (whether or not Mr. Turner was represented by counsel) and indicate that the judge did not recognize Mr. Turner as a person deserving of a basic form of respect: the opportunity to make a claim or defense. For example, the judge did not consider Mr. Turner's attempts to present evidence that he was out of work and unable to pay for that reason. He made no findings of fact as to the legal standard applicable before a person can be held in contempt and jailed. The judge dismissed Mr. Turner's attempt to get credits for good behavior or work while he was imprisoned without explanation. In sum, the judge did not see Mr. Turner as worthy of being taken seriously or of being given recognition respect; he treated Mr. Turner with contempt.

This is not a new problem and perhaps it is the natural outgrowth of the judicial role in a legal system with scarce resources and many cases. *Lassiter v. Department of Social Services of Durham County*,[76] decided thirty years before *Turner*, is a similar story of judicial contempt for a litigant. That case involved the state's attempt to terminate parental rights of a mother who had been convicted of second degree murder.[77] The majority of the Court recognized that errors had been made in the proceeding, but found that even if she had had a lawyer, it would not have made a difference to the outcome of her case.[78] Although a murder conviction in North Carolina was not a basis for termination of rights, the majority included this fact in the second sentence of its opinion.[79] The three dissenting Justices saw what was really at stake: the difference between recognition respect and appraisal respect. Justice Blackmun explained,

> Petitioner plainly has not led the life of the exemplary citizen or model parent. . . . But the issue before the Court is not petitioner's character; it is whether she was given a meaningful opportunity to be

[76] 452 U.S. 18 (1981).

[77] *Id.* at 23–24.

[78] The "weight of the evidence that she had few sparks of such an interest was sufficiently great that the presence of counsel for Ms. Lassiter could not have made a determinative difference." *Id.* at 32–33.

[79] *Id.* at 20; *see also id.* at 57 n.26 ("But while some States retain statutes permitting parental rights to be terminated upon a parent's criminal conviction, North Carolina is not among them." (citing N.C. GEN. STAT. § 7A–289.32 (Supp. 1979))).

> heard when the State moved to terminate absolutely her parental rights.[80]

The judge in Ms. Lassiter's case became impatient with her inability to conduct a proper cross-examination and expressed open disbelief at her testimony.[81] At one point the judge responded to her testimony by saying, "I wish you wouldn't talk like that it scares me to be in the same room with you."[82] The majority ignored these expressions of contempt from the bench, focusing only on Ms. Lassiter's shortcomings without seeing the broader issue: the court system is dependent on judges showing litigants recognition respect even when they are not worthy of esteem.

Indeed, in 1909, the English writer G.K. Chesterton wrote,

> And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.
>
> Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop.[83]

To its credit, the Court in *Turner v. Rogers* did hold that, prior to a sentence of incarceration, a civil contemnor is entitled to an evidentiary finding that he can pay.[84] But it failed to see the significance of the fact that, in this case, there was no such finding. In fact, the prescription of the Court for curing the problem faced by individuals like Mr. Turner was for there to be a form that the judge would fill out. But there was exactly such a form in the case below and the judge failed to fill out a key component of this form; he failed to check the box stating whether or not Mr. Turner had the ability to pay. This demonstrates that the Court saw as an isolated incident what is more likely a systemic problem. Cases such as *Lassiter* support this view.

Why, the Court might have inquired, did the judge fail to fill out key sections of the required form in *Turner*? Why was the judge in *Lassiter* unable

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[80] *Id.* at 57 (Blackmun, J., dissenting).

[81] *Id.* at 54.

[82] *Id.* at 55 n.24.

[83] G. K. CHESTERTON, TREMENDOUS TRIFLES 85–86 (1929); *see also* ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 11 (2009) (quoting and discussing CHESTERSON, *supra*).

[84] *See* Turner v. Rodgers, 131 S. Ct. 2507, 2520 (2011).

to listen to Ms. Lassiter's arguments? These omissions represent a fundamental failure of due process of law, which ought to promise recognition by the court of the individual before it. What is disturbing about the Supreme Court's failure to understand and point out the significance of the judge's refusal to grant Mr. Turner and Ms. Lassiter recognition respect is that this type of judicial performance, repeated enough times, can make a category of people unworthy of legal recognition as a de facto matter, and thereby undermine the rule of law. With repetition, it becomes acceptable to treat categories of litigants with contempt; to deny them recognition; and to refuse to "hear the other side," that is, to refuse to engage in the most basic element of due process.[85] Because the root of democracy is respect for persons as participants in the polity, this kind of judicial contempt erodes democracy.

This observation raises the question of what is to be done to protect litigants when judges fail to show them recognition respect. The reason for seeking state-provided representation for indigent persons such as Mr. Turner or Ms. Lassiter is that the lawyer, presumably likely to be the recipient of both judicial recognition respect and appraisal respect, interposes himself between the judge and the litigant. Additionally, the lawyer, who is already part of the legal system, may also serve as a witness for that system, a witness whose presence moves the judge to behave (at least outwardly) in a more neutral fashion—to check the right box on the form, for example—because he is being watched. But there may be other ways to increase recognition respect in everyday interactions in the court system. For example, studies are currently underway to see how individuals fare when representing themselves with the assistance of information intermediaries.[86] Judicial education likely also has a role to play in increasing judges' capacities to recognize litigants, even those who are unworthy of esteem in their eyes but nonetheless entitled to recognition.

Consider, in light of the preceding discussion, the case of *Campbell-Ewald Co. v. Gomez*.[87] One reason for a court to hold that an offer of settlement is not

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[85] *See* Caritativo v. California, 357 U.S. 549, 558 (1958) (Frankfurter, J., dissenting) ("*Audi alteram partem*—hear the other side!—a demand made insistently through the centuries, is now a command, spoken with the voice of the Due Process Clause of the Fourteenth Amendment, against state governments, and every branch of them—executive, legislative, and judicial, whenever any individual, however lowly and unfortunate, asserts a legal claim."); *see also* David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 1984–85 (2008) (analyzing the work of Stuart Hampshire on the requirement of hearing the other side).

[86] *See, e.g.*, Dalié Jiménez et al., *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEO. J. ON POV. L. & POL'Y 449 (2013).

[87] *See supra* notes 25–32 and accompanying text (introducing *Campbell-Ewald*).

sufficient to resolve a case is that such an offer does not achieve the goal of recognition from the court that the plaintiff had a legal claim which a judgment would provide. Another is that this legal claim does not only concern Mr. Gomez, but is brought on behalf of many others in the form of a class action. Neither in oral argument nor in the final opinion did the Court focus on and recognize any duty that Mr. Gomez might have to other class members once he had purported to be their representative when offered money to settle his own claim at the cost of abandoning theirs.[88]

B. Exchange of Proofs and Reasoned Argument

Litigants must provide the judge with proofs and arguments in support of their position. This process requires litigants to produce reasoned arguments, as the two sides present their evidence and justifications to the court; it is a form of democratic deliberation.[89] Such arguments benefit both the parties to the litigation and the public at large. It is no surprise, therefore, that deliberative democrats and other political theorists have focused on the courts as an example of deliberation and public reason.[90]

Lon Fuller explained that "[w]e demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting. This higher responsibility toward rationality is at once the strength *and the*

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[88] The class action rule provides that in order for a class action to be certified the class representative must be "adequate." FED. R. CIV. P. 23(a). Since adequacy is determined at the time of certification, the plaintiff's behavior prior to certification is used to determine adequacy. A representative who puts his own interests ahead of those of the class would be considered inadequate.

[89] *See, e.g.*, HANNAH ARENDT, THE HUMAN CONDITION 192–212 (1958) (discussing the role of democracy in fostering communication regarding issues that shape social life); GUTMANN & THOMPSON, *supra* note 12, at 45 ("Many constitutional democrats focus on the importance of extensive moral deliberation within one of our democratic institutions—the Supreme Court. They argue that judges cannot interpret constitutional principles without engaging in deliberation, not least for the purpose of constructing a coherent view out of the many moral values that our constitutional tradition expresses."). For further readings on deliberation and political life, see HUGH BAXTER, HABERMAS: THE DISCOURSE THEORY OF LAW AND DEMOCRACY (2011); HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY (2002); Cohen, *supra* note 12. For counter arguments focusing on judicial reasoning, see, for example, Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483 (2015); Maya Sen, *Courting Deliberation: An Essay on Deliberative Democracy in the American Judicial System*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303, 304 (2013) (arguing that "contributions both from social sciences and from doctrinal scholarship suggest that judges are strategic (and oftentimes political) actors, and that their 'deliberations' might be more similar to *quid pro quo* bargaining than to reasoned intellectual exchanges");

[90] *See, e.g.*, GUTMANN & THOMPSON, *supra* note 12, at 45; JOHN RAWLS, POLITICAL LIBERALISM 231–40 (1996) (discussing the Supreme Court as the exemplar of public reason).

weakness of adjudication as a form of social ordering."[91] Fuller focused on adjudicative *decision* (the judicial opinion, in other words), but he could have been describing the process that leads to that decision. Contrasting litigation with other social practices helps explain the point. In a contract, parties can negotiate or walk away; they may choose to give reasons for their positions that the other side can accept as legitimate in that process or not. Voting also does not require the voter to give a reason; quite the opposite, the voter votes alone and in secret. Politicians may give reasons for their positions in running for office, and there are political debates in which politicians give reasons in support of their policy proposals. But the voters themselves are not required to give reasons. By contrast, each litigant is required to present reasons for their position, and those reasons are tested against arguments from the other side. These arguments ought to be within the realm of arguments accepted as part of legal reasoning.[92]

A good example of litigation as a process of producing and testing reasons is marriage-equality litigation. In the case of *Perry v. Schwarzenegger*, attempting to invalidate Proposition 8 in California, the trial contributed to public understandings of the debate about marriage equality.[93] That trial publicized the existence of stable families headed by same-sex couples, contributing to a popular change in understanding about how a more inclusive right to marry that included same-sex couples could promote stable family life rather than erode it.[94] It tested the best arguments against permitting same-sex marriage. These same arguments had been articulated and parsed in litigation leading up to that trial, but it was at trial that the arguments had to withstand cross-examination. That process seems to have produced a new understanding of the force of those arguments. As David Boies, who tried the case for the plaintiffs, explained of opponents to marriage equality,

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[91] Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 367 (1978).

[92] That does not mean they must be recognized by all as good arguments or winnable ones. They might be, as Jack Balkin explains, "off the wall," but they are still in the same universe of discourse. Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/.

[93] This case eventually developed into *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). *See also* Perry v. Schwarzenegger, 704 F. Supp. 2d. 921 (N.D. Cal. 2010) (district court decision holding Proposition 8 unconstitutional).

[94] *See* Transcript of Oral Argument at 3101, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (2013) (No. C 09-2292-VRW). A lawyer for the opponents of Proposition 8 provided evidence that "[t]here's [sic] 37,000 children in same-sex families in California" and cited an expert opinion that children in same-sex families "are better off, perhaps, than in opposite-sex marriages." *Id.*

> When they come into court and they have to support those opinions and they have to defend those opinions under oath and cross-examination, those opinions just melt away. And that's what happened here. There simply wasn't any evidence.[95]

In his book about the *Perry* trial, Kenji Yoshino points out that in political discourse people can rely on misrepresentations, speculation, and hyperbole, but a trial is exacting and challenges such assertions.[96] The trial "forced an unusually direct, disciplined, and comprehensive confrontation between the opposing sides."[97] Although it is hard to say without more evidence whether the trial was truly a catalyst in changing public perceptions—and it is difficult to distinguish its effects from the myriad other social events that took place to shift the tide of public opinion and law—polls around the time of the trial indicate an increase in public acceptance of marriage equality.[98]

In addition to testing proofs and reasons, the process of litigation can also form information into narratives that help litigants and the public understand events.[99] The litigation over stop-and-frisk practices in New York City in *Floyd v. City of New York*, for example, catalyzed a public discussion about the propriety of those practices that went far beyond the courtroom.[100] Without the information produced in the lawsuit and the framing provided by the lawyers, that dialogue would not have received the same attention. The critical

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[95] KENJI YOSHINO, SPEAK NOW: MARRIAGE EQUALITY ON TRIAL 7–10 (2015).

[96] *Id.* at 8.

[97] *Id.* at 11.

[98] The trial was in 2010. At some point in 2010 or 2011, support exceeded opposition to same-sex marriage. *See* Nate Silver, *How Opinion on Same Sex Marriage Is Changing and What It Means*, N.Y. TIMES: FIVETHIRTYEIGHT (Mar. 26, 2013, 10:10 AM), http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/. The overall trend is increasing support for marriage equality, so that shift may not be a result of the trial itself but more a general zeitgeist to which the trial contributed. *Id.* For an analysis of the polls on this issue, see *id.*

[99] That narrative is not always neat or clear. For example, the trial of Ellen Pao's discrimination claim seems to have left two competing narratives on the table—that Ms. Pao was a victim of sex discrimination and that she was an under-performing employee. *See, e.g.*, Emily Bazelon, *What's Really at Stake in Ellen Pao's Kleiner Perkins Lawsuit*, N.Y. TIMES MAG. (Feb. 25, 2015), http://www.nytimes.com/2015/02/24/magazine/whats-really-at-stake-in-ellen-paos-kleiner-perkins-lawsuit.html. On the ability of trials to produce competing narratives more generally, see ROBERT P. BURNS, A THEORY OF THE TRIAL (1999) (a theoretical analysis); ROBERT A. FERGUSON, THE TRIAL IN AMERICAN LIFE (2007) (using case study examples of famous trials); *see also* Paul Schiff Berman, *An Observation and a Strange but True "Tale": What Might the Historical Trials of Animals Tell Us About the Transformative Potential of Law in American Culture?*, 52 HASTINGS L.J. 123, 144–45 (2000) (arguing that courts are "social institutions that construct narratives in the face of societal conflict, change, or trauma").

[100] For a summary of the competing narratives in the stop-and-frisk case, see Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

contribution of the trial was that the proofs and arguments were rigorously tested as witnesses were cross-examined and each side was forced to justify their arguments with both facts and legal analysis. The rigor of this process was reflected in the long and thorough opinion that the judge issued at the end of the case.[101]

The *Perry* and *Floyd* cases both culminated in trials, and traditionally the trial was the focus of narrative creation in litigation. But proofs, reasons, and narratives may also be produced by other pivotal moments in litigation. For example, motions to dismiss for failure to state a claim and summary judgment motions offer opportunities for litigants to argue about the relevant legal standard and sometimes even the application of facts to the law.[102] Even settlement can offer opportunities for the presentation of proofs and arguments in some cases. Although the traditional view is that settlement impedes the development of the law and the publication of narratives,[103] in some cases, such as class actions, a settlement can provide a moment of reckoning. For example, the litigation against the Swiss Banks brought by the heirs of Holocaust victims ultimately ended in a settlement.[104] A historical commission was created by twenty-four European countries in response to the restoration movement on behalf of Holocaust victims, of which the litigation was a key component.[105] The result of that commission's report was then used in the Swiss Banks litigation to determine how money should be allocated to victims and their descendants.[106] In response to another lawsuit against private companies who participated in slave labor, private corporations like Daimler Benz, Volkswagen, and Hugo Boss opened up their archives to a greater extent

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[101] *Id.* at 553–55. The liability and damages opinions are each nearly 100 pages long.

[102] These types of motions raise other issues, such as who should decide certain questions that combine facts and law. I address some of those issues, especially how they relate to summary judgment and the jury, in Alexandra D. Lahav, *The Jury and Participatory Democracy*, 55 WM. & MARY L. REV. 1029 (2014).

[103] *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).

[104] *See* MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 15–16 (2003).

[105] *Id.* at 6, 25–26, 49; Leora Bilsky, *The Judge and the Historian: Transnational Holocaust Litigation as a New Model*, 24 HIST. & MEMORY 117, 133 (2012).

[106] Bilsky, *supra* note 105, at 132–34; Leora Bilsky & Talia Fisher, *Rethinking Settlement*, 15 THEORETICAL INQUIRIES L. 77, 120 (2014); Leora Bilsky, *Transnational Holocaust Litigation*, 23 EUR. J. INT'L L. 349, 354–55 (2012). For a contrary perspective, see MICHAEL R. MARRUS, SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990S (2009). For a discussion of "law office history" as compared with the more nuanced narratives historians construct, see LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 195–97 (1996). Kalman describes the consternation of an historian whose work was used in a sex discrimination case to show that women did not want commissioned jobs; and, therefore, the employer was not liable for discrimination. *Id.* at 196–97.

than that required by law to prominent historians and hired them to write histories of these companies' involvement in atrocities.[107] The commissioning of these histories was driven by the threat of the litigation, by the promise of a settlement without a trial, and by the immunity from liability that the companies ultimately obtained.[108] Without the initial threat of liability and commencement of suit as part of the restitution movement, these companies' archives would likely have remained closed.

Although Fuller's statement that adjudication is a "device which gives formal and institutional expression to the influence of reasoned argument in human affairs"[109] is inspiring, there are nevertheless real concerns about the capacity of litigation to consistently produce reasons or even reasoned dialogue. Frank Michelman has pointed out that "whether [the] reasons supplied under threat of legal retribution can at all satisfy the internal need for revelation must be seriously doubted."[110] Forcing dialogue through formal procedures, he argued, is more likely to produce "aimless and perhaps destructive exactions of arid procedural performances."[111] As an empirical matter, it is not clear that this is always the case, although it is certainly a risk. The *Perry* case illustrates a very robust and engaged use of argument. Studies on the effect of formal attributes of legal proceedings show sometimes that they promote—and other times limit—the perception of legitimacy and satisfaction with the process.[112] Perceptions of legitimacy cannot be the sole basis for a normative argument in favor of process; they are contextual, dynamic, and potentially ephemeral. But when reasoning is perceived as arid or misunderstood by participants, this is a real problem for an argument favoring process based on reason.

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107 *See* BAZYLER, *supra* note 104, at 40, 57; Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 819–21 (2002); Emund L. Andrews, *Germany Accepts $5.1 Billion Accord to End Claims of Nazi Slave Workers*, N.Y. TIMES (Dec. 18, 1999), http://www.nytimes.com/1999/12/18/world/germany-accepts-5.1-billion-accord-to-end-claims-of-nazi-slave-workers.html.

108 *See* Neuborne, *supra* note 107, at 819–21.

109 Fuller, *supra* note 91, at 366.

110 Michelman, *supra* note 39, at 150.

111 *Id.*

112 For a study showing that litigants find proceedings more legitimate when formalities are followed, see Oscar G. Chase & Jonathan Thong, *Judging Judges: The Effect of Courtroom Ceremony on Participant Evaluation of Process Fairness-Related Factors*, 24 YALE J.L. & HUMAN. 221, 232–36 (2012). For a study showing the ways formal processes can limit the perception of justice and distance litigants, see PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998). For another perspective on the question, see BALL, *supra* note 6 (arguing that the formalism and theatricality of law contribute to its legitimacy by participants willingness to accept these rites).

Indeed, beyond the formal courtroom moments, in the many ordinary cases that settle, the only exchange of reasons may be between counsel for either side in settlement negotiations.[113] Furthermore, litigation is an adversarial process that depends on each side to present its arguments and proofs to best effect. But in a society where income and educational inequality mean that people do not have equal capacities to hire lawyers and invest in litigation, the adversarial system is likely to fail. Both lawyers and pro se litigants may be unable to provide good reasons or argue their points well because they are not sufficiently skilled or knowledgeable or do not invest the time in writing well-reasoned briefs.[114] This puts significant pressure on the judicial role.

Judges in an adversarial system are ordinarily charged with serving as a neutral arbiter, not involved in the development of one side or the other's case.[115] A recent decision by Judge Jack Weinstein illustrates this point.[116] To determine whether the plaintiff—who was appearing on his own behalf—had a case for discrimination, the judge asked him leading questions.[117] Judge Weinstein was able to determine that the plaintiff did have a claim as a result of his direct questioning, but he worried that his neutrality was compromised in the process of conducting this inquiry and therefore recused himself.[118] He wrote, "In many cases, *pro se* justice is an oxymoron. Without representation

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[113] Research demonstrates that judges are spending less and less time on the bench in the kind of formal interactions to which Michelman seems to be referring. *See, e.g.*, William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN ST. L. REV. 55, 89 (2013) [hereinafter Young & Singer, *Bench Presence*]; Jordan M. Singer & William G. Young, *Measuring Bench Presence: Federal District Judges in the Courtroom, 2008–2012*, 118 PENN ST. L. REV. 243, 258, 272–73 (2013) [hereinafter Singer & Young, *Measuring*] (describing data of the decline in courtroom hours and that there is no correlation between bench presence and speed of case resolution). For support of this view from judges, see, for example, Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849, 853 (2013); Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on Their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247, 263 (2009).

[114] For an example of how poor lawyering affects the development of the law, see Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs' Briefs, Its Impact on the Law, and the Market Failure It Reflects*, 63 EMORY L.J. 59 (2013); Scott A. Moss, *(In)competence in Appellate and District Court Brief Writing on Rule 12 and 56 Motions*, 57 N.Y. L. SCH. L. REV. 841 (2013). Judge Kravitz states that he does not hear oral argument from pro se litigants, and neither do the Sixth and Seventh Circuits. Kravitz, *supra* note 113, at 254, 269.

[115] *But see* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–77 (1982) (describing a shift in the judicial role from neutral to engaged or managerial).

[116] "If the plaintiff were to continue *pro se*, the court would probably be forced to intervene and, in effect, advocate on his behalf, possibly prejudicing the defendant's case." Floyd v. Cosi, Inc., 78 F. Supp. 3d 558, 561 (E.D.N.Y. 2015).

[117] *Id.*

[118] *Id.* at 561–62.

by counsel, it is probable, to some degree, that adequate justice cannot be served in this case."[119]

In sum, there are many reasons to think that in real life the run of human failings—such as ignorance, incompetence, laziness, and dishonesty—get in the way of the promise of the adjudicative process to produce and test proofs and reasons. One could take this observation in two ways. First, one could decide that although we often fall short of perfection, those failings should lead us to try harder, to produce reasons where they are currently missing, and to produce better reasons where they are currently poor. A second approach is to consider that human failings are part of why we require the production of reasons—that we must be skeptical about them and that the process of reasoned dialogue, while imperfect, nevertheless continues to exert its demands.[120] Either way, the fact that some people give poor reasons is not a basis for abandoning the process of reason-giving, or for making it even harder for litigants to give reasons.

c. Transparency

At least some measure of transparency is a social good, necessary not only for individual well-being but also for the successful functioning of a democratic society.[121] Litigation can bring to light vital information that would otherwise remain hidden through the process of civil discovery.[122] Litigation can reveal and draw attention to social or regulatory problems that might otherwise go unnoticed. It can help citizens police the government by forcing governmental entities to release information that would otherwise be kept secret and, in so doing, promotes individual liberty by placing an additional check on authority. On an individual level, a lawsuit can reveal information important to the litigants involved. For both individuals and the broader public, the process of litigation can combine the facts and the law to produce narratives and explanations of past events, frameworks for addressing hurtful events that are ongoing, and opportunities for healing as a result. Even when

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119 *Id.* at 561.

120 For an important analogous analysis focusing on how judges deal with legal indeterminacy and discussing the importance of the role of skepticism and disagreement in reason, see Christopher L. Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 YALE L.J. 997, 1003 (1994) (noting that "[t]he experience of moral conflict is a sign of maturity, an awareness of the complexity and depth of the values which claim our attention").

121 *See* Gillian K. Hadfield & Dan Ryan, *Democracy, Courts and the Information Order*, 54 EUR. J. SOC. 67 (2013).

122 *See* FED. R. CIV. P. 26–27.

these narratives are not fully satisfactory, as every story forecloses some other narrative path, they help participants come to terms with the past.[123]

For example, a 1993 outbreak of E. coli changed the way meat is regulated in the United States and much of the information that spurred new regulation was revealed through litigation. Prior to that outbreak, E. coli in meat was not regulated, nor did meat processors or many fast food restaurants take adequate care to prevent contamination.[124] As a result of contaminated and undercooked hamburger served at Jack in the Box restaurants in Washington state, four children died and many more were poisoned.[125] Initially, the company tried to settle these claims cheaply, offering to pay victim's medical expenses and small sums in exchange for releases.[126] If the company had succeeded in settling early and cheaply, it is not clear whether it would have made far-reaching changes. Instead lawsuits proceeded to discovery and it was revealed that the cause of the outbreak was undercooked meat—in some cases, meat was cooked on older grills which could not heat frozen patties to a safe temperature.[127] At least one employee had communicated to corporate headquarters that the meat was undercooked; her complaint was ignored because management was not sufficiently attuned to the risk of E. coli contamination.[128] Furthermore, the company had ignored local regulations requiring that hamburger meat be cooked to a higher temperature, instead attempting to comply only with federal regulations which mandated a lower temperature that did not kill the bacteria.[129] As a result of the high-profile litigation and the information obtained and publicized by the plaintiffs' lawyers, federal regulations now mandate higher temperatures and the restaurant chain overhauled its entire chain of distribution to minimize contamination.[130]

Litigation also allows citizens to police government and produces information that helps spur reforms. Studies show that some police

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[123] *But see* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40–44 (1983) (describing the jurispathic aspect of adjudication). The alternative nomos that Cover discusses can be part of the process of litigation (bringing claims) but not adjudication, where one interpretation forecloses others.

[124] JEFF BENEDICT, POISONED 80–81, 84, 86, 88–91 (2011).

[125] *Id.* at x.

[126] *Id.* at 113–16.

[127] *Id.* at 119–20, 160–61, 241–42, 245.

[128] *Id.* at 242.

[129] *Id.* at 88–89.

[130] *See* Wil S. Hylton, *A Bug in the System: Why Last Night's Chicken Made You Sick*, NEW YORKER, (Feb. 2, 2015), http://www.newyorker.com/magazine/2015/02/02/bug-system.

departments use information learned from lawsuits to change policies. For example, one study found that the Portland Police Department learned about a serious problem in one station by monitoring lawsuits. Officers on the night shift were repeatedly sued for excessive force because they hit prisoners on the head.[131] In response, the department invested in additional training and supervision in that station, and incident reports declined.[132]

Organizations respond differently to litigation, of course. Studies of employment discrimination law demonstrate that the apparent institutional incorporation of legal norms, such as policies against discrimination, can result in judicial deference to internal governance and allow policies that are merely window dressing to limit the kind of liability that would produce real reform.[133] Organizational responses to information gleaned from lawsuits range from symbolic policies to grudging acceptance to internalization and adoption of legal norms.[134]

The threat of litigation can also lead to the production of important information for future litigation and for policy making. In *Floyd v. City of New York*, the stop-and-frisk class action, for example, plaintiffs used reports routinely submitted by police officers documenting every stop to make the case that police disproportionately stopped minority residents.[135] These reports were required by the department, among other reasons, to "protect the officer and the Department from allegations of police misconduct which may sometimes arise from the proper performance of police duty."[136] In other words, the required reports were a preemptive gathering of information in preparation for litigation.

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[131] Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 854 (2012).

[132] *See id.* at 854 (describing police departments use of information from lawsuits to improve performance); *see also* CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 115–37 (2009) (demonstrating that the greater a police department's experience with litigation, the more the department is likely to take corrective action).

[133] *See* Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888, 894–95 (2011).

[134] *See* Jeb Barnes & Thomas F. Burke, *Making Way: Legal Mobilization, Organizational Response, and Wheelchair Access*, 46 LAW & SOC'Y REV. 167 (2012) (creating a study of a small sample of organizations showing the variety of organizational responses to Americans with Disabilities Act (ADA) litigation).

[135] The decision ruling that the stop-and-frisk practices were unconstitutional is *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

[136] CIVIL RIGHTS BUREAU, ATT'Y GEN. OF THE STATE OF N.Y., NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL 136 (1999), http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf.

Individuals and groups seek answers through litigation. In fact, once institutions understand this, they may implement reforms aimed at providing answers so that people do not need to sue to get information. For example, surveys of patients who brought medical malpractice suits found that many patients filed suit in order to find out why their injuries occurred.[137] Their decisions to file suit were the perverse result of doctors refusing to share information for fear of being sued. Once patients received information about what caused the medical injury, they often dropped their lawsuit.[138] Some hospitals responded by requiring disclosure of medical errors to patients. For example, one Michigan hospital instituted a policy under which it both disclosed information and provided compensation in cases where there was negligence, reducing the overall costs associated with medical malpractice claims in the process.[139] A study of 9/11 victims similarly found that they wanted answers from the legal process, not only compensation.[140]

Information in litigation is often revealed through the lawyer-driven process of civil discovery.[141] Information produced in this way is not necessarily publicly available and is ordinarily not filed with the court. Instead, information exchange is private and whether it is released to the public is dependent on the litigants' preferences, unless of course it is revealed in open court by being attached to a motion or at trial. It can be a serious problem from a democratic point of view when the information produced in discovery, which is useful for regulation or other types of public-oriented decision-making, is kept secret.

A recent case involving allegations of faulty (and dangerous) car parts illustrates the problem.[142] In the course of discovery, the parties agreed to a protective order with respect to the alleged defects.[143] The plaintiffs then

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137 *See* Kathleen M. Mazor, Steven R. Simon & Jerry H. Gurwitz, *Communicating with Patients About Medical Errors: A Review of the Literature*, 164 ARCHIVES INTERNAL MED. 1690 (2004); *see also* Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 721–28 (2007) (documenting plaintiffs' reasons for suing).

138 Mazor et al., *supra* note 137, at 1694.

139 Richard C. Boothman et al., *A Better Approach to Medical Malpractice Claims? The University of Michigan Experience*, J. HEALTH & LIFE SCI. L., Jan. 2009, at 125, 134–46; Allen Kachalia et al., *Liability Claims and Costs Before and After Implementation of a Medical Error Disclosure Program*, 153 ANNALS INTERNAL MED. 213 (2010).

140 Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC'Y REV. 645 (2008).

141 FED. R. CIV. P. 26–37.

142 Ctr. for Auto Safety v. Chrysler Grp., 809 F.3d 1092 (9th Cir. 2016).

143 *Id.* at 1095.

moved for a preliminary injunction, and attached to that motion documents (which were designated confidential) purporting to show that the faulty parts posed a danger to vehicle owners, and requesting an injunction to notify owners of the defect.[144] The Center for Auto Safety moved to intervene and obtain the sealed documents, but the district court held that because the preliminary injunction motion was not dispositive in the sense of ending the litigation, the documents need not be unsealed.[145] The reason for this was that although there is a strong presumption of publicity in court records, there is an exception for discovery appended to motions that do not go the merits of the case.[146] For motions that go to the merits, the party wanting confidentiality must prove a compelling need, but for non-dispositive motions, parties need only show good cause.[147] The Center for Auto Safety appealed the court's decision to keep the documents under seal.

The Ninth Circuit considered the question as one of whether a motion for a preliminary injunction is dispositive.[148] The majority held that it was, resting in part on the idea that a motion for a preliminary injunction includes the presentation of substantive evidence and, as a practical matter, may decide the case.[149] The dissent relied on a narrow interpretation of the term "dispositive" to mean motions that can end a case, and on the discovery rules, which give judges broad discretion to allow protective orders.[150] In the dissenting judge's view, only a narrow set of motions trigger the public interest in accountability and public confidence in the administration of justice (these policies form the basis of requiring a compelling interest standard, rather than the lower good cause standard, to keep information submitted to the court confidential).[151]

If the purpose of litigation is dispute resolution or law declaration, then limiting transparency to dispositive motions is a sensible approach. It assists in the resolution of disputes by allowing the parties to maintain confidences, and

144 *Id.* at 1095.

145 *Id.* at 1095–96. Ultimately, the plaintiffs lost the prelimnary injunction motion. *Id.* at 1096.

146 *Id.* at 1096.

147 *Id.* at 1095.

148 *Id.* at 1099, 1102.

149 *Id.* at 1099.

150 *Id.* at 1104–06 (Ikuta, J., dissenting).

151 *Id.* at 1096–97 (majority opinion) (describing policy reasons for compelling interest standard); *see also* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589 (1978). In that case the Supreme Court recognized that "[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Id.* at 597. At the same time, it also found that "[e]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Id.* at 598.

it furthers the public adjudicatory function by focusing on dispositive motions. But if the purpose of litigation is to produce other social goods, including forcing information to assist in decision-making, then the private interest in maintaining secrecy ought to be compelling before a court may enforce confidentiality. For example, trade secrets and embarrassing information may warrant protection under different theories of social welfare and both these interests, in the appropriate case, may be compelling. But evidence of faulty parts in automobiles would not meet this standard. The question ought to hinge on what is being hidden rather than on the instrumentality of suppression.

A similar problem arises in the context of confidential settlements. Stories of confidential settlements used to hide egregious, sometimes systemic, behavior periodically appear in the media. One prominent example is the Catholic Church's use of confidentiality provisions in settlements with alleged victims of sexual abuse.[152] By requiring individuals to sign confidentiality agreements in order to settle, the Church was able to hide the extent and systemic nature of the abuse. Another is the case of Firestone Tires. That company knew of the dangers of a product liability defect as early as 1996, but hid the fact by confidentially settling lawsuits.[153] In one case, the company even asked a lawyer to return all the evidence that had been turned over in discovery to preserve secrecy.[154] Ultimately, the dangers posed by the tires did become publicly known, but not until 2000.[155] The information was obtained in discovery and would have likely become public sooner had the company not obtained confidentiality agreements from litigants.

Some states prohibit confidentiality provisions in settlements where the underlying information implicates public safety.[156] Periodically, national

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[152] For a discussion, see TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE (2008). The story was revealed by the Boston Globe. Matt Carroll et al., *Church Allowed Abuse by Priest for Years*, BOS. GLOBE, (Jan. 6, 2002), https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTIrAT25qKGvBuDNM/story.html; *see also* Laurie Goodstein, *Albany Diocese Settled Abuse Case for Almost $1 Million*, N.Y. TIMES, June 27, 2002, at B1 ("As the sexual abuse scandal has escalated, many victims and lawyers have broken their confidentiality agreements. Father Doyle said that in this climate 'it's probably a good gamble' that there will be no repercussions.").

[153] Ashley Gauthier, *Secret Settlements*, NEWS MEDIA & L., Fall 2000, at 3.

[154] *Id.*

[155] *Id.*

[156] States have enacted sunshine litigation acts include Florida, FLA. STAT. § 69.081 (West 2004); Louisiana, LA. CODE CIV. PROC. ANN. art. 1426(c) (2005); South Carolina, S.C. R. CIV. P. 41.1; Washington, WASH. REV. CODE § 4.24.611(2) (West 2005); and Texas, TEX. R. CIV. P. 76a.

legislation has also been proposed.[157] At least one court has taken steps on its own: in a move that garnered national media attention, the District Court for the District of South Carolina voted to bar secret settlements.[158] Of course there are benefits to secret settlements, as well as costs, and much has been written about both.[159] Plaintiffs may obtain a higher recovery in exchange for secrecy, and defendants may be able to protect themselves from further liability. Furthermore, some scholars have suggested that if secret settlements are banned, cases implicating this type of information will settle before filing.[160] Some evidence shows that cases are often settled without all the information necessary to a fully informed decision; perhaps banning secret settlements will exacerbate this phenomenon.[161] These are important trade-offs that need to be considered in any policy discussion, but without underestimating the importance of the process of litigation for forcing information. The balance as it currently stands, which favors litigant autonomy in entering into secret settlements, privileges dispute resolution over transparency; the question is how dispute resolution can be balanced better with the social interest in transparency.

The baseline assumption of most of the rules governing settlement is that the purpose of litigation is to resolve disputes; and, therefore, conditions for the resolution of the dispute, so long as both parties freely agree, are not the court's concern. This approach should be reconsidered in light of the importance of the role civil discovery plays in regulatory decision-making by forcing information into the open. The idea that the process of litigation is information-forcing is part of the DNA of the Federal Rules of Civil Procedure as conceived by Charles Clark.[162] As Paul Carrington has explained,

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157 Editorial, *Secrecy That Kills*, N.Y. TIMES, June 1, 2014, at SR10 (describing a proposed federal law limiting secret settlements in light of the GM case).

158 *See* D.S.C. LOCAL R. 5.03(E) (prohibiting sealed settlements); Adam Liptak, *Judges Seek to Ban Secret Settlements in South Carolina*, N.Y. TIMES (Sept. 2, 2002), http://www.nytimes.com/2002/09/02/us/judges-seek-to-ban-secret-settlements-in-south-carolina.html.

159 *See* Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867 (2007) (showing the effects of secret settlements are different on different types of cases). For a different perspective focusing not on incentives but on normative implications, see Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481 (2008); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2650 (1995).

160 For a discussion, see Moss, *supra* note 159.

161 Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 811.

162 *See also* Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 35 (1994) ("Clark marveled at how the new procedure would permit litigators to enter the New Deal and to amass the information relevant to policymakers.").

> We should keep clearly in mind that discovery is the American alternative to the administrative state. . . . Every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accompanied by serious risk of exposure at the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct.[163]

Note that Carrington's focus is not on outcomes of litigation but on the process of discovery as contributing to the administrative state's collection of information. There is a great deal of empirical work to be done on the extent to which litigation in fact produces such useful information in the run of cases. I have described case studies because there are no such large-scale quantitative analyses. These cases indicate that information produced in litigation can be very important to regulators, consumers, and individuals who are in harm's way.

D. Enforcement of the Law

In the enforcement of the law the concepts of dispute resolution, adjudication, and performance of self-government overlap. Enforcement of the law can be usefully split up into two constituent parts: answerability and accountability.

Answerability is the capacity of individuals or institutions to call others who they believe have wronged them to account.[164] The fact that litigation permits individuals or institutions to call others to account for their conduct is intertwined with both recognition and reason-giving. The demand for an answer is a demand for recognition, although not from a governmental officer but instead from the other side—be it an organization, the government, or one's neighbor.

The second part of enforcement is accountability—that is, that the tribunal determines the extent of the wrongdoing and metes out a penalty for it. This can be achieved through dispute resolution outside the courts, such as settlement, under threat of litigation, or through adjudication itself. For the

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163 Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997).

164 On answerability, see Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 101 (2010). I am also grateful to Scott Shapiro for this insight.

most part, accountability is a function of the two rationales for litigation discussed at the start of this Article. Dispute resolution, including settlement, results in wrongdoers paying for their misconduct, and this is thought to both compensate the wronged and to deter future misconduct. Law declaration provides guidance about the requirements of the law even to those who have not directly participated in a lawsuit about the specific subject matter being regulated. Process has a role to play in producing accountability through the production of information, as we saw in the previous section.

E. Jury Service

A final way in which litigation promotes self-government is by involving citizens in the process of adjudication itself through the civil jury. By sitting in judgment of other citizens and participating directly in the judicial branch, the jury performs self-government. As Justice Kennedy explained in *Powers v. Ohio*, quoting Alexis de Tocqueville, "[T]he institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society."[165] The jury also serves as a witness to what happens in the judicial system, and through the act of witnessing the process of adjudication the jury both curbs judicial excess and educates citizens about the positive and negative aspects of the court system.

The Supreme Court considered the role of jury service and jury selection in civil cases in the case of *Edmonson v. Leesville Concrete Co.*[166] That case was an ordinary one for a jury to decide: an employee sued his employer claiming that "a Leesville employee permitted one of the company's trucks to roll backward and pin him against some construction equipment."[167] The employer used two peremptory challenges to remove potential jurors who were black, and Edmonson challenged the removal of these jurors.[168] The question for the Court was whether jurors could be excluded from *civil* litigation on the basis of race, or in other words, whether *Batson v. Kentucky*[169] applied to civil cases.[170]

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165 499 U.S. 400, 407 (1991) (alterations in original) (quoting 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Shocken Press 1961)); *see also* Blakely v. Washington, 542 U.S. 296, 306 (2004) ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.")

166 500 U.S. 614, 616 (1991).

167 *Id.*

168 *Id.*

169 476 U.S. 79 (1986).

170 *Edmonson*, 500 U.S. at 617.

The question hinged on the civil–criminal divide and the public–private distinction: in criminal cases, the state is acting against the defendant, whereas in civil cases involving two private parties the situation might be described as somewhat different. The dissent distinguished between public governmental action in the criminal context and the behavior of private lawyers in the civil context, but the majority rejected this reasoning.[171] Justice Kennedy, writing for the Court, explained that in civil cases, just as much as criminal, the jury performs an important function. "A civil proceeding," the Court explained "often implicates significant rights and interests," and their verdicts "no less than those of their criminal counterparts, become binding judgments of the court."[172] The Court went on to consider the relationship between rationality in the court system, racial prejudice, and the jury: "By the dispassionate analysis which is its special distinction, the law dispels fears and preconceptions respecting racial attitudes. The quiet rationality of the courtroom makes it an appropriate place to confront race-based fears or hostility by means other than the use of offensive stereotypes."[173] Exclusion harms not only the judicial system, but also the juror who is required to be subjected to racially discriminatory challenges in the courtroom.[174] The *Edmonson* case is in the tradition of the cases finally including women and African Americans in the civil right to perform jury service.[175]

Although the jury involves citizens in the adjudicative process in a very important way, the fact that jury deliberations are in a black box seems to contradict the idea that the litigation process promotes public deliberation. This is something of a problem for the proposition that the jury promotes democratic values, because an important part of the idea of deliberative democracy is the publication of reasons for decisions.[176] Although the jury's deliberations are only made public if the jurors choose to reveal them, in a jury trial there is still a public process through the litigants' presentations of reasoned argument and proof to the jury, and the jurors themselves are privy to

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171 *Id.* at 632 (O'Connor, J., dissenting).

172 *Id.* at 630 (majority opinion).

173 *Id.* at 631.

174 *Id.* at 628; J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 142 (1994). A peremptory challenge based on gender "denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation." *Id.*

175 *J.E.B.*, 511 U.S. at 131 (noting that for the most part "until the 20th century, women were completely excluded from jury service"); Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (holding that exclusion of African Americans from jury service violated the Fourteenth Amendement but stating that the exclusion of women from jury service is permissible).

176 *See supra* Part II.B.

their own deliberations. The process of presenting competing proofs and arguments at trial, and challenging these arguments, produces a public good. The requirement that lawyers present arguments and proofs to a lay jury rather than a judge changes that presentation, presumably making it more accessible to the public at large than it would otherwise be.

Perhaps the role of jury deliberation itself is to educate and empower individual citizens so that they are not alienated from the court system. In this understanding, the institution of the civil jury is more a means of involving citizens and a protection against bias and corruption than a public moment of dialogue between jurors.[177] Unlike clerks, bailiffs, judges, and lawyers, juries do not answer to judges, nor do their futures depend on being in the judge's good graces. The disapproval of the citizenry may spur judges to behave better, especially in the workaday types of cases that are important to individual participants but hold no glory for the judge. We saw earlier in the discussion of the *Turner* case how judges can become inured to the difficulties of the litigants before them and how familiarity can breed contempt. The presence of jurors or other witnesses in the courtroom who have no stake in the case may police such judicial callousness.

The practice of deliberation also promotes democracy among the jurors themselves. That is, the jurors engage in a form of democratic deliberation with one another, although that deliberation is not public. A study trying to determine whether jury participation increased public engagement, as measured by voting, found that persons who had served on a criminal jury were more likely to vote after jury service, but the same was not true for those who had served on a civil jury.[178] This provides indication that the hope that jurors would become better citizens by participating in jury service is misplaced. Yet the experience of jurors may still be important to them individually even if they do not vote more frequently afterwards,[179] and

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[177] For a description of the argument that the jury is a protection against corruption or bias among the judiciary, see THE FEDERALIST NO. 83 (Alexander Hamilton).

[178] *See* JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIL ENGAGEMENT AND POLITICAL PARTICIPATION 46–47 (2010) (discussing results of study which showed higher voting rates among persons who had served on a criminal jury, but no such correlation among persons who had served in a civil jury).

[179] Hanna Arendt, for example, saw her own participation on a jury as a form of political action, at least in her own distinctive sense of that term. *See* Robert P. Burns, *The Jury as a Political Institution: An Internal Perspective*, 55 WM. & MARY L. REV. 805, 823–24 (2014).

although jury service and voting have been analogized,[180] they are quite different civic experiences. In the voting booth the voter is alone, not exchanging reasons as part of the voting process itself, whereas in the jury room the juror is a participant in a conversation among equals.[181]

There are a number of ways in which jurors' conversation is limited. Traditionally, for example, jurors were not allowed to take notes; jury instructions were given orally, but the jury was not allowed to take those instructions with them into the jury room; jurors were ordinarily not allowed to ask questions; and a significant amount of information was denied jurors as a result of evidence rules.[182] Although at the beginning of the American republic jurors were allowed to decide the law as well as the facts, today the jury's decision-making power is much narrower.[183] Indeed, with the rise of summary judgment as a form of final adjudication, increasingly decisions that were once in the hands of jurors are decided by judges.[184] The tendency in modern procedure is towards earlier disposition of cases; longer pre-trial periods; greater emphasis on settlement; and, if settlement is not possible, summary judgment—all of which contribute to the diminution of the civil jury.[185]

Thus, the story of the jury over the course of American history has been one of declining scope of power and a declining role in adjudication. It is important to remember that most cases were not decided by juries even when jury trials were much more common than they are today,[186] and that in the past trials themselves were short and uncomplicated affairs.[187] Furthermore, the jury has always been controversial; even at the Founding there was

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[180] Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 204 (1995).

[181] Of course, one hopes voters discuss in the period leading up to a vote. But the act of voting is a lonely one.

[182] These limitations are discussed at greater length in Lahav, *supra* note 102, 1051–57. These include not being told about damages caps and not being informed of how similar cases were decided or the measure of damages in similar cases. *Id.* at 1052–53.

[183] Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 593 (1993).

[184] Lahav, *supra* note 182, at 1032–35.

[185] Richard D. Freer*, Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491 (2016).

[186] Historical evidence indicates that trial rates were never much above 30%. *See* Galanter, *supra* note 20, at 462–63.

[187] *See* Lawrence M. Friedman, *The Day Before the Trials Vanished*, 1 J. EMP. LEGAL STUD. 689, 692–93 (2004) (noting that "[t]rials were hasty and short, in other words—quick and dirty, even slapdash," and stating that this description applies in both the run of criminal and civil trials). For data on the changing length of trials since the 1960s, see Galanter, *supra* note 20, at 478–79.

disagreement about its proper role.[188] Still, today trials are at a low ebb, and the decline in trials over the past twenty years has been precipitous: since the mid-1980s, the absolute number of trials has declined by 60%.[189] This trend has a particularly significant effect on the civil jury, because although judges continue to adjudicate in the absence of a bench trial through various pretrial motions, a jury is only empaneled when there is a trial.

A number of reasons have been suggested for this decline. For example, some argue lawyers avoid trial because of their perceptions that the cost and risk of trial are high and juries are unpredictable, even if these beliefs are not based in fact.[190] Changes in the practice of law and the structure of the bar may also play a role as a greater proportion of legal services are provided to corporate clients, who perhaps have different cost–benefit calculations about going to trial than individuals or smaller entities once did.[191] But none of these explanations are satisfactory, as the data show that jury verdicts are not for the most part excessive, and that jury decisions are relatively consistent with judicial determinations as to liability.[192]

Whatever the cause, the decline in the civil jury represents a sharply diminished role for American citizens in the court system. This decline in direct participation in adjudication is also a decline in citizen power, and criticisms of the jury are at least symbolically not limited to the jury itself, but instead may represent a loss of faith in the ability of the people to govern themselves by making decisions on challenging policy questions, even simple

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188 *See* Landsman, *supra* note 183, at 580–81.

189 Galanter, *supra* note 20, at 461–63.

190 Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1266–67 (2005).

191 For a discussion of the legal profession's tilt towards legal services for organizations and corporations, see Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000); John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 751 (1998). Heinz and his coauthors found that legal effort on behalf of corporations in 1996 was about 64% where it was about 29% on behalf of individuals in cases involving family law, personal injury, criminal representation and the like. *Id.* at 767.

192 For an overview of outcomes in the run of cases and the types of cases brought in the state courts, where most cases are filed, see 11 ROBERT C. LAFOUNTAIN & NEAL B. KAUDER, NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF THE STATE COURTS: AN EMPIRICAL OVERVIEW OF CIVIL TRIAL LITIGATION (2005), http://cdm16501.contentdm.oclc.org/cdm/ref/collection/civil/id/24. The statistics on punitive damages are illustrative. Despite media accounts of large punitive damages awards, these are very few and far between. Punitive damages, which are awarded in 5% of trials in which plaintiffs prevail (which itself is a miniscule number compared to the total number of cases filed), and punitive damages have average value of $47,000 in tort cases and $80,000 in contracts cases. *Id.* There are outlier cases with large punitive damages awards, of course, and although they are very few they cast an inordinately long shadow over the conversation about litigation. *Id.*

ones. It is worth thinking about what types of cases ought to go to a jury and in what types of cases the decline in jury trials might generate less concern from a democratic point of view.[193]

I noted earlier that settlement, at least in certain contexts, can create many similar opportunities for reasoned dialogue to a trial.[194] Indeed, John Langbein has claimed that the decline of the civil trial is due to the information produced in discovery.[195] Langbein argues that civil procedure serves two purposes: to investigate the case and to adjudicate the dispute.[196] Since the advent of civil discovery, the need for a trial to investigate the facts of the case has diminished.[197] As Langbein explains, "[T]he better a civil procedure system is at investigating and clarifying the facts, the less it will need to take cases to adjudication."[198]

If Langbein is right, the democratic performance of transparency through litigation is in tension with the capacity of procedure to put citizens in the role of adjudicators—for the better the system is at producing information, the fewer juries will need to be empaneled. This conclusion further militates in favor of publicity in discovery. But it is also important to remember that discovering facts is not the same as interpreting them, and it is interpretation that leads to the resolution of the case. Sometimes, as Langbein writes, facts are clarified through investigation.[199] Other times, however, facts are known but disputed. As the Supreme Court explained in a recent case, "[D]ecisionmaking in fact-intensive disputes necessarily requires judgment calls. Regardless of whether those judgment calls are made by juries or judges, they necessarily involve some degree of uncertainty, particularly when they have to do with how reasonable persons would behave."[200]

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193 *See* Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1278 (2005) (asking whether the substantive dispute at issue should determine concerns about the decline in the number of trials).

194 *See supra* notes 103–08 and accompanying text.

195 John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 526 (2012)

196 *Id.* at 525.

197 *See id.*

198 *Id.* I generally agree with Langbein's logic except for one caveat, which is that often the issue in a contested case is one of what the facts mean. It is also the case that trials declined dramatically since the mid-1980s, *see supra* note 195, but there were no additional information forcing rules put into effect at that time, so with respect to that decline, the theory does not hold.

199 *Id.*

200 Hana Fin., Inc. v. Hana Bank, 135 S. Ct. 907, 912 (2015).

When a jury is empaneled, a trial has the potential to promote democracy in a different way than a settlement. The idea that lay jurors will decide cases, after all, is based on a faith in the educational attainment of the populace, in the ability of ordinary people to reason about law and arrive at good answers, and in the accessibility of law itself—that is, that the jurors can understand it. All of these are important to the rule of law. As Lawrence Friedman has written, the trial has always had an educational or theatrical function.[201] For this purpose, trials do not necessarily need to be commonplace, but they need to be available. The erosion of the jury trial which has accompanied a more general turn against litigation signals the erosion of important public rule of law values.

III. CHALLENGES TO LITIGATION

Litigation has always had the potential to promote democratic values in real and important ways, but it has not always realized this potential. This Part briefly places the role of litigation in American democracy in historical context and discusses some modern challenges.

American society has had what might charitably be called a complex relationship with litigation over the course of its history, and the courts have both fallen short of the ideals of recognition, reasoned argument, and transparency, and they have also sometimes risen to the occasion. The least well-off in society have always had difficulty accessing the courts for the most part.[202] Only recently have people of color and women been entitled to serve on juries.[203] Much of the business of American courts consisted of property claims and market transactions early in our history.[204] Yet there is also a long

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[201] Friedman, *supra* note 187, at 701 ("Show trials, in the age of the vanishing trial, are the last survivors of a system once totally or almost totally given over to the process of teaching lessons in a dramatic form.").

[202] For a history of the courts from the perspective of how they have not helped those most in need in society, see JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976).

[203] *See supra* note 175 and accompanying text.

[204] For a general overview of the arguments over procedural reform at the Founding, see LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 68–70, 101 (3d ed. 2005) (discussing arguments over the reform of procedure in the early republic). For example, evidence from Maine from the Colonial period to 1850 shows a dramatic rise in litigation and the number of lawyers after 1730—most of these being cases involving market transactions. *See* B. Zorina Khan, *'To Have and Have Not': Are Rich Litigious Plaintiffs Favored in Court*? 10–12 (Nat'l Bureau of Econ. Research, Working Paper No. 20945, 2015). On the importance of property rights, see JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990). On the development of litigation around debt cases, see BRUCE H. MANN, NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT 171–86

history of using the courts to vindicate rights and bring attention to social problems. For example, as early as 1850, despite the procedural difficulties, abolitionists turned to the courts to undermine the fugitive slave law.[205] Their attempts failed to bring about legal change for their clients, who were denied a jury and returned to slavery, but they used litigation to bring attention to injustice as part of a larger abolitionist movement.[206] Overall, many of the historical developments in litigation reflect larger developments and disagreements in the law and in society.[207] Because the law is not permanently fixed, in each era lawsuits are brought on behalf of different segments of society, and the biggest issues of the day have been subjected to courtroom as well as legislative battles.[208]

Today the ethos of procedure is restrictive, a development that seems to be a response to the perception that courts have more cases than they can well decide.[209] This perception seems to have been the result of the fact that when

(1987) (noting rise in debt cases not adjudicated or adjudicated by judges rather than jury from the beginning of the 18th century).

[205] For a description of judicial struggles with slavery, see ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1984); STEVEN LUBET, FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL (2010).

[206] For an example of such a lawsuit, see JOHN D. GORDAN, III, THE FUGITIVE SLAVE RESCUE TRIAL OF ROBERT MORRIS: BENJAMIN ROBBINS CURTIS ON THE ROAD TO *DRED SCOTT* (2013).

[207] For an analysis of Roscoe Pound's famous lecture, "The Causes of Popular Dissatisfaction with the Administration of Justice," as responding to the failure of the law to adjust itself to new social circumstances, see Barry Friedman, *Popular Dissatisfaction with the Administration of Justice: A Retrospective (and A Look Ahead)*, 82 IND. L.J. 1193, 1207 (2007); *see also* Roscoe Pound, Address Before the American Bar Association: The Causes of Popular Dissatisfaction with the Administration of Justice (Aug. 29, 1906), *in* 14 AM. LAW. 445 (1906).

[208] For general discussions of the relationship between law and social movements, and the relationship between social and legal change, see JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2010). For critique see, for example, Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323 (2006). I am not saying here that the courtroom is the best place to resolve every challenge to law, although I think it is one good place to do so, but only observing the fact that many such disputes do end up in the courts.

[209] *See* Galanter, *supra* note 190, at 1266 (describing the change in adjudication from trial to pretrial as a function, in part, of ideology: "The primary role of courts, in this emerging view, is less enunciating and enforcing public norms and more facilitating resolution of disputes"); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 929 (2000) (describing how judges "redefine their jobs by adding the management and settlement of civil cases to their judicial role"); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 359 (2010). On the fact that the impressions that litigation is out of control or bad for society are mistaken, see Theodore Eisenberg, Sital Kalantry & Nick Robinson, *Litigation as a Measure of Well-Being*, 62 DEPAUL L. REV. 247, 247–48 (2013); Marc Galanter, *News From Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993); Joanna C. Schwartz, *The Cost of Suing Business*, 65 DEPAUL L. REV.

many of today's prominent jurists were in law school, there was a marked increase in litigation rates. From 1930 to 1960 litigation rates in the federal courts were at a low ebb, and litigation rates rose with the creation of new federal causes of action in the 1960s and 1970s.[210] In comparison to a historic low, litigation rates were high in the 1970s and 1980s, but in a broader historical frame they may not be.[211]

Prominent among the doctrines that have restricted access to the courts is the Supreme Court's interpretation of the Federal Arbitration Act. The Court now upholds many arbitration clauses, even those that were the product of contracts of adhesion, or forbid class actions even for very small claims.[212] At the same time, the courts have imposed other myriad limitations on those class actions not barred by arbitration.[213] Standing doctrine has been increasingly narrowed.[214] Personal jurisdiction over manufacturers, especially foreign manufacturers, has been limited.[215] Higher pleading requirements point to an emphasis on screening cases over hearing claims.[216] It is easier for courts to

(forthcoming 2016). For one judicial expression of this view, see Lepucki v. Van Wormer, 765 F.2d 86, 87 (7th Cir. 1985) (per curiam) ("Relatively low barriers to entry have . . . generated an undesirable result—a deluge of frivolous or vexatious claims filed by the uninformed, the misinformed, and the unscrupulous.").

[210] Galanter, *supra* note 20, at 489 fig.19 (showing a rise in filings from 1962 to 1986 and a decline thereafter). On the role of the Second World War in this decline, see James R. Maxeiner, *The Federal Rules at 75: Dispute Resolution, Private Enforcement or Decisions According to Law*?, 30 GA. ST. U. L. REV. 983, 1003 (2014) (statement of Judge Alfred P. Murrah).

[211] Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1103 (1996) ("[I]t should be noted that per capita litigation rates were higher at some points in nineteenth and early twentieth century America—and higher still, from the few studies we have, in colonial America.").

[212] Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011). For a scholarly discussion, see Resnik, *supra* note 16.

[213] For an analysis of all the doctrinal limitations on class actions, see Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 821 (2013).

[214] *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95 (1983); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 225 (1988) ("The creation of a separately articulated and self-conscious law of standing can be traced to two overlapping developments in the last half-century: the growth of the administrative state and an increase in litigation to articulate and enforce public, primarily constitutional, values.").

[215] J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011); Paul D. Carrington, *Business Interests and the Long Arm in 2011*, 63 S.C. L. REV. 637, 638 (2012) (describing the *Nicastro* decision as unfair both to tort victims and domestic businesses).

[216] Ashcroft v. Iqbal, 556 U.S. 662, 687 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). There is no scholarly consensus on whether these cases in fact had a deleterious effect on plaintiffs or certain types of cases. David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1214 (2013); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2030–32 (2015) (describing results of a qualitative study that plausibility pleading has a disproportionately negative effect on civil rights cases); Jonah B. Gelbach, *Material Facts in the Debate over* Twombly *and* Iqbal, 68 STAN. L. REV. 369 (2016) (documenting difficulty in determining the effect of these

grant summary judgment; there is a greater emphasis on settlement over litigation; and it is harder to bring cases to trial.[217] All of these procedural developments, taken together, point to an approach to litigation that seems to go a step further than resolving disputes; these developments point towards entirely eliminating the manifestation of disputes in the court system—in other words, preventing lawsuits from being filed by raising procedural barriers to doing so.[218]

Rather than debating the substance and appropriate limitations on (or expansions of) legal rights, the lines of battle are around procedures that block substantive rights, and these procedural limitations have been successful in part because many people either do not realize their significance, or have adopted the view that litigation is bad and should be reduced without understanding its benefits.[219] While the erosion of or limitation on rights has at other historical moments been more direct and evident even to the casual observer of the courts, the present changes require explanation because they are happening around procedure more than substance.[220] Procedural doctrines are being interpreted to limit individuals' ability to vindicate core process values such as recognition of individuals as rights-holders, elaboration of reasoned arguments and proofs, information forcing to facilitate changes in law, and participation in the adjudication process directly, without much public discussion of what is being lost.[221] The expression of the disconnect may have been best articulated by the majority in *American Express Co. v. Italian Colors Restaurant*[222]: "[T]he fact that it is not worth the expense involved in *proving* a statutory

cases using data analysis); William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. (forthcoming 2016).

217 For a general look at these developments, see Stephen N. Subrin & Thomas O. Main, *The Fourth Era of Civil Procedure*, 162 U. PA. L. REV. 1839, 1861–67 (2014).

218 One area where this seems not to be the case is with respect to lawsuits predicted to end in default judgments, as in consumer debt collection suits.

219 Galanter, *supra* note 190, at 1269.

220 For a wonderful treatment of how the form of rights is dictated by perceived procedural and remedial possibilities, such that rights cannot be said to exist in a pure form, see Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

221 For a recent explanation of the turn against the courts, see SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF RETRENCHMENT (Steven Teles ed., 2015); Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV 1543 (2014) (demonstrating the procedural reforms emanating from the Supreme Court in recent decades); Subrin & Main, *supra* note 217 (describing a shift to a new, restrictive procedural model). On developments in class action doctrine, see David Marcus, *The History of the Modern Class Action, Part I:* Sturm Und Drang*, 1953–1980*, 90 WASH. U. L. REV. 587 (2013).

222 133 S. Ct. 2304 (2013). In that case the plaintiff argued that it could not bring a lawsuit on its own because the cost of mounting an antitrust suit far exceeded the return. *Id.* at 2306.

remedy does not constitute the elimination of the *right to pursue* the remedy."[223] Substantive rights, in this description, remind one of old facades preserved along a streetscape, the buildings for which they were once an entrance having long ago been abandoned.

The problem with the dominant approach is illustrated by *Sykes v. Mel S. Harris & Associates*.[224] That case involved a law firm that made its money by filing debt collection suits in large numbers, relying on the fact that consumers were likely to default.[225] The lawsuits were processed at such a rate that the lawyers did not review the affidavit of merit accompanying each complaint, although under New York law that affidavit was to be signed based on the attorney's personal knowledge.[226] Instead, the lawyers would sign the affidavits based on a "quality check" of one in each batch of fifty.[227] Having obtained a default judgment, the law firm would then enforce it even in cases where the defendant debtor did not in fact owe any debt or their ownership could not be proven.[228]

This is a picture of a broken legal system, where defendants do not have the wherewithal to appear at all and the courts become an instrument for enforcing debts. The Second Circuit affirmed that the case could proceed as a class action.[229] One judge dissented, arguing that a state court-based procedure which allowed for discretionary administrative mass vacatur of awards was superior to a class action and writing: "This is class litigation for the sake of nothing but class litigation."[230] Alleging that the only benefit of the litigation was to the lawyers who sought fees, he wrote, "[T]he door of the state court is open for the vacatur of the default judgment *en masse*, without class certification, subclasses, hungry lawyers, or issues of process and statutes of limitations."[231] But the administrative process for vacating default judgments does not directly involve those harmed. Rather, an administrator seeks to vacate the judgment on behalf of the defendants.[232] The majority noted that

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223 *Id.* at 2311.
224 780 F.3d 70 (2d Cir. 2015).
225 *Id.* at 74–75.
226 *Id.* at 77.
227 *Id.* at 77–78.
228 *Id.* at 78.
229 *Id.* at 98.
230 *Id.* at 98 (Jacobs, J., dissenting).
231 *Id.* at 103.
232 *Id.* at 94 (majority opinion). N.Y. C.P.L.R. § 5015(c) (McKinney 2015) (en mass vacatur may be obtained by application of an administrative judge who "may bring a proceeding" to vacate the judgments).

"this discretionary procedure (1) provides plaintiffs no right of action, (2) cannot address the gravamen of plaintiffs' allegations here as it could only vacate the default judgments against them, and (3) denies plaintiffs any control over the course of the litigation."[233] In other words, an administrative proceeding would resolve the dispute in a limited way, assuming that it was successful, but it would not declare that the Harris firm's actions violated federal and state laws; nor would it force the Harris firm to answer for their conduct (recall the case was only in the class certification stage, so the merits had not yet been reached); nor, importantly for the thesis of this Article, would the harmed group be permitted to make these claims to a judge directly.

The Federal Rules of Civil Procedure here and there point to a process-based understanding of litigation. For example, the newly revised discovery rules require that discovery be proportional to the needs of the case, and define these to include "the importance of the issues at stake in the action" and "the parties' relative access to relevant information, . . . the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[234] This rule recognizes that one relevant criterion for litigation is the importance of the issues at stake, but it does not specify importance to whom and why. The Advisory Committee Note to this revision recognizes that information forced in discovery may be important beyond the litigation, and "measured in philosophic, social, or institutional terms."[235] It affirms that many suits where what is at stake are "relatively small amounts of money, or no money at all" nevertheless seek "to vindicate vitally important personal or public values."[236] Judges can interpret the discovery rules keeping in mind the public benefit of disclosure of information, not only for the case before them but also for the society at large, rather than viewing litigation as a purely private process meant to resolve the dispute and nothing more. Similarly, the rule requiring judges to approve class action settlements only after a public hearing, discussed earlier, promotes

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233 *Sykes*, 780 F.3d at 94. The majority went on to say that

> [t]he dissent's distaste for 'hungry lawyers,' and aversion to awarding attorneys' fees in class actions cannot justify requiring plaintiffs . . . to pass through the threshold of the state courthouse to seek relief that cannot seriously be entertained as an adequate, let alone superior, substitute for proceeding by class on these claims.

Id.

234 FED. R. CIV. P. 26(b)(1).

235 FED. R. CIV. P. 26 advisory committee's note.

236 *Id.*

reason giving and proofs even outside of trial.[237] At the latter end of litigation, the rule permitting advisory juries allows the inclusion of jurors as participants in adjudication even where the jury right does not attach, promoting self-government.[238]

The greater work that needs to be done is not at the level of changing individual rules of procedure, which are largely discretionary in any event,[239] but instead changing the minds of judges as to what litigation is about. If the courts or Congress were to revisit their view of litigation and, instead of viewing it as a cost center, understood its role of permitting participants to perform acts that are expressions of self-government, this could promote a process of litigation that can achieve its democratic potential. To give just one example, currently, as a result of legislation passed in the 1990s, judges are measured by whether they are able to close motions and cases in a timely fashion.[240] Instead of measuring "disposal" of disputes, perhaps we should measure judicial productivity based on bench presence and interaction with litigants, as Judge William Young has suggested, to demonstrate the court system's commitment to recognition.[241]

CONCLUSION

This Article has argued that litigation has three purposes: to resolve disputes, to declare the law, and to perform self-government. It has focused on making a claim in favor of the third purpose—one that has been largely ignored. Previous descriptions of process-based theories of procedure have often relied on sociological legitimacy or acceptance of the outcome of the process by the litigants bringing the case as their justification. By contrast, the

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237 FED. R. CIV. P. 23(e). For the discussion of class action settlements that encourage public discussion, see *supra* notes 102–08 and accompanying text.

238 FED. R. CIV. P. 39(c). For a discussion of advisory juries, see Alexandra D. Lahav, *Participation and Procedure*, 64 DEPAUL L. REV. 513, 532–35 (2015).

239 On discretion in the rules, see Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 160 (2015) (a modern perspective on the exercise of discretion in the Roberts Court); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 923 (1987) (a historical perspective); *see also* Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 288 (2010).

240 *See* 28 U.S.C. § 476 (2012).

241 Steven S. Gensler & Lee H. Rosenthal, *Measuring the Quality of Judging: It All Adds Up to One*, 48 NEW ENG. L. REV. 475, 483 (2014); Gensler & Rosenthal, *supra* note 113, at 853; Kravitz, *supra* note 113, at 263; Singer & Young, *Measuring*, *supra* note 113, at 258, 273 (describing data of the decline in courtroom hours and concluding that there is no correlation between bench presence and speed of case resolution); Young & Singer, *Bench Presence*, *supra* note 113.

process theory presented here does not rely on sociological legitimacy. It focuses on litigation as a performance of self-government, in particular a performance that develops a type of deliberative democracy through repetition. Routine contempt for litigants can undermine democracy in the same way that routine performance of self-government can promote it, through repeated performances. Understanding litigation in this light can help procedural reformers better grasp the current problems with the administration of justice and better evaluate proposals for change.