

The Democracy in Courts: Jeremy Bentham, ‘Publicity’, and the Privatization of Process in the Twenty-First Century

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1. Privatizing the public: ‘Most oppose terror trials in open court’

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

The data slice is thin, but the question asked has powerful symbolism, for the poll suggested to those surveyed that the processes through which a government honors or undermines human rights could be removed from public view. Further, the questions identified one means by which public power is privatized, for in a ‘closed military court,’ the government retains control over its activities and cuts off public oversight. Another form of privatization is the transfer of government-based activities to non-governmental actors, sometimes also screened from public oversight. Both kinds of privatization are now commonplace in courts in many countries around the world.

In this essay, I explain some ways in which courts function as sites of democratic practices and why the poll’s term of ‘closed military courts’ erroneously suggested

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1 See CBS News.com, Poll: ‘Most Oppose Terror Trials in Open Court,’ Nov. 17, 2009, available at http://www.cbsnews.com/htdocs/pdf/poll_issues_111709.pdf.

2 According to the Poll six percent had no opinion. The survey, by random dialing with a sample split between land-lines and cell phones, had a three percent margin of error.

that processes meriting the name ‘court’ could be held behind closed doors. Courts provide government-sponsored opportunities to watch its obligation to provide equal treatment of all persons. Courts are government invitations to the public to invest in and engage with norm generation under structured processes imposing constraints on the authority of the disputants, the audience, and the state. Yet to do so requires that the term ‘court’ retain its contemporary meaning (shaped over centuries through a mix of practices and political theory) as an obligatorily open institution. If openness remains a robust attribute of ‘courts’, then the phrase ‘closed military court’ becomes an oxymoron.

Unpacking these arguments requires a review of some of the history and theories about the connection between openness and adjudicatory processes. That inquiry in turn engages the political philosophy of Jeremy Bentham, who was a major proponent of structuring encounters in many venues to provide the public with knowledge about and enable scrutiny of various actors and institutions—judges and courts, included. Open courts, codification of laws, and a free press were his methods for transferring authority to the public, forming a ‘tribunal’ whose opinions were to influence ruling powers.

Bentham’s work on ‘publicity’ contributed to what contemporary theorists style the public sphere, explicated by Jürgen Habermas, or as Nancy Fraser has suggested, more aptly ‘spheres’, to reflect the multiplicity of venues and diversity of speakers now participating in public discourse (Fraser 1992). Yet political theorists (in contrast to social scientists³) have paid relatively little attention to the role that lower level courts can play in providing a venue for structured exchanges among individuals and entities that confirm legal norms and that produceducing legal innovations. In many countries committed to democratic practices, courts have been both a source and a recipient of equality mandates that make them lively institutions, contributing (often controversially) to social ordering across a range of diverse problems.

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

Understanding the trajectory of these changes is one purpose of this essay, and another is to examine whether the trends are problematic. Bentham provides the basis for critique, for he argued that open courts educate the public and discipline the state. My concern (built on the recent book that I co-authored with Dennis Curtis⁴) rely on yet other functions of courts, changed because of the new obligations that democracies imposed on them to provide equal treatment to all persons. Political

3 See e.g., Silbey & Ewick 1998; Lind & Tyler 1988.

4 See Resnik & Curtis 2011a.

injunctions of equality interact with ancient court obligations to ‘hear the other side’ (*audi alteram partem*), resulting in opportunities for participatory parity that both enable democratic dialogue among disputants and impose constraints upon them. Further, within democratic systems, the conflicts generated by courts often produce changes in legal norms—demonstrating the power of popular input and the utility of courts to contemporary democracy.

But we are less sanguine than Bentham about the functions of information and the outcomes of publicity. Public contestation and democratic iterations do not necessarily insure progressive practices. (The majority of those polled in 2009, after all, preferred ‘closed military courts’). On the other hand, publicity in courts disciplines governments by making visible how they treat both their judges and disputants. Through public processes, one learns whether individuals of all kinds—including ‘suspected terrorists’—are understood to be persons equally entitled to the forms of procedure offered others to mark their dignity and to accord them respect and fairness.

1.1 From ‘rites’ to ‘rights’

The custom of open adjudicatory processes is longstanding; ancient Roman law conceived of criminal proceedings as *res publica*—a public event (Frier 1985; Crook 1995). Thereafter, dispute resolution was so basic to medieval communal life that some argue it was one of the first functions of cities, needing to deal with conflicts so as to facilitate commerce and provide a modicum of peace and security (e.g. Sbriccoli 1997, 37-55). Local rulers of various kinds regularly displayed their authority to make and enforce rules through public performances of their adjudicatory powers. But their processes relied on conceptions of judges, litigants, and the public that were very different than those of contemporary courts in democratic polities.

Then, judges were styled loyal servants of the states, subject to kingly (and godly) rule—in contrast to today’s judiciary, comprised of independent actors entitled to pronounce judgment on the state. Then, litigants depended on the grace of rulers to be eligible to participate in courts, and not all persons were authorized to bring suits, to testify, to serve as professional or lay judges, or to assert claims for protection of their person and property. The point of open procedures then was to impress on viewers the *power* of the state.

Between the seventeenth and twentieth centuries, however, those precepts gave way in many parts of the world to new conceptions of the state, of judges, of citizenship, and of persons. Judges gained a kind of independence unique among government employees. Persons of all colors, genders, ages, and kinds became eligible to participate in the many roles within adjudication, and the entire process became ‘public’ in a robust sense—public ownership and funding (augmented by the investments of private litigants in developing cases), public scrutiny, public participation, public ordering. ‘Rites’ turned into ‘rights’ as rulers lost discretion to close off their courts, to fire their judges, and to preclude all persons from rights-seeking (Resnik & Curtis 2007).

My focus in this essay is on public access, a right that traces back centuries and became codified in nineteenth century constitutions of both the state and federal governments in the United States. The mandate that ‘all courts shall be open’ can be found in the Vermont’s 1777 Constitution, followed by the 1792 Constitutions of Delaware and Kentucky; those provisions were often coupled with clauses protecting rights to justice and to jury trials.⁵ By the twenty-first century, the specific words ‘all courts shall be open’ were a part of the constitutions of nineteen states,⁶ with many more referencing ‘public’ or ‘open’ courts, and some forty including rights to remedies and due process (Resnik 2012b, 978, app. 1). The federal Constitution of 1789 was less specific, but soon thereafter, the 1791 Bill of Rights added new protections for individuals. The Sixth Amendment guaranteed criminal defendants rights to both ‘a speedy and public trial.’⁷ Further, the Seventh Amendment ‘preserved’ rights to jury trials for civil litigants when their cases ‘at law’ sought damages in excess of ‘twenty dollars.’ By the twentieth century, these guarantees, coupled with common law practices and First Amendment and Due Process rights, were interpreted to protect rights of audience for both civil and criminal trials, as well as third-party access to watch pre-trial evidentiary hearings and to read court records.⁸ Moreover, from the eighteenth century onward, the injunction for public access embodied *in* the constitutional requirements of ‘open courts’ was not limited *to* courts. Both federal and state constitutions imposed obligations on their legislative branches to enable the public to have first-hand knowledge of government decision making.

1.2 Theorizing openness: from unruly crowds to Bentham’s ‘publicity’

How does one account for rise of the norms that subject judges and disputants to public scrutiny? One catalyst for these changes was the very activities of Medieval and Renaissance European rulers who had relied on open spectacles—from public hangings to royal pageants—to reinforce their claims to authority (e.g., Smuts 1989).

5 All the original states’ constitutions guaranteed jury trials for criminal defendants, as did all states entering after the Union was formed. See, e.g., Connecticut Constitution of 1818, Art. First, § 9, available at <http://www.sots.ct.gov/sots/cwp/view.asp?a=3188&q=392280> (‘In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to demand the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his favour; and in all prosecutions by indictment or information, a speedy public trial by an impartial jury.’).

6 See, e.g., Alabama Constitution Art. I § 13 (‘That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.’).

7 The Sixth Amendment provides: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. See generally Herman 2006.

8 See, e.g., *Presley v. Georgia*, 558 U.S. 209 (2010) (per curiam); *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1 (1986); *Waller v. Georgia*, 467 U.S. 39 (1984); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court of L.A. County*, 980 P.2d 337, 20 Cal. 4th 1178 (1999); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 96 (2d Cir. 2004). See generally Resnik 1987.

As Michel Foucault has famously analyzed, those who produce spectacles do not control their meanings or effects (Foucault 1995, 32-120).

A much studied illustration of this proposition is the practice of public executions, which would seem to be an excellent vehicle for the display of sovereign authority. In seventeenth-century Amsterdam, the burgomasters staged the ceremony in which death sentences were pronounced in a ground floor room opened to onlookers, able to watch through windows of the Town Hall; executions followed thereafter out front (Fremantle 1962, 208). But authorities elsewhere achieved less by way of decorum. In England, executions ‘lurched chaotically between death and laughter’ as crowds generated carnivalesque atmospheres that undermined the ‘script’ of a solemn ritual of state authority (Laqueur 1989, 309-311). As Mikhail Bakhtin put it, the large crowds produced ‘the suspension of all hierarchical rank, privilege, norms, and prohibitions’ (Bakhtin 1984, 10). The consequence was a shift in authority; hangings could only take place ‘with the tacit consent of the crowd’ (Laqueur 1989, 352).

Scholars of the English legal system point out that, while executions have drawn historians’ attention, ‘many more people of all ranks of society [...] came into contact with the legal system through the civil rather than the criminal courts’ (Brooks 1989, 357). Expansion of the private sector, coupled with that of government’s administrative apparatus and the growth in the legal profession, brought people into court. As diverse audiences participated and watched, they came to develop views about legitimate decision-making—and came to believe that they had a role to play in altering rulers’ prerogatives.

The French and American Revolutions made that plain, offering an array of ideas about democratic governance. Jeremy Bentham, who was formulating his thoughts on public participation in governance as these revolutions were underway, was one of the few of his generation to provide a sustained examination of the role played by openness—‘publicity’, as he termed it—in a variety of venues, courts included.⁹ Because Bentham proposed the Panopticon design for prisons, he is associated, as Foucault (1995, 200-10) examined,¹⁰ with subjecting individuals to surveillance regimes without knowing when or by whom they would be observed.¹¹ But, as detailed below, Bentham also advocated designs for buildings and rules to put judges and legislators before the public eye as well. Through such openness, the public would, he thought, maximize self-interest and thwart the ‘sinister interest’ of

9 Bentham 1843 ‘Rationale of Judicial Evidence’. William Twining, a scholar at University College London who worked on Bentham, noted that Bentham devoted more than 2,500 manuscript pages to the *Rationale* and that the discussion of publicity was likely written around 1812 (Twining 1985, 29). Quotations to ‘Bentham’ come primarily from a few of the volumes of the *Works of Jeremy Bentham* published in the nineteenth century by John Bowring, who served as Bentham’s literary executor and who put several volumes into print after Bentham’s death in 1832. For facsimiles of the *Work*, available at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php&title=192.

10 See also Gaonkar & McCarthy, Jr. 1994, 558-68.

11 ‘Unverifiable’ was the term proffered by Foucault to capture the power that visibility of the Benthamite kind imposed through a ‘state of conscious and permanent visibility’ that ‘automizes and disindividualizes power’ (Foucault 1995, 201-202).

the political and legal establishments, collaborating to advance their own concerns rather than those of the ‘community in general’ (Schofield 2006, 135). Bentham’s trust in the public prompted him to make a myriad of proposals for parliamentary and legal reforms and to commit (at least in theory) to universal suffrage (Ibid., 150-52, 155).¹² The “ultimate end—political salvation”, could only be achieved by democratic ascendancy’ (Ibid., 152), and the goal of his many designs was ‘dependence of rulers on subjects’ (Ibid., 348).

1.2.1 Observing and cabining authority: the dissemination of knowledge through codification and publicity

Jeremy Bentham’s advocacy of publicity relied on various techniques. Famous for his utilitarian calculus (Bentham 1843, 6), Bentham had a passion for codification (a word he is credited with inventing (Schofield 2006, 304)), deployed in service of public knowledge (Schofield 2006, 304; Schofield & Harris 1998). Illustrative is Bentham’s objection to the common law, never to be ‘known or settled’ (Bentham 1843, 236-37). By replacing the common law with codes, legal parameters would become plain and truly derived from the ‘consent of the whole’ (Ibid., 235).

Bentham was particularly attentive to, and appalled by, judicial procedures in English courts. Bentham charged judges and lawyers (‘Judge & Co.’) with creating ‘artificial rules’ (Draper 2004, 7) producing a ‘factitious’ system (Twining 1985, 52) full of procedural obfuscation at the expense of their clients and the public (Ibid., 28, 41-42, 76-79). Civil courts were thus ‘shops’ at which ‘delay [was] sold by the year as broadcloth [was] sold by the piece’ (Draper 2004, 5).

Bentham sought instead to make procedure as ‘natural’ as possible, and he devoted the decade from 1803 to 1812 to drafting revised rules (Twining 1985, 23). He proposed replacing the term ‘court’ with the word ‘judicatory’ so as to avoid an association of judges with the monarchy (Rosen 1983, 149). In lieu of fragmented rules of evidence made by common law judges, Bentham turned to his favored technique of codification (Twining 1985, 3). In lieu of piecemeal adjudication, Bentham wanted judges to preside over a whole case (through what today is called the ‘individual’ calendar system, as contrasted with the ‘master’ calendar system) so as to dispense justice swiftly. And, in lieu of judgments on the papers, Bentham wanted oral procedures; he proposed that all evidence be taken through ‘oral interrogation before the judge in public’ (Ibid., 31).

Bentham also called for subsidies for those too poor to participate. He proposed that an ‘Equal Justice Fund’ be established, supported by using the ‘fines imposed on wrongdoers’, government funds, and charitable donations (Schofield 2006, 310; Rosen 1983, 153-54). Bentham wanted not only to subsidize the ‘costs of legal

¹² Nicola Lacey interpreted Bentham to have embraced women’s suffrage on utilitarian grounds but concluded that, if he were to have insisted on women’s suffrage, other of his proposals for reform would be dismissed, and thus he excluded women’s suffrage from his agenda on ‘utilitarian grounds’ (Lacey 1998, 444). Yet he ‘perceived far more clearly than most of his (male) contemporaries the irrationalities and injustices which characterized women’s social position in the late eighteenth century’ (Ibid., 466).

assistance but also the costs of transporting witnesses' and the production of other evidence (Rosen 1983, 153-54). Bentham proposed that judges be available 'every hour on every day of the year' (Peardon 1951, 196) and he suggested that courts be on a 'budget' for evidence to produce one-day trials and immediate decisions (Draper 2004, 11). Bentham's advocacy of simplifying procedure—in part through legislative control (Draper 2004, 8-9; Schofield 2006, 308-12)—aimed to enable public opinion to function as a 'direct check' rather than be deflected through the technically abstruse system replete with 'jargonization' (Bentham 1843, 23; Twining 1985, 78, 80). Publicity, 'underwritten by simplicity', would be the 'main security against misdecision and non-decision' (Twining 1985, 48).

Bentham's focus was on trials in courts but he also appreciated aspects of what was then described as 'conciliation', for its resemblance to the more 'natural' procedure he favored (Kessler 2009). Examples of 'conciliation courts' came from several countries, including Denmark and France, but details of their actual practices are not easily found. One model, from France, likely involved witnesses testifying before lay jurists (Ibid., 435). Bentham noted that under the Danish procedures, the conciliation courts efficiently resolved a good many claims, heard together (Ibid., 436-37, drawing on correspondence of Bentham). Further, in his work on the 'Principles of Judicial Procedure', Bentham called for judges to 'exercise a conciliative function' to attempt to extinguish 'ill-will' (Bentham 1843, 47).

Yet, as William Twining's reading of Bentham manuscripts identified, Bentham preferred 'rectitude of decision, that is, a strict adherence to justice under the law', and thus accorded 'only a grudging place to compromise' (Twining 1985, 94-95).¹³ Amalia Kessler has specified various bases for Bentham's 'anxiety' about conciliatory approaches. The lack of the formality of oath-taking and the absence of public scrutiny put honesty at risk (Kessler 2009, 438). Moreover, the informality of conciliation courts left decision makers free to make personal judgments rather than constrained by legal rules (Ibid.). Thus, a judge charged with compromise could permit 'partiality' for one side to provide that party a 'partial victory [...] under the pretext of conciliation'¹⁴ As a consequence, in some instances, settlements could be 'repugnant to' and a 'denial of' justice (Bentham 1843, 35).

1.2.2 The architecture of discipline: from 'Judge & Co.' to the panopticon

Bentham's commitment to publicity in trials was fierce: 'Without publicity all other

13 Specifically, Bentham recorded his admiration for Denmark's 'Reconciliation Courts' (Bentham 1843, 46-47). Bentham's description leaves ambiguous what Danish 'Reconciliation Courts' did. His point about the lack of enforcement suggests that these courts entered some form of judgment. As he described, 'the damage, in whatever shape, from every wrong on each side, will operate as a set-off to every other; an account, as complete as may be, will be taken of what is due on each side; and a balance struck, and payment [...] made accordingly' (Ibid.). Thus, reconciliation or conciliation may not parallel contemporary 'settlements', in which parties agree to an outcome in lieu of a third party rendering a decision.

14 Kessler 2009, 438 (quoting Bentham's *De l'organisation judiciaire, et de la codification* in the edition of Bentham put out by Étienne Dumont, his French editor).

checks are insufficient: in comparison with publicity, all other checks are of small account' (Bentham 1843, 355). Yet more needs to be understood about how—from Bentham's vantage point—'publicity' did its work. Bentham made various kinds of claims about publicity's utilities, all predicated on the interaction between audience and those observed, as he argued for its application to diverse activities.

One function of publicity was truth. Bentham argued that the wider the circle of dissemination of a witness's testimony, the greater the likelihood that a falsehood ('mendacity') would be ferreted out.¹⁵ ('Many a known face, and every unknown countenance, presents to him a possible source of detection.'¹⁶) Moreover, through face-to-face examinations in tribunals readily accessible across the countryside (Twining 1985, 48-51), judges could apply 'substantive law to true facts,' adducing more information at lower costs (Ibid., 27-28).

A second product of publicity for Bentham was education. Bentham believed that the public features of adjudication would generate a desirable form of communication between citizen and the state. While not legally obliged to deliver opinions, Bentham thought judges would want their audience to understand the reasons behind their actions. Thus, it would be 'natural' for judges to gain 'the habit of giving reasons from the bench' (Bentham 1843, 357). Providing a stage for such dialogic exchanges, courts were 'schools' as well 'theatres of justice' (Ibid., 354).

Publicity's third function was disciplinary; 'the more strictly we are watched, the better we behave' (Quinn 2001, 277). Bentham proposed that ordinary spectators (whom he termed 'auditors' (Bentham 1843, 356)) be permitted to make notes that could be distributed widely. These 'minutes' could serve as insurance for the good judge and as a corrective against 'misrepresentations' made by 'an unrighteous judge' (Ibid., 355).¹⁷ More generally, 'notification' of the public (Schofield 2006, 261) imposed oversight as it provided a possibility of reform. Once informed, public opinion could exercise its authority to 'enforce the will of the people by means of the moral sanction'—akin to 'judges operating under the Common Law' (Schofield 2006, 263).

Bentham's views on the importance of publicity were not, as noted, limited to courtrooms; he believed the benefits produced through the interaction of audience with those observed—truth, education, and superintendence—to be useful in diverse settings across a vast swath of social ordering. The 'doors of all public establishments ought to be thrown wide open to the body of the curious at large—the great *open committee* of the tribunal of the world' (Bentham 1843, 37, 46). Bentham's invocation of door-opening was more than a metaphor; he literally described in detail how to design structures to ensure these activities took place before the public. These many

15 As Twining quoted Bentham, 'Falsehood—corrupt and wilful falsehood—mendacity, in a word—the common instrument of all *wrong*' was the 'irreconcilable enemy of justice' (Twining 1985, 90, emphasis in original).

16 Bentham 1843, 355 (quoting himself from an earlier volume).

17 See also Bentham 1843, 158 (writing of 'Public Opinion': 'To the pernicious exercise of the power of government it is the only check; to the beneficial, an indispensable supplement. Able rulers lead it; prudent rulers lead or follow it; foolish rulers disregard it').

and varied plans used architecture as ‘a means of securing publicity, while publicity was a means of securing responsibility’ (Schofield 2006, 259).

Bentham is (in)famous for promoting the ‘Panopticon’, a prison that was designed to subject incarcerated inmates to continual observation (Bentham 1843, 46).¹⁸ Bentham proposed similar configurations for ‘mental asylums, hospitals, schools, poor-houses, and factories’ (Schofield 2006, 256)—subsequently prompting the Foucauldian fear of the power that the state could wield over individuals.¹⁹ Yet Bentham was not intent on designing buildings facilitating observation of persons only confined in institutions. He also wanted to put lawmakers before the public eye, and he specified several methods of doing so. One was direct observation: he called for a debating chamber that was “‘nearly circular’” with “‘seats rising amphitheatrically above each other’”.²⁰ A second was to enlarge the ‘audience’ by facilitating the flow of public information to persons not physically present. Observers—‘auditors’—taking notes in court for example, could circulate their notes to disseminate the information. For legislatures, Bentham suggested that buildings include a ‘separate box for the reporters for the public papers’ (Schofield 2006, 258). Third, Bentham wanted to require legislatures to provide information through an ‘official report of its proceedings, including verbatim accounts of speeches where the subject was considered to be of sufficient importance’ (Ibid., 258).

While creating such information-forcing methods, Bentham did not want government officials to be the sole source of such accounts. His proposal to build-in designated space for newspaper reporters freed them ‘to produce unofficial records of the proceedings and thereby “prevent negligence and dishonesty on the part of the official reporters’”.²¹ As for the executive branch, Bentham designed a way to link the ministers of government, physically, through ‘boxes and pulleys’ to permit ‘instantaneous intercommunication’ (Schofield 2006, 254-55). He also wanted to have the administrative branch of government compile records of and statistical information about government’s output (Rosen 1983, 116-126).

Bentham’s enthusiasm for openness did not render him insensitive to the burdens of public processes and the need for privacy. He advocated closure in various contexts, such as secret ballots for voting, and listed several specific instances that made closure of trials appropriate. His justifications for privacy included protecting participants from ‘annoyance’, avoiding unnecessary harm to individuals through ‘disclosure of facts prejudicial to their honour’ or about their ‘pecuniary

18 See also Schofield 2006, 255-56. ‘The activities of the inmates would be open to constant scrutiny from the prison governor or inspector, and the activities of both to the scrutiny of the public at large, who would be encouraged to visit the panopticon’ (Ibid., 255).

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

20 Schofield 2006, 258 (quoting Bentham).

21 Schofield 2006, 258 (quoting Bentham).

circumstances', and preserving both 'public decency' and state secrets.²² Thus, the presumption in favor of public trials should, upon occasion, give way. (Bentham's list of circumstances for closure, like his arguments for openness, parallel those made in contemporary courts.²³) As for other parts of government, Bentham put the executive (or administrative) sphere at an 'intermediate' level, noting that secrecy could be appropriate when issues of diplomacy and the military were involved (Schofield 2006, 270). Further, Bentham advocated an exception to his principle of publicity for voting; the secret ballot was protection against corruption (Ibid.).

The end state of the various sources of information was to inform Bentham's 'Public Opinion Tribunal' (Rosen, 1983 26-27)²⁴—the general public, informed by knowing the basis for decisions, the process of decision making, and the outcomes, and thus able to assess whether the rules comported with its interests. As Bentham scholars have noted, his commitment to 'common sense' and reliance on '*observation, experience, and experiment*' have a good deal in common with John Locke's attachment to knowledge that was based in empiricism (Twining 1985, 52, emphasis in original); both men were optimistic (or naïve) about the complex relationship between knowledge and judgment.

Given his ambitions, Bentham ought to be read as broadening 'the scope of democratic theory' by expanding the means of making elites accountable (Rosen 1983, 13-14). Furthermore, he sought to facilitate participation by the non-elite, as he advocated roles for the audience and subsidies for the poor to use judicial services (Ibid., 153-55). Bentham aimed to produce what Robert Post has called 'democratic competence', which underlies commitments to free speech and a free press.²⁵ Thus, while a lively debate about how to categorize Bentham's philosophy is ongoing, several Bentham scholars identify him as a proponent of democracy (Schofield 2006, 147-155; Rosen 1983, 11-14, 41-54, 221-37).

Bentham's insights were plainly radical when measured against the baseline of the historical context in which he wrote. In marked contrast to the adjudicatory proceedings of Renaissance Europe, when people watching trials were not seen as

22 Specifically, exceptions permitted expelling those who disturbed a proceeding and closing proceedings for the preservation of 'peace and good order', to 'protect the judge, the parties, and all other persons present, against annoyance', to 'preserve the tranquility and reputation of individuals and families from unnecessary vexation by disclosure of facts prejudicial to their honour, or liable to be productive of uneasiness or disagreements among themselves', to avoid 'unnecessary disclosure of [...] pecuniary circumstances', 'to preserve public decency from violation' and to protect 'secrets of state' (Bentham 1843, 360). As these brief excerpts make plain, the parameters for closure were somewhat 'vague' (Twining 1985, 99).

23 For example, Art 6(1) of the European Convention on Human Rights provides that: 'Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

24 Bentham invoked the image as a vehicle of reform but did not specify fully how it would be formed or cohere (Rosen 1983, 38-40). See Cutler 1999, 321.

25 Post thus explored the propriety of some forms of regulation under the First Amendment in the United States as he parsed the distinct values of 'democratic legitimation' and 'democratic competence' (Post 2009, chs. 1-2).

having the power to sit in judgment of judges or to assess the decency of the state's procedures, Bentham raised the possibility that the state itself could be subjected to judgment. Bentham's widely-quoted phrase made that point directly: 'Publicity is the very soul of justice. [...] It keeps the judge himself, while trying, under trial' (Bentham 1843, 316; 355).

Benthamite reforms were part of what shifted 'spectators' from that role's passivity to take up a more active posture as 'observers', engaging not only in the carnival of the crowd but also in critique expressive of their developing authority.²⁶ By Bentham's era, the responses of observers were gaining weight and relevance. Popular opinion was coming to matter through the elaboration of what has come to be called a 'public sphere' that could affect political rulers.

1.3 Forming public opinion through complementary institutions: an uncensored press and a subsidized postal system

Thinking about courts in isolation is erroneous, for the mandate for openness that framed their work interacted with the development of other institutions also facilitating discursive exchanges about governance. While Bentham's attention to courts as places of politically relevant practices makes him especially relevant for this discussion, he was not the only theorist of his century specifically interested in the function of publicity.²⁷ For political philosophers, Immanuel Kant's 'publicity principle' may be the more salient, with its well-known claim that all 'actions relating to the right of other human beings are wrong if their maxim is incompatible with publicity'.²⁸ As David Luban has explained, Kant's formulation required policies to be subjected to public debate as a constraint (Luban 1998, 156).²⁹ Both Kant and Bentham wrote in the wake of David Hume, regularly cited for the proposition that it is 'on opinion only that government is founded' (Hume 1898, 110).

How does the public, in any of these postures, obtain information? As noted, Bentham's suggestions included permitting note-takers ('auditors') in court and reporters in the legislature so that the public had sources of knowledge independent of the government (Bentham 1843, 570). As he explained, 'the distinction between a government that is despotic, and one that is not so' is that 'some eventual faculty of effectual resistance, and consequent change of government, is purposely left, or

²⁶ The distinction between spectators and observers is drawn by Crary 1998, 1-25.

²⁷ Bentham has, however, been praised for being 'one of the first persons to see the supreme importance of the problem of information in government' in terms of efficiency, accountability, and responsibility (Peardon 1951, 203). Later theorists also described the importance of publicity. John Rawls, for example, posited that agreements reached about justice should be accompanied by 'publicity', by which Rawls meant that 'citizens have a knowledge of the principles that others follow' (1971, 16, 275). According to Rawls, courts were also required to perform in public. Adjudication had to be 'fair and open'—enabling the public to see that the judges were 'independent and impartial' (Ibid., 239).

²⁸ The quote is from David Luban's translation of this statement from the second appendix of Kant's *Perpetual Peace*, written in 1795; Luban argued that he had captured the German wording more precisely than had others. See Luban 1998, 154, 155 n1.

²⁹ Distinctions between Bentham's publicity right and that of Kant are explored in Splichal 2003.

rather given, to the people' (Bentham 1843, 277). Another was an unfettered press that would help, Bentham thought, promote the requisite '*instruction, excitation, correspondence*'.³⁰ Indeed, Bentham thought the 'newspaper was a far more efficient instrument than pamphlets or books' because of the 'regularity and constancy of attention' it provided to unfolding events (Schofield 2006, 268).³¹

Bentham's enthusiasm for an exchange among citizens, via press and post, was shared by others on both sides of the Atlantic. James Madison's short essay, *Public Opinion*, extolled its virtues as 'the real sovereign in every free' government (Madison 1983). To enhance the 'general intercourse of sentiments', Madison wanted the ready 'circulation of newspapers through the entire body of the people' (Ibid.). This exchange could enable the public to monitor their representatives (in a Benthamite fashion) or provide citizens in a fledgling polity a means to gain a sense of affiliation with their government (akin to Hume's aspiration of gaining public confidence).³² Thus, scholars of the theories of both Bentham and Madison³³ disagree about the degree to which they hoped to inspire participatory exchanges as contrasted with disciplinary control. Post, press, and courts could be means of engendering cohesion with the 'imagined community' of the nation-state (Anderson 2006), either to debate its norms or to bring into being Madison's 'united public reason' (Sheehan 2004, 416), with the political force to support the government.³⁴

In the United States, echoes of these aspirations can be found in some state constitutions' express commitments to a free press, which were sometimes—as in Georgia's 1777 Constitution—next to jury rights ('Freedom of the press and trial by jury to remain inviolate forever'³⁵). The federal 1791 Bill of Rights provided protection for the free press, complementing congressional authority under the 1789 Constitution to 'establish Post Offices and Post Roads.'³⁶ Congress enacted the Post Office Act of 1792, which expanded and subsidized the network of communications (mostly via stage coaches) by giving newspapers 'unusually favorable terms, facilitated the rapid growth of the press', and prohibited government surveillance of posted exchanges (John 1995, 31).³⁷

Turning for a moment to Europe, a 'national network of symbolic

30 Schofield 2006, 251 (quoting Bentham, emphasis in the original).

31 David Zaret located the development of pamphletting and the press earlier. See Zaret 2000.

32 John 1995, 60-61. John also read Madison as failing to appreciate the political force that public opinion could have and the role to be played by communications outside government channels (Ibid., 29).

33 Compare Sheehan 2004 with Gibson 2005. See also Koschnik 2001.

34 Madison's *Public Opinion* essay argued that there were cases 'where the public opinion must be obeyed by the government; so there are cases, where not being fixed, it may be influenced by the government'. Madison added: 'This distinction, if kept in view, would prevent or decide many debates on the respect due from the government to the sentiments of the people'. Further, '[t]he larger a country, the less easy for its real opinion to be ascertained, and the less difficult to be counterfeited; when ascertained or presumed, the more respectable it is in the eyes of individuals. This is favorable to the authority of government. For the same reason, the more extensive a country, the more insignificant is each individual in his own eyes. This may be unfavorable to liberty' (Madison 1983).

35 Georgia Constitution of 1777, Art. LXI, available at http://avalon.law.yale.edu/18th_century/ga02.asp.

36 See, e.g., U.S. Constitution Amendment I and Art. I, § 8, cl. 7.

37 The prohibition on opening letters was sometimes ignored (John 1995, 43).

communication' was put into place in the eighteenth century (Blanning 2007, 24-38). By the early 1700s, a 'cross-post system' linked cities and by 1760 most major towns boasted daily mail service. Key to the utility of mail was literacy, evidenced by the fact that in 1630, an estimated 400 books were available while, by the 1790s, some 56,000 were in print (Ibid., 479). In the contemporary world where internet broadcasts are commonplace, those achievements may be hard to appreciate but, in 1832, Francis Lieber pronounced the postal system 'one of the most effective elements of civilization' along with the printing press and the compass.³⁸

1.4 Developing public sphere(s)

Bentham's optimism about public knowledge gave way to concerns about the need to revitalize the public sphere, elaborated during the second half of the twentieth century by Jürgen Habermas (1991).³⁹ Habermas credited Bentham with forging 'the connection between public opinion and the principle of publicity' (Habermas 1991, 99).⁴⁰ Habermas also read Bentham as seeking a transparency in parliamentary debates so that deliberations there would be continuous with those of the 'public in general' (Ibid., 100). Habermas likewise credited Kant as identifying publicity as the mechanism for a convergence of politics and morality that could produce rational laws (Ibid., 102-04, 117-18). But Habermas argued that, because only property owners were admitted to the public debate, the public sphere had become a vehicle for 'ideology' (Ibid., 117)⁴¹ and could no longer serve as a means for the 'dissolution of power' (Ibid., 135-36).

Law has been central to Habermas but unlike Bentham, details of the practices of courts have not.⁴² Habermas focused on how law bound 'state functions to general norms' that protected capital markets (Habermas 1991, 79). Habermas cited practices in Austria and Prussia as examples of when 'public scrutiny of private people coming

38 Quoted by John 1995, 8.

39 See generally Calhoun 1992; also Goode 2005. Habermas's historical account focused on how eighteenth-century cultures of philosophy, literature, and the arts have shaped a sense of a readership/ spectatorship authorized to provide a 'self-interpretation of the public in the political realm'—with views independent of those formulated through the church or government (Habermas 1991, 55, 36-37). Zaret disputed the historical account by arguing that the origins of the 'public sphere' predated the eighteenth century (Zaret 2000, 32).

40 Habermas defined 'public' in terms of 'openness', writing, 'We call events and occasions "public" when they are open to all, in contrast to closed or exclusive affairs ...' (Habermas 1991, 1).

41 Habermas there cites Hegel's concept.

42 The shaping of democratic rule of law through discourse theory is the central burden of Habermas 1998. Habermas devoted a chapter to the 'Indeterminacy of Law and the Rationality of Adjudication' (194-237), and further noted the role played by evidentiary procedures as constraints on the range of argument available (234-37). In addition, he was interested in the legitimacy of constitutional adjudication (238-86), and theories of judicial articulation of constitutional rights. Even as Habermas spoke of the infrastructure for spectatorship—'assemblies, performances, presentations, and so on' (361, emphasis in original),—Habermas did not return to trials as part of his discussion of 'Civil Society and the Political Public Sphere' (329). The lack of this focus could stem from a tradition in political theory of treating courts and politics separately and, perhaps, because German civil inquisitorial law traditions put the processes of evidence taking in the hands of judges who would proceed in a series of discrete intervals—thus making the impressions of the observer, so acute for Bentham in the common law, seem more remote for Habermas.

together as a public' had helped to shape civil codes relating to property (Ibid., 76). When 'legislation [...] had recourse to public opinion', it could not be 'explicitly considered as domination' (Ibid., 82). Over time, a variety of 'basic rights' (such as voting, free press, and association) protected access to the public sphere (Ibid., 83). But without 'universal access' (Ibid., 85), which nineteenth-century Europe did not provide, the public sphere could not do its work.

Habermas both admired and critiqued 'public opinion', for he saw it as subject to manufacture through the intertwining forces of the market and the state. Publicity that had once served to enable opposition 'to the secret politics of the monarchs' came instead to be used to earn 'public prestige' for specially-situated interests (Ibid., 201). The press became entangled with 'public relations' efforts, as advertisements promoted consumerism (Ibid. 181-95). The resulting consensus that might exist was superficial, 'confusedly enough [...] subsume[d] under the heading "public sphere"' (Ibid., 4).⁴³ The public sphere thus served as a space for performance of prestige rather than as a forum for 'critical debate' (Ibid., 201).

Habermas could draw on many instances of governments deploying publicity in service of their aims. A self-acknowledged example comes from President Theodore Roosevelt who, in his first annual congressional message, explained that '[t]he first essential in determining how to deal with the great industrial combinations is knowledge of the facts—publicity' (Roosevelt 1901). He established a 'publicity bureau' as a 'Department of Congress' to investigate and disseminate data on the administrative work of federal agencies. Soon thereafter, advertising became a favored form of publicity, followed by a 'science' of publicity as well as firms marketing themselves as experts in advertising and public relations.⁴⁴

Habermas sought to interrupt such developments through prescriptions aimed at facilitating public reasoning as members of pluralist polities communicated, discursively, so as to reach a genuine consensus. According to Habermas, individual private interests themselves were not capable of being 'adequately formulated, let alone politically implemented, if those affected have not first engaged in public discussions to clarify which features are relevant in treating typical cases as alike or different...' (Habermas 1998, 450). Positive law needed legitimacy derived through a procedure of 'presumptively rational opinion and will-formation' (Ibid., 457). Thus, the public sphere needed to be reconstituted, as such discursive space was essential in the current social order. Without gods and monarchs, one needed a vibrant public sphere to establish that the relationship between the 'rule of law and democracy' was more than a 'historically contingent association' (Ibid., 449).

Borrowing from political theorist Nancy Fraser, I have added an 's' to the term public sphere in the subtitle of this section to underscore that no single 'public' exists. Rather, a pluralistic social order, replete with racial, gender, class and ethnic hierarchies, is constituted through a series of spheres in which norms are debated

43 Habermas argued that deployment of the press 'to serve the interests of the state administration' could be found in the sixteenth century (Habermas 1991, 20-24).

44 See generally Sheingate, forthcoming.

(Fraser 1992, 123, 128). Moreover, as Fraser has pointed out, the exchanges in these various and sometimes overlapping spheres are not equally participatory; certain voices dominate in stratified societies (Ibid., 124). Fraser also focused on the disparate capacities of those who need to be heard as she called for ‘participatory parity’ and argued for more structures to enable a ‘plurality of competing publics’ to emerge rather than aspire to the formation of a ‘single, comprehensive public sphere’ (Ibid., 117). Courts are one site that is responsive in some measure to the inequities that undermine the kinds of ‘discourses’ to which Habermas and Fraser aspire. As analyzed below, the obligations of equal treatment and open proceedings are expressly designed with participatory parity in mind.

1.5 Reflexivity: transnational signatures of justice

Before turning to these contemporary utilities of adjudication in democratic social orders, a summary of the impact of past and current trends is required. Courts have been restructured during the last four centuries. The status of the judge shifted from loyal servant of the government to an independent actor, insulated from reprisal so as to be able to sit in judgment of the government. Enshrined in national laws (such as the 1701 Act of Settlement in Britain⁴⁵ and Massachusetts’ Constitution of 1780), this proposition has also become a fixture of transnational obligations. The European Convention on Human Rights of 1950 is illustrative—requiring in Article 6(1) that tribunals be ‘independent and impartial’.⁴⁶

Obligations of publicity are likewise entrenched in law, with injunctions to governments to protect the freedom of information (Ackerman & Sandoval-Bellesteros 2006). Article 10 of the 1948 Universal Declaration of Human Rights is one example: ‘everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal’ in determining criminal charges. Article 6 of the European Convention on Human Rights of 1950 frames the right more broadly, protecting openness in civil as well as criminal adjudication: ‘[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly...’⁴⁷ The 1966 International Covenant on Civil and Political Rights, promulgated by the United Nations, provides another example in Article 14: ‘[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal

45 The 1701 Act of Settlement provided that English judges served ‘during good behavior’ and could only be swept from office upon a vote of both Houses of Parliament.

46 Article 5 also provides: ‘Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.’

47 The case law of the ECtHR has found that the right to a hearing often entails rights to oral hearings if individuals’ ‘civil rights and obligations’ are at issue. See *König v. Germany*, App. No. 6232/73, 2 Eur. H.R. Rep. 170 (ser. A) paras. 88-89 (1978). A large body of law parses questions of when these rights are engaged and what forms of hearings suffice. See, e.g., *Riepan v. Austria*, App. No. 35115/97, ECHR 2000-XII, para. 9-41; *Göç v. Turkey*, App. No. 36590/97, 11 July 2002 [GC], para. 51.

established by law’.

Requirements of publication became codified, as did practices of judgments be ‘pronounced in public’ in courts around the world.⁴⁸ Court rules provide further specificity, with such requirements as having judgments be ‘pronounced in public’ (to borrow from the Rules of Procedure and Evidence from the International Criminal Tribunal for the Territories of the former Yugoslavia), as well as published in written form.⁴⁹ One of the newest transnational courts, the International Criminal Court (ICC) goes further, by specifying the desired composition for the audience. The ICC’s rules require that decisions on admissibility of potential cases, as well as on jurisdiction, responsibility, sentences or reparations ‘shall be pronounced in public and, wherever possible, in the presence of the accused, the Prosecutor, the victims [...] and the representatives of the States which have participated in the proceedings’.⁵⁰

Of course, such provisions also recognize the legitimacy of closures under specified circumstances.⁵¹ And, while not often directly cited, Bentham’s explanation of publicity’s importance for adjudication (as well as his justifications for exceptions) has been echoed regularly by judges in both the United States and Europe, as they insist on public processes either when enforcing United States constitutional provisions⁵² or the ‘fundamental guarantee’ to a ‘public hearing’ under Article 6 of the European Convention on Human Rights.⁵³

A term from the social theorist Pierre Bourdieu—‘reflexivity’ (Bourdieu & Wacquant 1992, 36-46, 235-36; Bourdieu 2003; Bourdieu 1987, 838)—is apt, in that the practices of open courts have become a signature feature that helps to define an institution *as a court*. Moreover, that ambient understanding is shared not only within the professional field of jurists but more broadly in popular culture. Enactment of that precept was, in the seventeenth and eighteenth centuries, by way of foot traffic and personal visits; new techniques of dissemination developed thereafter (Martin 2008).⁵⁴ Before the contemporary era of high levels of security before one can enter many courts, paths to knowledge about what transpired within came, in many countries, by way of the open doors and windows of courtrooms, the expansion of the newspaper business, and commercial publishers who reported court decisions.

48 See, e.g., International Court of Justice, Rules of Court, Art. 94(2); Statute of the Inter-American Court on Human Rights, Art. 24(3); International Criminal Tribunal for the Former Territories of Yugoslavia, Rules of Procedure and Evidence, Rule 98 *ter* (A). A few courts make the reading judgments optional. See, e.g., ECtHR Rules, Rule 77(2).

49 See, e.g., ICJ Rules Art. 94(2), 95; Statute of the Inter-American Court on Human Rights, Art. 24(3). Other systems make reading judgments optional. See, e.g., ECtHR, Rules of Court, Rule 77(2) (Dec. 2008).

50 ICC, Rules of Procedure and Evidence, Rule 144(1).

51 See, e.g., ECHR Art. 6(1).

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

53 See, e.g., *Schuler-Zraggen v. Switzerland*, App. No. 14518/89, 16 Eur. H.R. Rep. 405 para. 58 (1993); *Fischer v. Austria*, App. No. 16922/9020, Eur. H.R. Rep. 349 (1995).

54 The availability of information in different forms did not necessarily produce more transparency (LoPucki 2009).

Even with the new barriers to easy physical access, today's technologies amplify the options. In addition to electronic databases available on the internet and 'public information officers' ('PIOs') briefing the press, some jurisdictions televise court proceedings.⁵⁵ Examples include the Supreme Court of Canada, the International Criminal Tribunal for Yugoslavia, many states in the United States, and an occasional federal appellate court (Brown 2007, 1). Transnational courts often provide that judgments be published in more than one language; the European Court of Justice, for example, requires publication in more than twenty languages.

The right of public access to courts is synergistic with the obligations to protect judicial independence and to hear both sides. Open processes can make plain that a government must acknowledge the independent power of the judge or, alternatively, can reveal state efforts to try to impose its will on judges. Together with opportunities to be heard, open access and judicial independence have become definitional of courts.

Thus far, the focus has been on the links of some of these attributes to the past, with attention paid to the expansion and continuity of rights forged in the eighteenth century. But appreciation for differences is needed, not only in terms of the techniques for publicity but also in reference to new norms for judges and new forms of regulation of judges. The injunction 'hear the other side' is ancient,⁵⁶ but its implications have changed. While once the point of 'fair process' was to provide process in accordance with legal rules, over the last century 'fairness' came to provide a metric of evaluation, obliging that governments provide a certain quantum of process when people asserted claims of rights (Langford 2009).⁵⁷

Moreover, aspects of Bentham's interest in oversight of judges helped to produce calls for judicial 'accountability', a proposition sometimes in tension with the ideology of judicial independence, including from popular as well as regal will (Contini & Mohr 2008, 49-65). Publicity is used to facilitate evaluations, as exemplified by a 2008 study that reviewed surveys from several European countries seeking to assess 'the quality of court performance' in providing public services. The measures, aiming to capture 'fairness' and 'efficiency',⁵⁸ included reviews of complaints against judges. Accountability has come to be linked to 'transparency', a word regularly used in

55 Details and concerns about the impact of such technologies can be found in Mulcahy 2008.

56 The words 'Audi & Alteram partem' are, for example, inscribed on the Town Hall of Amsterdam (Fremantle 1959, 76). See also below n75.

57 See also *Caritativo v. California*, 357 U.S. 549 (1958), 558 (Frankfurter, J., dissenting) ('*Audi alteram partem*—hear the other side!—a demand made insistently through the centuries, is now a command, spoken with the voice of the Due Process Clause of the Fourteenth Amendment, against state governments, and every branch of them [...] whenever any individual, however lowly and unfortunate, asserts a legal claim').

58 Contini and Mohr, for example, looked at various efforts to evaluate and control judges. Complaints were one method; of some thousand filed about judges in France and Spain, the majority involved delays and almost none resulted in sanctions against judges (Contini & Mohr 2008, 29). Similarly, a comparison of nine European countries in 2004 showed that fewer than twenty-five judges received sanctions in any one country during that year (Ibid., 30). In terms of using managerial techniques such as linking pay to output, a Spanish court ruled that approach illegal (Ibid., 44-45). Another method was surveys of attitudes toward judges (Ibid., 72-74). Contini and Mohr called for more comprehensive, interactive, and cooperative methods to enhance communications (Ibid., 94-103).

reference to courts, often clad in glass, said to embody that prescription.

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

2. Privatizing adjudication

The very practices of adjudication in democracies that have opened up a world of persons eligible to bring claims to courts pose a profound challenge *for* courts. Around the world, dockets have swelled and, despite Bentham’s advocacy for an Equal Justice Fund, countries have not provided sufficient funding directly to courts or to litigants to enable all those eligible under law to pursue their claims or to support the staffing needs of judiciaries. While constitutional precepts at the transnational, national, and subnational levels extol courts, recent rulemaking and statutes about courts have diminished the information-forcing, publicity-providing functions of courts. Three of these techniques—reconfiguring court-based procedures to privilege settlement, devolving adjudication to agencies that provide less public access, and outsourcing decisions to private providers—are sketched below.

2.1 Managerial conciliation in courts

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

In an office setting without the robe, using a computer and court administrative staff to monitor the entire caseload and individual case progress; conferring with lawyers (often by telephone or videoconference) in individual cases to set dates or limits; in that same office at a computer, poring over a particular lawsuit’s facts, submitted electronically as affidavits, documents, depositions, and interrogatory answers; structuring and organizing those facts, rejecting some

or many of them; finally, researching the law (at the computer, not a library) and writing (at the computer) explanations of the law for parties and lawyers in light of the sorted facts. For federal civil cases, the black-robed figure up on the bench, presiding publicly over trials and instructing juries, has become an endangered species, replaced by a person in business attire at an office desk surrounded by electronic assistants. (Hornby 2007, 462.)

This picture accurately reflects that the mandate of federal judges has shifted. Some sixty years ago, when nationwide rules of civil procedure were promulgated, those rules created a 'pre-trial' procedure for judges and lawyers to meet and confer in advance of trial. The innovation aimed to simplify trials; the archival records of the rule drafters do not reflect that judges were supposed to use the occasion to encourage lawyers to settle cases or to seek methods of dispute resolution other than adjudication (Resnik 2000, 934-43; Resnik 1982, 378-80). Indeed, when in the 1950s a group of distinguished proceduralists returned from a visit to courts in Germany, they wrote of their surprise at how the German judge was 'constantly descending to the level of the litigants, as an examiner, patient or hectoring, as counselor and adviser, as insistent promoter of settlements' (Kaplan 1958, 1472).⁵⁹

But, by the 1980s, that description became apt for judges in the United States, who were reframing their role and the rules that governed their procedures. By the early 1990s, and with enthusiastic support from Congress in provisions endorsing 'alternative dispute resolution' (ADR), what had once been 'extra-judicial' procedures have become 'judicial' procedures (Clark 1981). As Judge Hornby's description illustrates, federal judges are now multi-taskers, sometimes deployed as managers of lawyers and cases, sometimes acting like super-senior partners to both parties advising on how to proceed, sometimes serving as settlement masters or mediators, and at other times as referral sources, sending disputants either to different personnel within courthouses or to institutions other than courts. That work is one of the many factors contributing to the 'vanishing trial' (Galanter 2004; Resnik 2004), a term describing the fact that, as of 2002, fewer than two of one hundred civil cases filed in the federal courts started a trial.

2.2 Devolution to agencies; outsourcing to private providers

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

As of 2001, Congress had authorized some 1700 judgeships in the federal courts, with about 840 provided for trial judges constitutionally chartered and

⁵⁹ Admiration for German civil procedure can be found in a good deal of U.S.-based literature. See, e.g., Langbein 1985.

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

Comparing the volume of fact-finding activities during 2001 in federal agencies and federal courts provides a snapshot of the shift towards administrative adjudication. That year, some 100,000 evidentiary proceedings—where a person testified, but not necessarily at a trial—took place inside the more than 550 federal courthouses around the United States. In contrast, some 700,000 evidentiary proceedings took place in four federal agencies with a high-volume of adjudication (Resnik 2004). But unlike federal courts, in which constitutional precepts insist that doors be open, many federal administrative adjudicatory proceedings are presumptively closed to outsiders. Further, even if one could attend, finding such hearings is difficult as they take place in office buildings that do not easily welcome passersby.

The third mechanism of privatization is the outsourcing of decision-making through enforcement of contracts mandating arbitration in lieu of adjudication. My own 2002 cell phone service agreement provides an example: By unwrapping the phone and activating the service, I waived rights to go to court and became obligated to ‘arbitrate disputes arising out of or related to’ this or ‘prior agreements’. Even when ‘applicable law’ permitted joining class actions or class arbitrations, I had waived rights to do so. In purported symmetry, this contract stated that both the provider and the consumer were precluded from pursuing any ‘class action or class arbitration’.⁶⁰

The law of the United States once refused to enforce such pro forma contracts out of concern that one party had overwhelming bargaining power. Judges also explained that arbitration was too flexible, too lawless, and too informal as contrasted with adjudication, which they praised for its regulatory role in monitoring adherence to national norms (Resnik 1995, 246-253). However, beginning in the 1980s, the Supreme Court reversed some of its earlier rulings. It reread federal statutes to permit—rather than to prohibit—enforcement of arbitration contracts when federal statutory rights were at stake, albeit with the caveat that the alternative mechanism provided an ‘adequate’ mechanism to enforce statutory rights.⁶¹ Adequacy did not, however, require the same procedures (such as discovery), and the burden of showing that costs charged to disputants are inappropriately burdensome falls on the party contesting the mandate to use the alternative to court.⁶² In 2013, a five-person majority enforced an arbitration contract even though the cost of an

60 An example can be found on the websites of many providers. One such agreement is republished in Resnik 2006a, 1134-39.

61 See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), 119; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), 640; *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985), 218.

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

individual plaintiff proving the federal anti-trust violation exceeded the potential recover, and in that decision as that majority had done in 2011, the Court upheld prohibitions on ‘class arbitrations’—contracts that precluded aggregation of claims in these alternative fora.⁶³

The explanations proffered by judges developing this case law relied not on the differences between arbitration and adjudication, but on the similarities—both were posited to be simply variations on the dispute resolution theme. In the United States today, consumers and employees alleging that companies have violated federal or state statutes of various kinds (such as truth-in-lending or anti-discrimination laws) can be sent to dispute resolution programs selected by manufacturers and employers. In addition, when parties disagree about how to interpret contractual provisions about whether arbitration is required, the Supreme Court has ruled that such issues are to be decided, at least initially, by the private arbitrators and not by judges.⁶⁴

Yet contemporary investigations into the processes provided have raised many questions. One set of cases challenges arbitration provisions in certain kinds of contracts, such as credit cards, on anti-trust grounds, as evidence of collusion in consumer practices.⁶⁵ Lawsuits predicated on state consumer laws also object to the lack of neutrality of arbitration services; the allegations were that, in debt collection cases, one provider of services decided ‘in favor of the business entity and against the consumer 100% of the time.’⁶⁶ A related federal congressional investigation concluded that in that industry, ‘consumer arbitrations’ were rarely filed by consumers; rather, debt collection agencies relied on contracts requiring arbitration to use such procedures ‘against consumers.’⁶⁷

Some lawmakers have translated these concerns into constraints on the use of these contracts for certain kinds of transactions. Congress has insulated poultry farmers and car dealers, who are not bound by *ex ante* waivers of rights to arbitrate. Other legislative proposals call for broadening those protections to civil rights

63 See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. ___ (June 20, 2013). In the *AT&T* case, the Court held that the Federal Arbitration Act (‘FAA’) preempted a California judicial rule that if a waiver prevented the opportunity to vindicate a right, that contractual provision was not enforceable. See generally Resnik 2012a. In contrast, in 2011, the Canadian Supreme Court declined (5-4) to insist on arbitration of a consumer dispute with a cell phone provider. *Seidel v. Telus Commc’ns, Inc.* (2011), 329 D.L.R. 4th 577, paras. 13, 31, 48-50 (Can.). Because the cell phone provision made ‘the class action waiver dependent on the arbitration provision,’ it too was not enforceable, but the court took no position on whether a class ought to be certified (*Ibid.*, paras. 46-49).

64 See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Rent-A-Center, West, Inc. v. Jackson*, ___ U.S. ___ (2010).

65 See *Ross v. Bank of America*, 524 F.3d 217 (2d Cir. 2008).

66 Complaint for Injunctive Relief and Civil Penalties for Violations of Business and Professions Code Section 17200 at 2, *The People of the State of California v. National Arbitration Forum, Inc, et al.*, No. CGC-08-473569 (California Supreme Court, August 22, 2008).

67 See Staff Report, Arbitration Abuse: An Examination of Claims Files of the National Arbitration Forum; Domestic Policy Subcommittee, Majority Staff Oversight and Government Reform Committee, U.S. House of Representatives, July 21, 2009, 7, available at <http://www.clarksvilleonline.com/wp-content/uploads/2009/07/Report-on-National-Arbitration-Forum.pdf>.

claimants and consumers.⁶⁸

Across the Atlantic, the European Court of Justice (ECJ) upheld an Italian statute imposing mandatory ‘dispute settlement rules’ for disputes between consumers and telecommunication companies and entailing some use of the internet to file claims. Consumers had argued that the statute violated Europe’s commitment to providing everyone with a ‘fair and public hearing.’⁶⁹ The ECJ’s Advocate General concluded that ‘a mandatory dispute resolution procedure without which judicial proceedings may not be brought does not constitute a disproportionate infringement upon the right to effective judicial protection [...] [but] a minor infringement [...] that is outweighed by the opportunity to end the dispute quickly and inexpensively.’⁷⁰ In 2010, the ECJ concurred but, unlike the U.S. Supreme Court, imposed regulatory caveats: that the settlement outcomes were not binding; that the ADR efforts imposed no ‘substantial delay’ in bringing legal proceedings and that the ADR tolled time bars; that forms of judicial ‘interim measures’ remained available; and that, if settlement procedures were available only electronically, national courts were to assess the burden placed on individuals.⁷¹ More generally, European courts have been reluctant to permit enforcement of contracts in which one party has the power to draft, making ‘unfair terms’ in consumer contracts unenforceable.⁷² Thus, adjudicatory procedures are themselves in litigation, with ongoing debates about when to permit and when to preclude opportunities to use open courts.

2.3 Law’s migration: ADR across borders

The narrative of shifting procedural norms criss-crosses jurisdictions. Many litigants, judges, lawyers, and law professors are members of transnational organizations that serve as mechanisms for the import and export of norms and practices (Resnik 2006b; Resnik, Civin, & Frueh 2008). During the twentieth century, many such entities promoted adjudication, both within nation-states and beyond. The growth in border-crossing courts is illustrative. In 1946, the International Court of Justice (ICJ) at The Hague became the successor institution to the League of Nations’ court. In the 1950s and 1960s, the ICJ was joined by regional courts in Europe and in the Americas and, in the 1990s, by the International Tribunal for the Law of the Seas (ITLOS), the International Criminal Court, and geographically focused courts dealing with the former Yugoslavia, Rwanda, and Sierra Leone.

More recently, the transnational norm entrepreneurs have developed the market

68 See Food Conservation and Energy Act of 2008, sec. 210 (Production Contracts, Arbitration), Pub. L. No. 110-246, June 18, 2008); Motor Vehicle Franchise Contract Dispute Resolution Process, Pub. L. No. 107-273, § 11028, 116 Stat. 1835 (2002) (codified at 15 U.S.C. § 1226 (2006)). The effort to protect consumers and civil rights plaintiffs more generally has not, as of this writing, been successful. See, e.g., Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong.

69 See Case C-317/08, *Alassini v. Telecom Italia* (Mar. 18, 2010).

70 Cases C-317/08 to C-320/08, Opinion of Advocate General Kokott (Nov. 19, 2009).

71 Case C-317/08, *Alassini*, paras. 47-67.

72 See Case C-40/08, *Asturcom Telecomunicaciones Sl v. Nogueira* (Oct. 6, 2009) (relating to a reference under Article 234 [current 267] from Spain).

of ADR, embraced by many sectors worldwide. In England and Wales, the ‘Woolf Reforms’ of the 1990s have put into place pre-filing ‘protocols’ that require lawyers to negotiate before filing lawsuits (Woolf 1996). Refusals to accept settlements and insisting on trials can put litigants at risk of cost sanctions (Genn 2010). The impact has transformed the procedure of England and Wales, as well as influenced practices in some other Commonwealth countries such as Australia and Canada (Andrews 2010, 97-111).

Linda Mulcahy has concluded that as a consequence of such changes and choices in courtroom construction, the ‘spectator has been marginalized’, undermining the norm of public trials (Mulcahy 2007). After studying settlement programs in English courts, Simon Roberts similarly found that courthouses have become ‘increasingly symbolic’ spaces; the large buildings are now used to ‘legitimize the decision-making of the parties themselves’ (Roberts 2009, 23). Hazel Genn in turn asked ‘What is Civil Justice For’, as she explored the lack of funding, the declining trial rates, and the pressures to move away from public processes in England (Genn 2010). Emblematic was the decision, in the winter of 2011, by the government which called for the closing of 142 courthouses.

Moving from this example of one country to the European Union, a 2008 Directive on Mediation called for national courts to develop that mode of dispute resolution for cross-border disputes.⁷³ And, just as many transnational courts exist, many private providers of dispute resolution services are competing intensely for market shares. With reforms of commercial arbitration laws in England making it more attractive,⁷⁴ new institutions—such as a ‘JAMS’, an acronym to denote a company providing ‘Judicial Arbitration & Mediation Services’—are now proffering their services worldwide. What do these arbitrations, including when government authorities are disputants, offer? In addition to parties’ abilities to pick their judges and their procedures, they can also decide that the procedures and the outcomes remain outside the public purview.

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

The twentieth century has been marked by the ‘triumph’ of adjudication as courts became the *sine qua non* of market economies and of governments. The last decades of that century and the beginning of the twenty-first present another trend, the decline of courts in favor of alternatives whose processes and outcomes are less

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

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

public and less regulated than those of courts.

3. Adjudication as a democratic practice

What then is problematic? A Benthamite response is that the privatization of courts undercuts their accuracy, educative, disciplinary, and legitimating functions. Further, Bentham was skeptical of conciliation because it privatized decision-making, rendering litigants more dependent on judicial preferences than on law. Yet, one could concur or demur on various grounds, both empirical and normative (Duff et al. 2007; Resnik 1987). For example, in so far as Bentham argued that publicity enhanced factual accuracy, a good deal of contemporary research instead points to how visual cues can be misread and be misleading (Spottswood 2011). Further, evidence provided by ‘innocence projects’, examining trial records after convictions and freeing those wrongly convicted, document persons sentenced to death based on witnesses who lie in public.

In the book related to this essay, Dennis Curtis and I take a somewhat different tack, overlapping in inquiring about public courts as sources of knowledge but interested in different kinds of production. Our argument is not focused on the relationship between openness and truth but instead on how public processes of courts give meaning to democratic aspirations that locate sovereignty in the people, constrain government actors, and insist on the equality of treatment under law (Resnik & Curtis 2011a). While Bentham stressed the protective side of adjudication (policing judges as well as witnesses), we are interested in how the public facets of adjudication engender participatory obligations and enact democratic precepts. On this account, diminution of public adjudication is a loss for democracy because adjudication can itself be a kind of democratic practice. Specifically, normative obligations of judges in both criminal and civil proceedings to hear the other side,⁷⁵ to welcome ‘everyone’ as an equal, to be independent of the government that employs and deploys them, and to provide public processes enable two kinds of democratic discourses. One is between public observers and ‘Judge & Co.’—borrowing Bentham’s reference to judges and lawyers but enlarging it to include litigants as well. The other comes from exchanges among the direct participants in an adjudicatory triangle.

Before unpacking these claims, two prefatory comments are in order, one about the meaning of adjudication and the other about democracy. A good deal of the literature on trials is focused on the criminal docket, with its encounters between individuals and the state seen as politically freighted, as governments are understood to have special obligations towards the accused, as well as victims (e.g., Duff et al 2004, 2006, 2007). The question of structuring procedures to legitimate violence against

75 A mid-twentieth century account of English administrative decision-making detailed the lineage of the phrase: ‘That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca’s *Medea*, enshrined in the Scriptures, embodied in Germanic proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden’ (de Smith 1955, 570-71).

those violating social norms in the criminal context (e.g., Christodoulidis 2004, 179-202) has sometimes deflected attention from state power that inheres in judgments requiring the transfer of assets, the reconfiguration of families, the legitimacy of the receipt of government benefits, or the regulation of commercial transactions. Thus, our interest is in shaping an understanding of the political import of adjudication—whether denoted criminal or civil, public, administrative, or private.

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

3.1 The power of participatory observers to divest authority from judges and litigants

The potential roles for audiences to play can be seen by way of a return to the initial discussion of the survey, offering respondents the options of choosing a ‘closed military court’ or an ‘open criminal court’ for trials of suspected terrorists. Open courts and published opinions permit individuals who are neither employees of the courts nor disputants to learn, first-hand, about processes and outcomes. Indeed, courts—and the discussions that their processes produce—are one avenue through which private persons come together to form a public (Calhoun 1992, 1-48), assuming an identity as participants acting within a political and social order. Courts make a contribution by being what could be called ‘non-denominational’ or non-partisan, in that they are one of relatively few communal spaces not organized by political, religious, or social affiliations. Open court proceedings enable people to watch, debate, develop, contest, and materialize the exercise of both public and private power.

This openness changes the power relationships between the participants and their audiences by preventing the state and disputants from controlling the social meaning of conflicts and their resolutions. This point was made decades ago when Hannah Arendt observed in the context of twentieth-century Stalinist Russia that show trials were a crack in totalitarianism, for they demonstrated that a government felt the need to provide an explanation, however contrived, rather than impose its power without a façade of justification (Arendt 1973). ‘The very fact that members of the intellectual opposition can have a trial (even though not an open one), can make themselves heard in the courtroom and count on support outside it, do not confess to anything but plead not guilty, demonstrates that we deal here no longer with total domination’ (Ibid., xxxvii).

A disquieting example of this shift in power comes from the broadcast of the video of the death of Saddam Hussein. Hussein was hanged on December 30, 2006, five days after he lost an appeal of his sentence.⁷⁶ At first, the media reported that ‘14

⁷⁶ During the course of the trial, three defense lawyers were killed and two judges were dismissed (Burns,

Iraqi officials had attended the hanging' at an unspecified location and that witnesses said Mr. Hussein 'was dressed entirely in black and carrying a Koran and that he was compliant as the noose was draped around his neck' (Santora, Glanz, & Tavernise 2006). But within a day, a 'video [...] appeared on the Internet [...] apparently made by a witness with a camera cellphone'; the tape showed the 'mocking atmosphere in the execution chamber' and recorded the taunts hurled at Hussein at his death (Burns & Santora 2007). The organized media in different countries debated whether to air that video⁷⁷ but did not control all of the channels of distribution. Dissemination was decided by others, who posted the video on the web. The disclosures resulted in a torrent of reaction about the timing, fact, and process of the execution.

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

Moreover, courts provide a unique service in that they create distinctive opportunities to gain knowledge. Conflicts have many routes into the public sphere. The media (including bloggers) or members of government may initiate investigations. Courts may help uncover relevant information in these arenas (as we have seen in the litigation related to individuals detained after 9/11). But courts distinguish themselves from either the media or other government-based investigatory mechanisms in an important respect: the attention paid to ordinary disputes. Courts do not rely on national traumas or scandals or on selling copies of their decisions. Courts do not respond only when something 'interesting' is at issue.

What is the utility of having a window into the mundane as well as the dramatic? That is where people live and that is where state control can be both useful and yet overreaching. The dense and tedious repetition of ordinary exchanges is where one finds the enormity of the power of both bureaucratic states and private sector actors. That power is at risk of operating unseen. The redundancy of various claims of right and the processes, allegations, and behaviors that become the predicates to judgments can fuel debate not only about the responses in particular cases but also

Glanz, Tavernise & Santora 2007).

⁷⁷ Carter 2007 (noting that Fox News and CNN both ran the video, and that Fox had followed Al Jazeera in doing so).

about what the underlying norms ought to be. So-called ‘domestic violence’ provides one ready example of the role of public processes in reorienting an understanding of what was once cabined as ‘private’ and tolerated as within the familial realm. Civil and criminal litigation about violence against women has helped to shape an understanding of how gender-based violence is a mechanism of subordination and an abuse of power (Siegel 1995).⁷⁸

Public knowledge gathered from open dispute resolution ought not, however, to be presumed to be generative of policies running in any particular direction or of attitudes supportive of judicial rulings. Public awareness can generate new rights, like protection against violence, as well as new limitations, such as ‘caps’ on monetary awards for torts because of a popular view that courts (and specifically juries) over-compensate victims (Marder 2005). Moreover, because even a few cases can make a certain problem vivid, social policies may respond in extravagant ways to harms that are less pervasive than perceived.

3.2 Public relations in courts

Bentham presumed what now seems to be a naïve faith in the free-forming public opinion. Post-Habermas commentators (with television shows such as ‘Mad Men’ about advertising agencies in view) are, in contrast, well aware of how ‘public relations’ in courts can aim to manipulate opinion (Habermas 1991, 193). In high-stakes, high-visibility litigation, disputants with resources may hire media consultants who work with lawyers to shape popular views of the merits of the claims. Courts in turn worry about distortion of their work; many now provide ‘public information services’ or ‘media alerts’ to directly disseminate decisions. Campaigns against judges also rely on publicity to pressure judges (who may, if needing to be reappointed or reelected, be vulnerable) to be responsive to opinions in ways that can undermine judicial autonomy. One anti-immigration prosecutor in Arizona, for example, has repeatedly accused the local courts and particular judges of failing to enforce laws related to unlawful entry into the United States (Welch 2007; Thomas 2007). As David Luban has thus noted, publicity itself can be used to undercut the legitimacy of the very institution making the knowledge public.⁷⁹

High-profile cases have galvanized sectors of the public, able to use the attention brought to particular kinds of harms to change governing laws. Criminal sanctions are exemplary here, as public disclosures of particular crimes produce anger. In response, judges and legislatures have imposed enhanced sentences. Illustrative is the press coverage of individuals found to have sexually assaulted children, which has prompted new laws that require individuals who are convicted of a wide array of offenses to register so that their names and photos are broadcast and potential

78 Efforts to address some of the injuries were enacted, at a federal level in the United States, in the Violence Against Women Act of 1994 (see generally Resnik 2001).

79 All ‘actions relating to the right of other human beings are wrong if publicizing their maxim would lead to self-frustration by undercutting the legitimacy of the public institutions authorizing those actions’ (Luban 1998, 192).

neighbors can be forewarned about their presence upon release from prison.⁸⁰ Thus, publicity itself has come back into vogue as a form of punishment.

How does one assess such changes? Bentham had argued that expanding the flow of information will enable public opinion to become ‘more and more enlightened’ (Schofield 2006, 267) to advance society’s interests. That metric requires some definition of what societal interests are. Experiences since Bentham with public displays make plain that openness does not necessarily trigger reasoned discourses, nor does increased information necessarily ‘produce an improvement in the quality of opinions held by the people.’⁸¹ Further, the harms of false accusations—vivid during the 1950s as individuals were accused of being Communists—are substantial (Goldschmidt 1954)—rendered all the more powerful through the distribution mechanism of the internet.⁸² Webcasting live trial testimony (as contrasted with appellate arguments) raises yet other problems, for it could turn the act of bearing witness to particular events into being put on display through Youtube.

Law has not ignored the need to impose some degree of regulation on audiences. Legal rules and doctrine insist on decorum inside courtrooms. Further, concerns that trials could devolve into carnivals or engender sentiments weighted sharply towards one party have resulted, upon rare occasion, in exclusion of the press.⁸³ Other rules aim to cabin efforts by audience members to influence decision makers. An example from the United States was an effort by observers to wear badges depicting a victim of a crime; the issue was whether such a display had prejudiced a jury.⁸⁴ Others report courtroom-packing to convey impressions about a defendant’s contributions to segments of a community (Bucy 2010).

The development of new methods of producing public events—through web databases and broadcasts—requires in turn yet other legal precepts to address audiences that can be both virtual as well as physically present. In jurisdictions that provide for electronic filings that become available on the web, requirements now direct that certain kinds of information (such as social security numbers) be deleted.⁸⁵ Further, as discussed at the outset, when a trial judge planned to permit a video stream of the trial about the constitutionality of California’s prohibition on same-sex marriage, he also limited the sites of observation to a few federal courthouses and retained discretion to exclude certain portions from the webcast.⁸⁶

In short, to appreciate the political and social utilities of the public dimensions of adjudication is not to ignore the costs and burdens imposed (Bentham listed

80 See, e.g., *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003)

81 Bentham thought it would. See Schofield 2006, 267.

82 The utility of internet databases depends on how materials are formatted and whether charges are imposed for access (LoPucki 2009, 55; also Markoff 2007).

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

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

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

86 *Hollingsworth v. Perry*, 558 U.S. 183, 188 (2010) (per curiam).

many⁸⁷), nor to underestimate the potential for the exploitation of courts. The immediate participants in a dispute may find the exposure to the public disquieting. Even the disclosure of accurate information can be uncomfortable. Moreover, the public dimensions of adjudication may inhibit parties' abilities to find common ground, thereby deepening discord. And, despite Bentham's confidence that public disclosure reveals falsehoods, many court records are subsequently impeached as predicated on lies by witnesses.

Further, one should not romanticize spectatorship. A 2010 decision by the United States Supreme Court about the exclusion of the public arose from a trial judge asking the 'lone courtroom observer' to leave the room.⁸⁸ Locating judgment in courthouses with windows to the streets and open doors makes publicity possible, but a question remains about how to secure an audience whose members understand themselves as participatory observers, functioning politically as responsible 'auditors' (Bentham 1843, 356) rather than indifferent viewers or as partisans. Watching state-authorized processes could prompt celebration, action, or dialectic exchanges that develop new norms of diverse kinds, but boredom can also result. Bentham saw this problem of obtaining 'an audience for the "judicial theatre"' (Schofield 2006, 310). He considered whether to have public authorities require attendance as a matter of duty, provide compensation for attendance, or devise some other 'factitious means' to bring people into the audience (Bentham 1843, 354). Another method was the printed word; Bentham advocated that permission be liberally granted for the publication of information obtained—and for its republication as well.

Technologies such as webcasting may reduce the challenges for those seeking to observe court proceedings. However, although virtual capacities make it easier to watch, they also enable snippets of information to be consumed in private, without any semblance of processes signaling civic responsibility. Technology does more; it increases the competition for attention through opening windows into many dramas, resulting in what Jonathan Crary has called a 'suspension of perception' (Crary 1999). Getting and keeping attention in a world rich or overwhelmed with a plethora of visual materials haunts all efforts at constructing shared and sustained experiences of the interactions between 'facts and norms' (to borrow from Habermas).

Thus, a host of problems haunt the project of publicity. Some problems stem from getting an audience and sustaining attention, and others relate to getting attention of the wrong kind. Viewers may be episodic or distracted, and neither interested in nor able to see full proceedings and to understand and accurately put their knowledge into the public stream of information. As noted above, high profile cases may create misimpressions about the frequency or depth of particular kinds of harms and may prompt lawmaking that is either overbearing or unresponsive. Litigation develops narratives that—as an empirical matter—affect and sometimes generate public agendas and fuel social movements addressing the intersections of private interests and public rights. (In the United States, debates about abortion,

⁸⁷ See above n22 and accompanying text.

⁸⁸ *Presley v. Georgia*, 558 U.S. 209, 210 (2010) (per curiam).

affirmative action, and sexuality provide ready examples (e.g., Post & Siegel 2007)). Authority is relocated but whether the results are 'enlightened' depends on views about the underlying social norms, before and after the conflicts that public court processes help to spawn.

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

3.3 Dignifying litigants: information-forcing through participatory parity

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

A distinct facet of what makes courts especially useful in democracies comes from shifting attention from what potential observers may see and do to the interactions among litigants, judges, witnesses, and jurors. This aspect of our argument about the utility of open courts hinges on the view that adjudication is itself a democratic practice—an odd moment in which individuals can oblige others to treat them as equals as they argue in public about their disagreements, misbehavior, wrongdoing, and obligations. Litigation forces dialogue upon the unwilling (including the government) and, momentarily, alters configurations of authority. The social practices, the etiquette, and a myriad of legal rules shape what those who enter courts are empowered to do (Cover 1983; Resnik 2005b).

When cases proceed in public, courts institutionalize democracy's claim to impose constraints on state power. More than that: in criminal trials, the theory of trial is that defendants are enabled, by procedures, to '*contest the common*

interpretation’ of their actions and to oppose government imposed meanings.⁸⁹ In many legal traditions, a conviction person has a ‘right of allocution’, a right to speak before being sentenced, that forces the judge to acknowledge the personhood of the defendant and to hear whatever that individual wishes to say.⁹⁰ Many commentators note that the jury—as well as lay judges more generally—infuse adjudication with democratic participation by qualified citizens who gain the stature of judge, ad hoc (Hörnle 2006). But consider also the democratic constraints imposed on professional jurists. If working in open courts, the government employees we call judges have to account for their own authority by letting others know how and why power is used. (Recall Bentham’s admonition: ‘Publicity is the very soul of justice [...] It keeps the judge himself, while trying, under trial.’⁹¹)

Courts can be a great leveler in another respect, in that participatory parity⁹² is an express goal, even when not achieved. ‘Hear the other side’ has been augmented, in many jurisdictions, by obligations to equip ‘the other side’—sometimes by means of free lawyers for criminal defendants or poor civil litigants or targeted funds for witnesses and transcripts. Moreover, when government officials are parties to litigation, they are forced either as plaintiffs or defendants to comply with court rules, divulging information and responding to questions posed by opponents or the court. In countries requiring disclosures of documents through discovery, government litigants must also produce documents, files, e-mails, and other records.

Courts’ processes render instruction on the value accorded to individuals and, on occasion, reveal that courts cannot or do not make good on commitments of equal treatment and respect. For example, during the 1970s and 1980s, as claims of discrimination based on race and gender were brought to courts, some judges responded as though differential treatment was natural. Lawyers and litigants sometimes found that, because of their gender and race, they were subjected to treatment they found demeaning. In response to such concerns, the chief justices of many state courts convened special projects, denominated ‘fairness’ or ‘gender bias’ and ‘racial bias’ task forces, to inquire into areas of law (such as violence against women or sentencing) and practices (such as modes of address or appointments to court committees) to learn about variations by gender, race, and ethnicity (e.g., Resnik 1996). Statutes, rulemaking, and case law resulted because transcripts, judgments, and public exchanges documented behaviors at odds with the provision of ‘equal justice under law’.⁹³

This function of courts as potentially egalitarian venues can be seen from attempts to avoid them. After 9/11, the executive branch in the United States repeatedly sought to enact legislation ‘stripping’ courts of jurisdiction over claims

89 Hildebrandt 2006, 25 (emphasis in original). See also Roberts 2006; Markovits 2006.

90 See, e.g., U.S. Federal Rules of Criminal Procedure 32(i)(4)(A)(ii).

91 Bentham 1843, 316, 355. See also Andrews 2010, 79.

92 Fraser argued that such parity was requisite to the proper functioning of Habermasian public spheres (Fraser 1992, 118).

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

that the government had wrongly detained and tortured individuals.⁹⁴ The effort to create a separate ‘tribunal system’ for alleged enemy combatants aimed to control access and information as well as to limit the rights of detainees by augmenting the powers of the state.

4. The press, the post, and courts: venerable eighteenth century institutions vulnerable in the twenty-first

Bentham, Madison, and their cohort helped to frame three institutions of discourse—the court system, the postal service, and the uncensored press.⁹⁵ As has become familiar in the last decade, the stability of two—the postal service and the press—is in question as both are beset by difficulties.

One report characterized the United States Postal Service as in a ‘death spiral’ (Lochhead 2001, 26). In 2009, 13,000 fewer post offices existed than had in 1951, with more closings underway. As the system continued to lose money (with \$2.8 billion cited as the amount lost in 2008⁹⁶), some commentators called for the dissolution of the Postal Service as an obsolete institution to be replaced by the internet and private providers (Tierney 1988, 212-218). Others worried that the Postal Service had already been transformed, favoring ‘junk mailers and big media over political opinion journals’ (John 2009, 23).

The contemporary defense of the post office as a public institution rests on arguments akin to those made by Madison and Bentham—that ready communication through public services binds the nation and local communities while servicing the needs of the economy.⁹⁷ Indeed, in the 1958 Postal Policy Act, the U.S. Congress made such an argument—that its establishment of the post service was ‘to unite more closely the American people, to promote the general welfare, and to advance the national economy.’⁹⁸ Yet, by the 1970s, Congress had limited the cross-subsidies that made the exchange of newspapers inexpensive,⁹⁹ lessening the degree to which the public subsidized a universal service that facilitated a wide range of exchanges (Kielbowicz 2006; John 2006, 576).

A similar narrative of vulnerability envelops the press, with the decline of print media, consolidation of ownership, and diffusion through electronic sources (Baker 2007). In 1950, when the U.S. population stood at just over 152 million, some 1,700

94 See Military Commissions Act of 2006 (codified in scattered sections of 10, 18, 28, and 42 U.S.C. (2006)). The statute’s limitations on access, through habeas corpus, to courts were struck down as unconstitutional. See *Boumediene v. Bush*, 553 U.S. 723 (2008). See generally Resnik 2010a.

95 Other examples include public libraries, parks, and police.

96 See *Restoring the Financial Stability of the U.S. Postal Service: What Needs to be Done?: Hearing Before the Subcomm. Fed. Workforce, Postal Service, and the District of Columbia*, 111th Cong. (March 25, 2009), available at http://oversight.house.gov/index.php?option=com_content&task=view&id=3865&Itemid=27.

97 *U.S. Postal Service: 101: Hearing Before the Subcomm. on Federal Workforce, Postal Service, and the District of Columbia of the House Comm. on Oversight and Government Reform*, 110th Cong. 232 (Apr. 17, 2007) (Testimony of Charles W. Mapa, President, National League of Postmasters).

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

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

daily newspapers were supported through customers, resulting in a circulation of almost 54 million paper copies. By 2008, the U.S. population had doubled to 304 million, but the number of papers circulated was down; 1,400 daily newspapers delivered 48 million copies.¹⁰⁰ In 2009, more than a hundred newspapers closed, including large presses such as the Seattle Post-Intelligencer (Westphal 2010; Dumpala 2009). Well-known and long-solvent publishers of newspapers filed for bankruptcy (Ovide 2008 and 2009), and the revenues of the remaining papers dropped between 2007 and 2009 (Westphal 2010).

The question is whether the fragility of the press and the post forecasts what awaits courts. Evidence of deep concern about the solvency of courts can be found throughout the state systems. Indeed, in the fall of 2009, the Chief Justice of Massachusetts warned that state courts were at risk of a 'slow and painful demise' (Marshall 2009). More than 40,000 people entered the courts of Massachusetts on a daily basis, but funding for the services they sought was scarce (Marshall 2010). In her view, one ought not assume that courts were 'too big to fail,' and that like other 'big' institutions critical to the country, might need 'federal assistance for infrastructure support' (Marshall 2009, 12-13).

Returning to the federal courts for a moment, a pervasive assumption has been that case filings, which grew over the twentieth century, would always be increasing. Yet, with small variations in numbers, federal court filings—aside from bankruptcy petitions—have been more or less flat in the years between 1995 and 2010. Despite the predictions of a 1995 'Long Range Plan of the Federal Courts' that, by 2010, more than 600,000 cases would be before the federal judiciary, the number of civil and criminal cases filed annually has ranged since then from about 325,000 to 375,000. Of course, many variables affect filing rates, but concerns about filing and trial data have sparked concern from congressional oversight committees. In May of 2010, a Subcommittee on Economic Development, Public Buildings, and Emergency Management of the Committee on Transportation and Infrastructure held hearings to consider curtailing funding for federal courthouse construction.

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

'Bargaining in the shadow of the law' is a phrase often invoked (Mnookin & Kornhauser 1979, 950), but bargaining is increasingly a requirement of the law

100 See Newspaper Association of America, Total Paid Circulation, available at <http://www.naa.org/TrendsandNumbers/Total-Paid-Circulation.aspx>

of conflict resolution. While one might be enthusiastic about the development of institutions offering competition to the state and undermining the hegemony of it, the alternatives to adjudicatory facilities developed thus far have not been accompanied by transparent processes enabling evaluation of their contributions. Further, their use in many instances has been a mandate of the state, rather than an option proffered by a state agnostic about which route to take. And, in the end, the authority of the 'private' alternatives rests on state enforcement.

Thus, the distinctive character of adjudication as a specific kind of social ordering is diminishing. Through case management, judicial efforts at settlement and mandatory ADR in or through courts, devolution to administrative agencies, and enforcement of waivers of rights to trial, the framework of 'due process procedure' with its independent judges and open courts, is being replaced by what can fairly be called 'contract procedure' (Resnik 2005a). Despite growing numbers of persons who use the title 'judge' and conflicts called 'cases', it is increasingly rare for state-empowered actors to be required to reason in public about their decisions to validate one side of a dispute. In mimetic symmetry, both court-based judges and their counterparts in the private sector now produce private outcomes that are publicly sanctioned. Thus, the efforts to manage increased demands on courts by shifting to alternative dispute resolution represent adjudication's decline.

Bentham had proposed that the evils of 'Judge & Co.' be curtailed with simpler and more public procedures. Observation was a major part of his proposed interventions to curb the excesses. In contrast, contemporary solutions advocated by ADR proponents entail moving away from courts and privatizing procedures. No data are collected nor proceedings made open for regular observances. Some efforts are defended as responsive to woefully inadequate budgets provided for courts. And often times, judges are themselves the proponents of the alternatives.

Yet the proffered solution of privatized processes threatens not only litigants and members of the potential audience but judges as well. As efforts aim to alter juridical modes and reconfigure courts as but one of many places for dispute resolution, as judges embrace management and settlement, as they stop working before the public eye and producing results subject to public scrutiny, judges lose the argument for judicial independence from political oversight as well as for public subsidies. Further, judges themselves are protected by the public nature of their work and could be more vulnerable to political control from public and private actors, if not required to do much of their job in court.

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

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

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

But the point is not to create undue dichotomies between adjudication and its alternatives. Indeed, the reconfiguration of processes in courts to produce private settlements makes plain that court-based procedures are not necessarily public ones. The parallel proposition is that one ought not assume that secrecy is an essential characteristic of ADR. Law can build in a place for the public (‘sunshine’, to borrow the term that legislators have used¹⁰¹) or wall off proceedings from the public. In some states, the outcomes of settlements in medical malpractice cases must be posted on the web; in others, a litigant must stand up in court to accept a settlement and acknowledge an understanding of its terms. Whatever the places constituted as authoritative, opportunities exist to engender or to preclude communal exchanges. Or, as Bentham put it: ‘Considered in itself, a room allotted to the reception of the evidence in question [...] is an instrument rather of privacy than of publicity; since, if performed in the open air [...], the number of persons capable of taking cognisance of it would bear no fixed limits’ (Bentham 1843, 354).

In sum, the choices of the construction of adjudication are upon us—whether to send ‘suspected terrorists’ to ‘closed military courts’, and whether to try to enlist the nomenclature of ‘courts’ so as to lend legitimacy to their outcomes. But ‘suspected terrorists’ are not the only persons who are being subjected to closed procedures authorized by the state. The display of justice is on the wane in some of the venues in which it was once vibrant, and its relocation to other locations has not been accompanied by either rites or rights of audience. If the twentieth century heralded the story of the triumph of an ideology committed to public court processes as central to responsible, democratic, national and transnational governance, the twenty-first century has thus far been marked by the retreat from those premises, literally and metaphorically.

101 See Florida Statutes Ann. 69.081 (2009) (the ‘Sunshine in Litigation Act’).

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