Chapter 16
Constituting a Civil Legal System Called "Just": Law, Money, Power, and Publicity

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Abstract From the vantage point of a world reorganized by the COVID-19 pandemic and riven with political and social conflicts, this book is a powerful testament to how embedded dispute resolution systems are as normal facets of ordinary good governance. The shared commitments are to measured, consistent, and accessible means of obtaining relief for allegedly unlawful behavior. What the authors debate are not the goals of supporting dispute resolution services but the modalities for doing so. The questions are how and who responds to calls for legal help.

This volume thus represents the success of political and social movements that have shaped the expectations, practices, culture, and laws of dispute resolution systems in the last centuries and, more recently, have brought to the fore concerns about a "justice gap." Several chapters hone in on the distance between what systems purport to provide and what they deliver, as demand exceeds the supply of responders.

But demand for what? The core questions include what kinds of harms merit legal recognition as well as whether, were all claimants able to obtain responses, the resulting procedures would be part of a civil legal system worth calling "just." Analysis of these justice questions entails considering the metrics to choose when assessing the substantive rights and entitlements recognized, the processes provided, and the quality of results. How does one measure whether the quantum of legal protection and the invocation of those rights and entitlements are optimal or reflect under-protection, over-protection, under-claiming or over-claiming? What factors are the bases for assessing the various processes espoused or criticized by the chapter authors? What are the baselines for assessments of outcomes? These queries bring

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into focus another critical issue, that of perspective. What are the vantage points from which to understand the civil legal system so as to make judgments about whether a system is just or unjust? These are the issues I address in the chapter that follows.

16.1 The Interaction of Norms, Practices, and Doctrine

Discussions of implementation are at the heart of this volume. In this brief commentary, I step back to ask prior questions about the normative aspirations, the doctrinal mandates, and the pragmatics of contemporary civil justice systems. I explore some of the law and the political economy of the choices pursued under the rubric of "paths to a civil justice system," and I underscore three interrelated facets to be taken into account when assessing the justice of a legal system.

The first is about the substantive entitlements a civil justice system protects. The discussion of consumers, household members, and employees reflects the range of rights that political movements have recently brought into being. But the status quo neither should be taken for granted nor be seen as intrinsically optimal. Courts have been one venue for debate about who merits recognition as entitled to law's protection, about the forms procedures take, and the kinds of remedies to be made available. Hence, new modes and technologies need to address whether and how they will contribute to norm development. If they do not, they are at risk of being vehicles for stagnation or retrenchment.

My second concern focuses on the extent of government support for courts, for other forms of dispute resolution, and for those who seek to participate. Subsidies of various kinds are necessary to ensure that all members of the body politic are empowered to use the mechanisms created. Litigant asymmetries raise significant problems of fairness for dispute resolution. The diversity of kinds of legal rights raises a host of complex questions about line-drawing. Decisions need to be made about what kinds of claimants to encourage and what forms of economic transfers—from the government to individuals or among disputants—to provide or require and about how aggregate procedures can help.

Third is the issue of the public face (or not) of dispute resolution systems. The obligation of courts to function in public is longstanding, but the shift to other forms of government-sponsored or government-obliged processes does not always entail access for third parties, who are neither disputants nor decision-makers. The activities as well as the results of new modes need to be available to the public (more accurately, as detailed below, the many public(s)) so that questions of the underlying legal rights, the range of remedies, and the procedures can be the subject of informed discussions about the justice of the practices.

Knowledge is required about whether pathways (using various technologies) enable people to get into courts or their alternatives. Obtaining that information requires both learning about the range of users and observing the processes real-time.

Only then can one know whether justice is a goal embedded in the new routes and that justice is a result of the civil remedial structures provided.

16.2 From Exclusionary Judicial Systems to Mandates for Egalitarian Redistribution of Authority: Participatory Parity in Courts

What the 15 chapters in this volume make plain is that the human rights movements of the last century have ensconced new metrics of what makes a civil legal system just. To appreciate the shift requires a glance back in time, as adjudication is an ancient rite. Indeed, historians of Europe identify the need for dispute resolution as one of the reasons for the rise of city-states in the late Medieval period. The physical embodiment of those practices can be seen in the extant town halls of Renaissance Europe and in the thousands of segregated, purpose-built courthouses that have since become icons of government.[1]

The old and the newer structures bear testament to the intertwining of political, legal, and judicial power. Governments need their members and residents to participate in adjudicatory processes as one means of promoting peaceful resolutions, of supporting economic growth, and of generating and reinforcing states' own authority to function. Adjudication (whether in civil, criminal, or administrative tribunals) confirms and produces power.

Court proceedings were once deeply exclusionary: a narrow band of the population was legally entitled to redress. Around the world, civil justice systems historically excluded people by gender, marital status, race, nationality, class, and much else. In contrast, today, constitutional democracies oblige their legal systems to welcome as full participants all persons, including those with limited economic resources. Women and men of all colors have gained juridical capacity to serve in the full range of roles, from litigant and witness to lawyer, staff, and judge.

The changing face of judiciaries and the growth in demand for adjudicatory services and for other "paths" to civil justice[2] is an artifact of a host of new legal rights for family members, employees, tenants, consumers, and detainees, and of aspirations that all individuals should be able to live in safe environments and be treated with dignity and respect. The numbers of people seeking courts' help is one marker of the success of the link between these commitments and civil justice systems. The recent expansion of rights not only have brought new claimants *to* courts but also have changed the law and practices *of* courts, which are now understood as obliged to welcome diverse users.

Given the history of courts as exclusionary institutions that implemented racialized hierarchies and regimes of colonialism and subordination, we have much to

[1] Resnik and Curtis (2011).

[2] See Genn (2009, 2018).

celebrate in these developments. Courts have come to represent—and to present themselves as—venues of equality in which power redistribution is requisite to justice and hence to courts' own legitimacy. The result is that governments have to devise means of implementing the concept of *participatory parity* in the entry to and use of their dispute resolution systems.

Making good on that promise is, however, complex. Democracy not only has changed adjudication, but also has challenged it profoundly. As authors in this volume discuss, some of the new technologies and modes of dispute resolution aim to respond to the numbers of people seeking assistance and to the problems of unequal access. But unlike court-based adjudication, for which open and public access is one of the signature features,[3] few of these new processes build in mechanisms to include third parties. Moreover, one ought not take for granted the stability of the principle of participatory parity because not all of the alternatives to courts make provisions to subsidize or otherwise assist users.

16.3 New Obligations to Lower Entrance Barriers

Because the idea of government subsidies for needy litigants is relatively novel, unfolding, and potentially unstable, more needs to be said about its doctrinal roots and scope. I explore these issues by discussing a few decisions from the United States and the United Kingdom Supreme Courts, as they called on governments to reduce barriers to access by waiving or lowering court fees.

A half-century ago, in the early 1970s, a group who described themselves as "welfare recipients residing in Connecticut," filed a class action lawsuit and argued that state-imposed fees of sixty dollars for filing and service, coupled with no mechanism to waive that requirement, violated the U.S. Constitution by precluding them from getting divorced. In 1971, in *Boddie v. Connecticut*, the U.S. Supreme Court agreed.

In John Marshall Harlan's opinion for the Court, he explained that the combination of "the basic position of the marriage relationship in this society's hierarchy of values and the . . . state monopolization" of lawful dissolution resulted in a due process obligation by the state to provide access.[4] This decision was the first in U.S. history that identified the constitutional obligation to waive fees in civil litigation for people unable to afford the filing costs to obtain a divorce.

To think of the issue only in terms of the parties is to miss the perspective of the government, whose needs courts routinely serve. As Justice Harlan wrote:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its

[3] Resnik (2019b).

[4] *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).

> members, enabling them to govern their affairs and definitely settle their differences in an orderly, predictable manner.[5]

As this brief excerpt reflects, the potential scope of the obligation to ease access could well include all kinds of civil disputes. Moreover, such assistance could range from fee waivers to subsidies for transcripts, experts, and attorneys.

Within short order, the U.S. Supreme Court retreated from this formulation by limiting the reach of its own understanding of when and why governments ought to subsidize courts and their users. The Court declined to recognize poverty as a suspect classification that would have triggered equal protection obligations across a range of legal domains.[6] Instead, the Court relied on an alchemy of constitutional commitments to due process and equal protection to recognize a narrow obligation to protect low-income, low-resource litigants when in certain forms of conflict with the state.[7] A related line of cases used this constitutional approach to conclude that governments could not use incarceration as the penalty when people lacked resources to pay fines and fees without first inquiring into their ability to pay.[8]

The constitutional law decisions interacted with legislative action. In 1974, the U.S. Congress chartered the Legal Services Corporation (LSC) to provide federally subsidized lawyers authorized to represent a segment of people too poor to seek civil legal advice.[9] Yet the LSC has never been funded sufficiently to meet the needs of those eligible for its services.[10] In 1976, Congress also provided for fee-shifting from losing defendants to successful civil rights plaintiffs to encourage the pursuit of such claims.[11]

Furthermore, revisions of federal procedural rules in the 1960s permitted class actions and other forms of aggregation that enable cost-sharing among litigants and provide incentives for lawyers to represent groups.[12] These group-based lawsuits are usually understood as enabling new plaintiffs to enter courts, yet these aggregations also work at times to the benefit of defendants, when they seek binding resolutions to preclude additional lawsuits.[13]

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[5] *Boddie,* 401 U.S. at 374.

[6] See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16–18 (1973).

[7] The examples in addition to *Boddie v. Connecticut* include *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963); and *M.L.B. v. S.L.J.*, 519 U.S. 102, 106–07 (1996). The limited approach to requirements for lawyers, even when an individual faces months in jail, can be seen from *Turner v. Rogers*, 564 U.S. 431 (2011). See generally Resnik (2011a), Resnik (2000), pp. 2132–2137.

[8] See *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983); *Tate v. Short*, 401 U.S. 395, 397–99 (1971); *Williams v. Illinois*, 399 U.S. 235, 240–41 (1970).

[9] See, e.g., Houseman and Perle (2007).

[10] See, e.g., Legal Services Corporation, 2018 Annual Report; Legal Services Corporation, 2019 Annual Report.

[11] The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988(b); Farhang (2010).

[12] The history and current issues are explored in two symposia on the fiftieth anniversary of the class action rule. See Resnik (2017a, b).

[13] See, e.g., *Mullane v. Central Hanover Bank,* 339 U.S. 306 (1950).

As discussed below, retrenchments came thereafter. The Supreme Court has narrowed the reach of the principles it announced in *Boddie*. The legislature has not sufficiently funded services for civil legal aid. Attacks are underway to limit the use of class actions and other aggregate procedures, and during the last two decades, the U.S. Supreme Court has read the 1925 Federal Arbitration Act to permit providers of goods and services and employers to require claimants to forego the use of courts and to proceed, if at all, through single-file private arbitration.

Boddie centered on the role that courts play in family life. Counterpart in Europe are cases such as the 1979 *Airey* decision of the European Court of Human Rights, which recognized rights of access to civil remedial processes; effectuation sometimes involves legal services, such as when family dissolution is sought and the process is complex.[14]

In addition to households, courts have been foundational to markets, as adjudication provides one mechanism to enforce horizontal obligations among individuals and entities in contemporary societies. The need for governments to lower barriers to such litigation was the basis for *R. (in the Application of UNISON) v. Lord Chancellor,* rendered in 2017. Evidencing an understanding broader than that of the U.S. Supreme Court, the U.K. Supreme Court found unlawful the high fees the government had imposed for use of its employment tribunals.

Writing the central opinion for the Supreme Court, Lord Reed provided an aspirational account of the role for courts:

> Every day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established. Their cases form the basis of the advice given to those . . . now before the courts, or who need to be advised . . . [that] their claim might fairly be settled, or . . . that their case is hopeless. . . . But the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them.[15]

Lord Reed also noted in his opinion that resolutions often come through negotiation or mediation; yet:

> those procedures can only work fairly and properly if they are backed up by the knowledge on both sides that a fair and just system of adjudication will be available if they fail. Otherwise, the party in the stronger bargaining position will always prevail.[16]

Even though "judicial enforcement of the law is not usually necessary, and . . . that the resolution of disputes by other methods is often desirable," the Court required tribunals to be open to people of limited means, asserting legal rights.

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[14] *Case of Airey v. Ireland*, 32 Eur Ct HR Ser A (1979).

[15] *R (on the application of UNISON) v. Lord Chancellor*, UKSC 51 para. 70, 71.

[16] *R (on the application of UNISON) v. Lord Chancellor*, UKSC 51 para. 72.

16.4 Affirmative Obligations to Provide Dispute Resolution Services

This brief account of a few legal rulings exemplifies the development of affirmative obligations to open courthouse doors. A large literature debates the roles courts play in enforcement of economic and social rights,[17] but less attention has been paid to courts as themselves *services* that governments must provide to individuals. Part of the reason courts go unrecognized as a genre of government provisioning akin to health, education, and housing is that courts are a longstanding feature of political orders, democratic or not.

Along with the related services of policing and prisons, courts are one of a network of government institutions that could be part of sustaining wellbeing and, given the new egalitarianism of courts, could (if living up to democratic aspirations) be mechanisms for resource redistribution. Bringing courts into the fold of social and economic rights underscores that they share the problems that haunt discussion of those rights. The questions include: what branches of government decide levels of funding; what taxes (called fees, fines, assessments, surcharges, and the like in this context) can be imposed on users; what subsidies are required, and what forms of rationing are licit? The *Boddie* and *UNISON* decisions answered aspects of these questions, as they insisted on lowering barriers to entrance for subsets of litigants—certain private parties in conflict about particular kinds of claims and dependent on the state to provide the structure for resolution.

But how broad are the mandates? The aim to lower transaction costs is part of what drives discussions in this volume that call for alternative dispute resolution (ADR) and online dispute resolution (ODR) or their mix. Another segment of this volume focuses on the role played by attorneys. While some individuals choose to represent themselves, many lack the means to have lawyers and instead navigate procedures with little or no expert guidance. Their needs prompt interest in rethinking how to remake procedures to lower the reliance on lawyers.

A question less explored in this book is whether, in addition to circumstances when access fees must be waived, governments have to do more to equip civil litigants through an array of services, of which lawyers are but one. Attention needs to be paid to the drivers of political and legal movements that could widen or limit the obligations of governments to facilitate use of civil justice, whether through courts, lawyers, or other routes.

Experiences in the United States provide grounds for concern. In the last decade and especially after the recession of 2008, localities looked to courts as "revenue centers" and increased the fees imposed on participants.[18] A host of what have come to be called "legal financial obligations" (LFOs) are assessed for a wide array of court-related activities.

[17] Resnik (2019a).

[18] See generally Resnik et al. (2018, 2019).

The expanding reliance on fees and assessments has affected understandings of what courts represent—seen less as venues for rights pronouncement and more as discriminatory extractors of money from people seeking help from or hailed into court. "Court debt" comes from financial obligations that individuals incur in civil, administrative, and criminal litigation, as legal systems charge fees at entrance, for subsequent filings. In some jurisdictions, when civil defendants respond, they too must pay fees unless those individuals seek court recognition that they are too poor to do so.[19] Courts impose charges on litigants for transcripts of proceedings, to register to obtain "free" public defenders, and to use civil and criminal diversion programs, including court-based arbitration.[20] And, as the U.S. Supreme Court detailed in 2017 in *Nelson v. Colorado,*[21] not all jurisdictions return the assessments associated with criminal proceedings when individuals are acquitted.

The harms of court debt are not experienced equally. The impact of such practices is felt most acutely by people with limited resources and by communities of color, either because they seek assistance from the legal system or because they are subjected to over-policing, prosecution, and punishment.[22] A growing body of empirical evidence documents the racial inequalities when fees are assessed and surcharges imposed. The debt associated with the legal system undermines individuals, families, and communities.[23] Nonpayment in some jurisdictions can be met with driver's license suspensions (and then more fines for driving without a license),[24] and the loss of voting rights.[25]

The grim picture of courts that I have just sketched needs to stand alongside the model put forth by Lord Reed, who discussed the utility of courts' availability for the social order and framed legal principles to open doors to the state's dispute resolution system. Some of the methods discussed by authors of chapters in this book hone in on access issues, while others assume that ADR, ODR, and other new technologies will be intrinsically more hospitable to users. That empirical question cannot be answered without data collection to understand the demographics of actual and potential users.[26] In addition to the need for such research, few of the chapters directly address either the question of norm generation and development or the issue

[19] A chart detailing examples of fees is at Resnik (2018a), p. 664.

[20] See, e.g., generally Statutory Court Fee Task Force, Illinois Court Assessments (2016) [hereinafter Illinois Court Assessments 2016].

[21] *Nelson v. Colorado*, 137 S. Ct. 1249 (2017).

[22] The U.S. Department of Justice's report on Ferguson and the subsequent litigation and settlement provide one of many examples. See Civil Rights Div., U.S. Department of Justice, Investigation of the Ferguson Police Department (2015) [hereinafter Ferguson Report]. See also Bell (2018), Smith (2018), pp. 2317–2319.

[23] See generally Harris (2016).

[24] See, e.g., *Robinson v. Purkey*, 326 F.R.D. 105 (M.D. Tenn 2018), reversed, 814 Fed. Appx 991 (6th Cir. 2020). See also Fowler v. Benson, (24 F.3d 247 (6th Cir. 2019).

[25] *Jones v. Governor of Florida*, 975 F. 3d 1016 (11th Cir. 2020).

[26] See Byrom (2019a, b).

of third-party access in the use of ADR, ODR, and AI, and these are the questions to which I turn.

16.5 Open to Whom? Participatory Observers as Well as Disputants

On both sides of the Atlantic Ocean, "open justice" has been a rallying cry and, in some instances, a description. The concept is an artifact of political agendas of the Enlightenment. Governments committed to expanding nation-state power had the economic resources on public buildings and apportioned funds dedicated to constructing courthouses to serve as icons of law, justice, and their own authority. Persons walking into courtrooms not only had rights to observe what transpired therein, but also governments hoped that what they saw would prompt or renew commitments to the rule of their law. The professionalization of judges, lawyers, and architects, interacting with political commitments, forged a system in which courthouses became a signature of governments. The commitments in law to judicial processes being open (what I have called *doctrinal openness*) intersected in some eras with functional openness, and both were in service of the need to build state power.

The "right to a public hearing" for criminal and civil proceedings is a familiar refrain in European law. The U.S. Supreme Court has many times insisted that criminal trials and related proceedings be open to the media and the public in general. Lower courts recognize a right to civil trials and the hearings related to those processes.[27] Thus, access to courts has come to reference both the right of individuals to bring cases to courts and the right of third parties to watch. While litigation is often styled as a triangle, with the judge at the apex dealing with opposing plaintiffs and defendants, the depiction of adjudication ought to be a square, with a fourth line to denote the audience.

That fourth line has political implications, as openness is also a route to challenge state power. As Jeremy Bentham said long ago: "Publicity is the very soul of justice. . . . It keeps the judge himself, while trying, under trial."[28] Bentham imagined that what he called a "Tribunal of Public Opinion" would, through observation, be able to see whether judges were self-interested (which he thought they were) and hence could form critiques to press for changes. Given Bentham's critique of "Judge & Co. (to wit, lawyers), ADR advocates could well invoke him, as Bentham pressed for

[27]See *Press-Enter. Co. v. Superior Court* (Press Enterprise I), 464 U.S. 501, 503–05 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 559–63, 580 (1980) (plurality opinion); see also Resnik (2018b). The Sixth Amendment right of the defendant is sometimes either itself the basis of access by third parties or related to a First Amendment right or "freedom" of the public to "listen." See *Richmond Newspapers*, 448 U.S. at 576.

[28]Bentham (1843a), pp. 573, 582.

procedural revision as well as for lower court costs. Bentham famously termed filing fees a "tax on distress."[29]

My analysis of the new metrics of legitimacy for courts reflects that they have become venues in which norms of democracy can take material shape. Bentham saw courts as "schools for justice" because he thought judges would naturally want to explain their decisions to their audience. For me, the state is not only a teacher but also a *student*, reminded that all of us have entitlements in democracies to watch power operate and to receive explanations for the decisions entailed. The observers are, in this account, a necessary *part* of the practice of adjudication, anchored in democratic political norms that the state cannot impose its authority through unseen and unaccountable acts. Therefore courts are, like legislatures, a place in which *democratic practices* occur in real-time.

My analysis also assumes that law and norms—substantive and procedural—are not fixed but are constantly dynamic and debated and that court-based processes are one venue for those exchanges. This proposition prompts my concerns about the functional privatization of dispute resolution and the use of online forms. Underlying the use of some fast-track techniques is the assumption that the job of law is to take the law "as is" and apply it to individual problems. But how do we know what the law is? Or how can we push for changes?

Moreover, we cannot have the kind of unvarnished faith in public processes that Bentham espoused. He presumed the plausibility of constituting a singular public, understanding its own self-interests, aggregating preferences, and therefore enhancing the general welfare. In contrast, in the twenty-first century, we know of the many competing and deeply divided public(s), with different understandings of their own self-interests than what others ascribe to them.[30] Today, political and critical theorists insist on the construction of preferences and the multiplicity of points of views,[31] just as art historians remind us that cubism broke the linear plane and refuted the singular perspective valorized in Renaissance art.[32]

Further, we know well about another kind of public—what I term a "predatory public," trolling on the internet in a manner that can entail personal aggression against individuals and impose significant harms.[33] The injuries come from a too-easy dissemination of information (true and false) about individuals. Thus, Jeremy Bentham is invoked not only as the central theorist for the much-admired publicity of justice's "soul," Bentham is also the touchstone for modern public relations, advertising, and propaganda. The methods of manipulation have expanded through technologies, which are exemplified by conflicts over the impact and use of sites like Facebook.

[29]Bentham (1843b). See also Resnik (2011b).

[30]Fraser (1992).

[31]See, e.g., Mansbridge (2001).

[32]See, e.g., Crary (1992).

[33]Examples are provided by many. See, e.g., Eltis (2011).

16.6 Repeat Players, Privatization, and Public Involvement

The entrenchment of new rules of privatization reflect what Marc Galanter described as the ability of "repeat players" (the "haves" in his classic article) to come out "ahead" by using their resources and knowledge to structure procedures that benefit their interests rather than those of "one-shot" players.[34] Galanter explained that reiterative involvement in legal processes provides insights into (and the potential for authority over) the procedures that have substantive impacts on rights and remedies. Understanding the incentives of governments, other entities such as corporations, judges, and lawyers—all of whom are the repeat players—is central to appraising the new rules proffered and some of which are installed.

Many of the contemporary procedural innovations are justified as requisite to "open justice." Exemplary is the 2016 Report entitled *"ODR and the Courts: The Promise of 100% Access to Justice?"*[35] Through a series of images and commentary, the monograph volume outlines steps for responding to conflicts. Depicted are individuals behind computers working through whether they can reach a resolution. In another frame, a person is labeled as a mediator, and another a judge.

But the public is not in sight. The text of the monograph reflects its title, insistent that ODR will promote users' "fairness experience;"[36] the "users" referenced are disputants. Unlike the 2017 *UNISON* decision of the U.K. Supreme Court, requiring that filing fees be limited in employment tribunals because of the general need to know about the enforceability of rights, "which underpins everyday economic and social relations,"[37] this monograph neither addresses the public nor describes how users and consumers should be understood as citizen-agents empowered to participate in shaping dispute resolution processes.

The exclusion of the public is not inevitable. Some ODR processes, such as those underway in the courts of British Columbia, include efforts to preserve the principle of openness[38] even as ODR is becoming "the court." Policymakers describe their provisions as responding to concerns about individual privacy and the appropriation of web-based information while maintaining commitments to institutional

[34]Galanter (1974).

[35]HiiL (2016) p. 38.

[36]HiiL (2016), p. 41. The discussion of informational justice, distributive justice, restorative justice, procedural justice, and interpersonal justice, *id.* p. 42, does not address a role for an observing public. "Transparency of outcomes" is in view, but not of process. The monograph spoke of concerns about how to scale up ODR to lower marginal costs (*id*. p. 54) and to enable a "respectful dialogue" (*id*. p. 44). The monograph did not provide the metrics of respect.

[37]*R (on the application of UNISON) v. Lord Chancellor*, UKSC 51 para. 71.

[38]British Columbia Civil Resolution Tribunal Rules, pp. 1–39 (May 1, 2021) https://civilresolutionbc.ca/wp-content/uploads/2021/04/CRT-Rules-in-force-May-1-2021.pdf [hereinafter British Columbia CRT Rules].

openness.[39] An online dispute resolution process in British Columbia's Civil Resolution Tribunal ("CRT") aims to shift a variety of claims away from what was an in-person, open court-based system that had generally been open to the public and move those exchanges on line.[40]

In short, while celebrating ADR and ODR as answers to the "global crisis" in access to justice, these new technologies focus on one sense of openness—*accessibility* for disputants—in part through lowering the cost of the process. Often ignored is the other sense of openness, the role of third parties welcomed to observe. And, relatedly, also ignored is a role for collective action. The models are focused on single-file decision-making rather than on group-based information and resource sharing. This approach exemplifies a form of complacency about the status quo. The implicit assumption is that the law as we have it is good but what we are lacking is access to it. And for some proponents of ADR/ODR, the exclusion of the public is a method of claim suppression by limiting information about potential injuries and routes to redress.

But what about how the law could/would/should change—in all directions? When it rejected high filing fees in the Employment Tribunal in the U.K., the Supreme Court insisted that access to courts was not "of value only to the particular individuals involved;" the Court invoked a 1932 ruling, which was an ordinary dispute that resulted in a new rule; producers of consumer goods were under a duty to take care of the health and safety of the consumers of those goods, which Lord Reed described as "one of the most important developments" in twentieth-century U.K. law.[41] Theorists from Habermas to Pierre Bourdieu have analyzed the interplay between fact and law and the reflexivity that constructs our professional habitus.

Procedures always allocate authority and, as Jeremy Bentham instructed long ago, access by the public is requisite to the capacity to scrutinize, let alone to discipline, the decision-making and the norms that undergird it. Without third-party access to the processes and outcomes of ADR/ODR, and to the formulas and algorithms that underlie AI, we cannot know what judgments, predicated on what understandings of people, practices, facts, and obligations, are being promoted. Without some forms of public access, we cannot know whether fair treatment is accorded regardless of litigants' status, and the relationship of remedies to harms. Without oversight, we cannot ensure that decision-makers are independent of parties. And without public accountings of how norms are being applied, we cannot consider the need for revisions of underlying rules, remedies, and procedures by which to decide claims of right. We lose the very capacity to debate what our forms and norms of fairness are. Whether called "court," or "ADR," or "ODR," we cannot, without both forms of openness, decide whether the paths, processes, or resolutions are just.

[39] *British Columbia CRT* p. 3. *See* Thompson (2017). British Columbia Civil Resolutions Tribunal, Access to Information and Privacy Policies, July 2020, pp. 1–14, https://civilresolutionbc.ca/wp-content/uploads/2019/02/Access-to-Info.

[40] British Columbia CRT Rules.

[41] *R (on the application of UNISON) v. Lord Chancellor*, UKSC 51 para. 69.

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