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For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication

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I. FOR OWEN FISS

The title of this essay, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, is modeled on the title of another essay — written in 1975 by Robert Cover and called *For James Wm. Moore: Some Reflections on a Reading of the Rules.*[1] I use Bob Cover's words to invoke his presence, for it was Bob who brought me together with Owen and forged the links that have become a several-decade collaboration.[2] But my reference to the 1975 essay stems not only from our emotional and intellectual engagement with Cover but also from its relevancy. As many know from *Moore's Federal Practice*,[3] James William Moore was a law professor at Yale who, along with Charles Clark, helped to write[4] and then to instruct us all about the Federal Rules of Civil Procedure.[5] Cover's reference to Moore thus evokes the great procedural reform project of the first half of the twentieth century in the United States — the Federal Rules of Civil Procedure.[6]

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1. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975).

2. *See* ROBERT M. COVER, OWEN M. FISS & JUDITH RESNIK, PROCEDURE (1988); OWEN M. FISS & JUDITH RESNIK, ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE (2003); JUDITH RESNIK, THE PROCESSES OF THE LAW: THE CHANGING ROLES OF AND FOR COURTS (Foundation Press, 2004). *See also* ROBERT M. COVER & OWEN M. FISS, THE STRUCTURE OF PROCEDURE (1979).

3. JAMES WM. MOORE & JOSEPH FRIEDMAN, MOORE'S FEDERAL PRACTICE (1st ed. 1938); JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE (Daniel R. Coquillette, Gregory P. Joseph, Sol Schreiber, Jerold S. Solovy & Georgene M. Vairo, eds., 3rd ed. 2003).

4. Charles Clark & William Moore, *A New Federal Civil Procedure I. The Background*, 44 YALE L.J. 387 (1935) [hereinafter Clark & Moore, *The Background*]. Charles Clark & William Moore, *A New Federal Civil Procedure II. Pleadings and Parties*, 44 YALE L.J. 1291 (1935) [hereinafter Clark & Moore, *Pleadings and Parties*].

5. William Moore, *The Place of the New Federal Rules in the Law School Curriculum*, 27 GEO. L.J. 884, 892 (1939).

6. In 1934, Congress authorized the Supreme Court to promulgate a nationwide set of rules. *See* Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28

Cover's essay — *Reflections on Reading the Rules* — began by stating that:

> we who think about procedure have become so transfixed by the achievement of James Wm. Moore and his colleagues in creating, nurturing, expounding and annotating a great trans-substantive code of procedure that we often miss the persistent and inevitable tension between procedure generalized across substantive lines and procedure applied to implement a particular substantive end. There are, indeed, trans-substantive values which may be expressed . . . by a code of procedure. But there are also demands of particular substantive objectives which cannot be served except through the purposeful shaping, indeed the manipulation, of process to a case or to an area of law.[7]

This analysis of the Federal Rules is another reason to begin by quoting Robert Cover, for that trans-substantive procedural code is also key to the work of Owen Fiss. The existence of a set of procedural practices for federal judges is the central *sociological* fact that undergirds Owen's work. The 1938 Federal Rules spanned the country, creating national processes that united federal judges sitting thousands of miles apart by imposing on them shared daily practices that promoted their identity as a distinctive cadre of legal actors. The creation of the Federal Rules helped to shape the persona of "the federal judiciary" with which Owen Fiss is deeply engaged. The expansion of a federal lower court judiciary during the first half of the twentieth century set the stage for a set of judges — across the country — to develop bodies of law (including in areas of special concern to Owen, such as anti-discrimination law) that in turn have shaped expectations of adjudication in a way Owen believes are vital to American social order.[8]

In another part of my title — *Reflections on the Triumph and the Death of Adjudication* — I use a locution closer to the genre directly associated with Owen Fiss. Owen consistently offers a clear plot line, encapsulated in titles such as *The Forms of Justice*,[9] or *Against Settle-*

U.S.C. § 2072 (1982)). Thereafter, the Court appointed a committee to do the drafting. *See* Order Appointing Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1935). In 1935, the Committee appointed by the Court to draft decided to create a uniform set of rules for law and equity. *See* Clark & Moore, *The Background, supra* note 4, at 431-35, where they encourage the adoption of a uniform set of rules, and Clark & Moore, *Pleadings and Parties, supra* note 4, at 1292-99 (explaining the Court's decision). The Supreme Court then promulgated the first set, to become effective in 1938. *See* Rules of Civil Procedure, 308 U.S. 645 (1938).

7. Cover, *On Reading the Rules, supra* note 1, at 718-721, 734.

8. *See, e.g.*, Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1 (1979) [hereinafter, Fiss, *Forms of Justice*].

9. *Id.*

ment,[10] or *Why the State?*.[11] But unlike Owen's broad declarative titles, I offer a puzzle, for I have linked the "triumph of adjudication" to its "death" and hence have muddied the waters. As I explain below, Owen's aspiration for the substantive rationality and utility of adjudication has been challenged not only by the tensions that Bob Cover described between trans-substantivity and procedure purposefully modeled to substantive goals, but also by the failure of state-based adjudicatory processes to focus on and to develop broad constituencies supportive of their deployment for all kinds of claimants.

In this essay, I provide a rapid retrospective of some hundred years of history of civil processes in the United States and (ever heroic, in Owen's tradition) also refer to the world more generally, as a predicate to exploring today's challenges, different from those on which Cover focused twenty-five years ago. The question, then, was the permissibility of manipulating process to obtain outcomes, but the assumption, then, was that a court-based procedural regime was itself durable. Cover's concerns about ossification and formalism have, under the aegis of a majority of five on the Supreme Court, proved justified in many ways[12] — making plain the ongoing relevance of his insights.

Here, I argue that a different set of concerns needs to be explored because of the current challenges to civil processes themselves. A conflict has emerged between judging as we understand it and systems of dispute resolution that lack most of adjudication's values and attributes. As Owen Fiss has many times insisted, adjudication is predicated on public and disciplined fact-finding, licensing judges to impose regulatory obligations.[13] The focus on the individual judge and the belief in adjudication embraces the state as a central regulator of conduct. The presumption is that transparent decision-making by state-empowered judges can be controlled through judges obliged to invoke facts adduced through a record, to give explanations, and to make available appellate review.[14]

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10. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

11. Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987) [hereinafter Fiss, *Why the State?*].

12. *See, e.g.*, Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999); Great-West Life Ins. & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002). *See generally* John Langbein, *What ERISA Means by "Equitable": The Supreme Court Trail of Error in* Russell, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317 (2003); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343; Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L. REV. 223 (2003) [hereinafter Resnik, *Constricting Remedies*].

13. *See* Fiss, *Forms of Justice*, *supra* note 8.

14. *See* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1024-31 (2000) [hereinafter Resnik, *Trial as Error*].

But that view now has a serious competitor, committed to the utility of contract and looking to the participants to validate outcomes through consensual agreements produced through processes sometimes styled "alternative dispute resolution" (ADR) and sometimes "dispute resolution" (DR). Civil processes are one site of the struggle between public and private governance and between state-based redistribution efforts and market-focused mechanisms – between constitutionalism on the hand, working through a regulatory state that relies in part on adjudication, and contract on the other, aimed at maximizing utility by reflecting preferences and tastes.[15]

My purposes in this essay are threefold. First, I explain why the familiar forms and functions of adjudication, engaged by Owen's jurisprudence, are not necessarily durable. Second, I hope to inscribe new images of federal judges, no longer heroic solo actors but part of a corporate body that has begun to socialize the next generation of judges to be suspicious of adjudication and to prefer negotiation. As I detail, the management of today's federal judiciary uses its collective voice to lobby against Congress providing new federal rights and remedies if enforced in federal court. Third, I demonstrate how, by cutting off classes of litigants from high-profile adjudication by life-tenured federal judges and sending these litigants to less public processes, policy choices of both judges and lawyers have limited the development of broad constituent support for adjudication.

II. NEW POSSIBILITIES FOR ADJUDICATION

The expansion and contraction of adjudication are both framed by the same developments, which made the prospect of adjudication plausible for whole new sets of claimants in the United States and beyond. First, during the twentieth century, the state came to be understood as itself subject to regulation, as bound by its own rules, as obliged to treat persons with dignity and respect. Individuals gained the right to use litigation to call state officials to account and to hold government to its own promises.[16] Second, in part through new information technologies, injuries experienced by large numbers of individuals, once seen as individualized and isolated events, became visible as patterns of connected events. Third, the growth of the profession of lawyers provided the per-

15. *See generally* Judith Resnik, *Civil Processes*, *in* OXFORD HANDBOOK OF LEGAL STUDIES 748-72 (Peter Cane & Mark Tushnet eds., 2003).

16. *See generally* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. J. INT'L L. & ECON. 521 (2003); James E. Pfander, *Government Accountability in Europe: A Comparative Assessment*, 35 GEO. WASH. J. INT'L L. & ECON. 611 (2003); Judith Resnik & Julie Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003).

sonnel to generate regulations and responses to aggregate forms of injury.[17]

A fourth factor, one that has been under-appreciated in the literature of courts, is women's rights. Women of all colors only gained juridical voice in the last century, and the radical reconception of women as rightsholders[18] — both within and outside of their families — has driven up the volume of disputes. One illustration: The highest demand on civil legal aid funds in England has come from disputes related to family life.[19] When one adds women to other groups (some denominated by race, ethnicity or class and others by age or social and economic status, and including those women who share these multiple markers of identity), one finds new definitions of what kinds of rights are needed and what constitutes justice.

Adjudication's "triumph" and its "death" are interrelated outcomes of a century of developments. Below, for narrative clarity, I abstract one from the other.

A. *Adjudication's Triumph*

Take the changes in conceptions of the persons eligible to hold rights, new understandings of the obligations of the state, and changing technologies, and reflect on a sequence of events supporting a narrative of changes in the United States that I have styled "The Triumph of Adjudication." Return to the 1938 Federal Rules of Civil Procedure with which I began. Their drafters created a trans-substantive code to simplify process, to ease access to courts, and to collapse distinctions between law and equity. With their flexible, equity-based approach to diminish formalism,[20] these rules put trial judges front and center and

17. *See, e.g.*, RICHARD L. ABEL & PHILLIP S.C. LEWIS, LAWYERS IN SOCIETY: AN OVERVIEW (1995); Stephen C. Yeazell, *Re-financing Civil Litigation*, 51 DEPAUL L. REV. 183 (2001).

18. *See, e.g.*, Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002); Judith Resnik, *Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. & FEMINISM 393 (2002); Rosa Ehrenreich Brooks, *Feminism and International Law: An Opportunity for Transformation*, 14 YALE J.L. & FEMINISM 345 (2002); Vicki C. Jackson, *Gender and Transnational Discourse*, 14 YALE J.L. & FEMINISM 377 (2002).

19. *See* Tamara Goriely, *Making the Welfare State Work: Changing Conceptions of Legal Remedies Within the British Welfare State*, *in* THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES 108 (Francis Regan, Alan Paterson, Tamara Goriely & Don Fleming. eds., 1999); Anne Owers, *Public Provision of Legal Services in the United Kingdom: A New Dawn?*, 24 FORDHAM INT'L L.J. 143, 158 n.8 (2000).

20. The new rules relaxed pleading requirements but imposed obligations on adversaries to exchange information — both written and oral — about the facts and law in dispute. The concept of lawyers and judges meeting (the "pre-trial") was borrowed from practices of state courts and the English system, whereas the mandated disclosure of information ("discovery," accomplished through interrogatories, in-person depositions, production of documents, examination of physical evidence, and admissions) was largely an invention of the 1938 Rules. *See generally* Stephen N.

endowed them with a good deal of discretion to tailor processes to the circumstances of a particular case.

Moreover, encoded in my phrase, "The Triumph of Adjudication," and in the very existence of the Federal Rules of Civil Procedure are decisions about the allocation of responsibility between judges and Congress in elaborating rights. Recall that during the early part of the twentieth century, a struggle ensued in the United States between a growing national bar and some populist members of Congress who were leery of decision-making in Washington.[21] Remember that, around 1900, the federal judiciary itself was small, numbering under 100.[22] But the national lawyers won. In 1922, Congress began what became a great expansion project, adding to the ranks of life-tenured federal judges,[23] who today number more than 1,000.[24] In 1934, Congress gave power to the Supreme Court to promulgate federal rules — thereby displacing and replacing local practice with national norms.[25] One rationale was technocratic and managerial. Judges turned to the language of business, to make their processes more efficient and modern.[26]

References to efficiency alone are insufficient to capture all of the agendas. In the wake of the Depression, many saw federal governance as a necessary and as a desirable response to political and economic conditions. An expansion of federal jurisdiction was a mechanism by which to spread and to enforce a national legal regime. In the 1940s, the Civil Rights Movement turned to the federal courts, and by the Warren era, constitutional interpretation looked favorably upon court-based processes to enable racial equality and to enhance human dignity. Congress not only supported but also expanded this project, time and again

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Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987); Stephen Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules, and Common Law*, 63 NOTRE DAME L. REV. 693 (1988); Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

21. *See* Subrin, *supra* note 20, at 943-45, 955 (discussing the conflict).

22. *See* Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 612-13 (2002) [hereinafter Resnik, *Inventing the District Courts*].

23. *See* Act of Sept. 14, 1922, Pub. L. No. 67-298, 42 Stat. 837, 837-838 (creating 24 new judgeships). The Act also created the Conference of Senior Circuit Judges, the forerunner of what is now called the Judicial Conference of the United States. *Id.* at 838 (codified as amended at 28 U.S.C. § 331 (2000)).

24. *See* Resnik, *Inventing the District Courts*, *supra* note 22, at 614-22.

25. Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. 2072 (1994)).

26. For example, in the 1960s and thereafter, federal courts also adopted individual calendar systems so that a judge assigned at the outset of a case would have responsibility for it from filing to disposition, thereby enhancing judicial authority over its processing. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 395-402 (1982). *See also* Resnik, *Trial as Error*, *supra* note 14, at 946-47.

authorizing government officials and private parties to bring lawsuits as a means of enforcing federal law.[27] In short, federal procedure was a piece of a larger constitutional project.[28]

The story would be too narrow were it only focused on civil litigation. Consider also the overhaul of criminal litigation. The procedural requirement of a "right to counsel"[29] that had sat substantively vacant in the United States Constitution for almost two hundred years was suddenly given new meaning. The Constitution was read to mandate equipage, to insist on state subsidies for criminal defendants and federal rights to process. *Gideon v. Wainwright*[30] and *Brady v. Maryland*[31] required that indigent criminal defendants be provided with state-paid lawyers, who (in theory) were to be accorded respect, some flexibility, and information by prosecutors. This interpretation of the Constitution was a part of the Supreme Court's insight that some states had used their criminal justice systems to enforce views of racial inequality,[32] just as the contemporary refusal to intervene bespeaks a narrowed vision of the constitutional obligation to create equality.[33]

And, then, the idea shaped in the criminal context that individuals ought to be empowered and equipped in the contest with the state migrated to the civil side. The Supreme Court — borrowing Professor Charles Reich's insight that statutory entitlements were forms of "property" to be protected from state deprivation by "due process of law"[34] — required that final decision-making about government entitlements employ judicial modes of process to ensure fairness. *Goldberg v. Kelly*[35] is the obvious shorthand here, as during the 1960s and 1970s the template for adjudication provided by the Federal Rules was applied in some respects to the administrative context.

Other types of civil litigation started to look different in light of an understanding of the obligation to equip litigants and to welcome them

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27. For example, between 1974 and 1998, the Congress created more than 470 new federal causes of action. Resnik, *Trial as Error*, *supra* note 14, at 956 (citing a memorandum with this data that was drafted by staff at the Administrative Office of the U.S. Courts).

28. *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003).

29. U.S. CONST., amend VI.

30. 372 U.S. 335 (1963).

31. 373 U.S. 83 (1963).

32. *See, e.g.*, Henry v. Mississippi, 379 U.S. 443 (1965).

33. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987).

34. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

35. 397 U.S. 254 (1970). This case, and the litigation materials from its record, are reproduced in the first chapter of COVER, FISS & RESNIK, *supra* note 2, and in FISS & RESNIK, *supra* note 2. *See generally* Judith Resnik, *The Story of Goldberg: Why This Case Is Our Shorthand*, in CIVIL PROCEDURE STORIES: AN IN-DEPTH LOOK AT THE LEADING CIVIL PROCEDURE CASES (Kevin M. Clermont ed., Foundation Press, forthcoming 2004).

as rights-seekers. The project was not confined to conflict with the state, for the goals were broader: to facilitate the ability to pursue rights when disputing others. Access fees to courts were modified, mostly by statute.[36] The Legal Services Corporation was created,[37] and the United States Constitution was read to require that a very small sliver of indigent civil litigants — parents faced with state efforts to terminate their right to be a legal parent — were, under certain circumstances, to be provided lawyers who were paid by the state.[38]

Aggregate processing became another vehicle by which to enhance access. Class actions generate subsidies for litigants by relying on economies of scale to get a small cadre of lawyers to serve a wider set of claimants.[39] In the 1960s, the Federal Rules were modified to facilitate large-scale litigation. That new class action rule, complemented by statutes authorizing consolidation across federal district courts,[40] reshaped our imagination about what litigation might accomplish.[41] Proceedings with hundreds and thousands of individuals, some in search of institutional reform and some in search of money, became more commonplace. These mega cases soon overshadowed — in the press, in popular imagery, and in law schools — the small value social security claimant, pitted against a sole adversary, even when that adversary was the state.

In this story trumpeting the "Triumph of Adjudication," markers of success include congressional creation of new federal rights and the filing of more cases. The legislature embraced adjudication by authorizing litigants to bring a widening array of lawsuits aimed at enforcing civil

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36. Constitutional obligations to require fee waivers were imposed in only limited areas. *See* Boddie v. Connecticut, 401 U.S. 371 (1971), as narrowed by Ortwein v. Schwab, 410 U.S. 656 (1973) and Kras v. United States, 409 U.S. 434 (1973). Statutory provisions can be found at 28 U.S.C. § 1915, which was narrowed as amended in the Prison Litigation Reform Act, Pub. L. No. 104-134, § 804, 110 Stat. 1321 (1996). Congressional authorization for fee waivers dated back to the act of July 20, 1892, ch. 209, 27 Stat. 252, which provided that any poor "citizen" could commence or prosecute a claim without paying fees. *See* John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (1923). Legislation made such provisions available to appellate litigation. *See* Act of July 1, 1918, ch. 113, 40 Stat. 634, 683.

37. *See* Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. § 2996 (1994)) (amended by Pub. L. No. 95-222, 91 Stat. 1619 (1977) (codified as 42 U.S.C. § 2996 (1998)).

38. *See* Lassiter v. Dep't of Social Services, 452 U.S. 18 (1981). *See also* M.L.B. v. S.L.J., 519 U.S. 102 (1996) (requiring the state to provide transcripts to enable appellate review when such parents could not afford to pay for them).

39. *See generally* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000).

40. Multidistrict Litigation Act, Pub. L. No. 90-296, 82 Stat. 109 (codified as amended at 28 U.S.C. § 1407 (1988)) (first enacted in 1968).

41. *See* FED. R. CIV. P. 23 (1966). *See generally* Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21 (1996); Judith Resnik, *From Cases to Litigation*, 54 LAW & CONTEMP. PROBS. 5 (1991).

rights, environmental rights, consumers' rights, workers' rights. Between the 1960s and the 1990s, caseloads within the federal system tripled, as hundreds of new statutory causes of action were enacted.[42] That demand soon outstripped the life-tenured judiciary, even as Congress was greatly augmenting its ranks. Life-tenured judges worked in tandem with Congress to manufacture non-life-tenured auxiliary judges, magistrate and bankruptcy judges, administrative law judges, hearing officers, and the like, all of whom today comprise a workforce of some 4000 federal adjudicators committed to this national project.[43]

Moreover, this discussion ought not remain parochial, focused solely on the United States.[44] Relevant evidence of the embrace of adjudication comes from covenants promulgated through the United Nations, announcing rights to fair and public hearings to protect equality before the law and putting the judiciary and judicial independence at the fore. In 1985, the United Nations issued twenty "basic principles on the independence of the judiciary" to underscore both the import of judges and the need to secure their protection against the very governments that deploy them.[45] The packet includes guarantees on judicial terms of service, powers of finality, and mechanisms to ensure autonomy. Procedures for "effective implementation" followed, including the deployment of a special rapporteur to monitor and to assess compliance.[46] Yearly reports have been produced, addressing corruption, accountability, and independence. Other transnational documents and

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42. Resnik, *Inventing the District Courts*, *supra* note 22, at 649.

43. *See* Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983), [hereinafter Fiss, *The Bureaucratization of the Judiciary*]; Patrick Higginbotham, *Bureaucracy — The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261 (1980); Patricia Wald, *The Problem With the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766 (1983).

44. Indeed, a signature of Owen Fiss's activism has been his efforts to move this constitutional adjudicatory project to the Southern hemisphere and the Middle East. *See* Irwin P. Stotzky, *The Indispensable State*, 58 U. MIAMI L. REV. 201 (2003).

45. Basic Principles on the Independence of the Judiciary, UN Doc. A/CONF.121/22/Rev.1, at 59 (1985), *available at* http://www.umn.edu/humanrts/instree/i5bpij.htm, a declaration adopted at the 1985 Milan conference and later approved by the UN General Assembly, GA Res. 40/32 (Nov. 29, 1985) and 40/146 (Dec. 13, 1985), *reprinted in* CENTRE FOR HUMAN RIGHTS, 1 HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS pt. 1, 386 (1994), For example, Article 5 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." The International Covenant on Civil and Political Rights (Dec. 16, 1966, 999 UNTS 171) creates rights to judicial processes as substantive requirements.

46. In April 1994, the United Nations Commission on Human Rights appointed a Special Rapporteur, Param Cumaraswamy of Malaysia, to help bring attention to the relevant guidelines and conventions related to judicial autonomy and to the treatment of jurors, lawyers and prisoners. *See Independence of the Judiciary: A Human Rights* Priority (UN Dep't of Pub. Info. 1996), *at* http://www.un.org/rights/dpi1837e.htm.

individual countries have announced understandings — predicated upon a mixture of constitutional and natural law — of a judiciary's rights to independence,[47] sometimes secured by financing and sometimes by set terms of office not controlled by the government in power.[48] And in these last few decades, we have seen a willingness of judges to exercise universal jurisdiction, in the sense of using domestic legal power to take jurisdiction over wrongs outside a country's borders.[49] Further, in the spring of 2003, the International Criminal Court opened its doors, joining a few other transnational courts. On the private law side, efforts coordinated through the American Law Institute and UNIDROIT have produced a draft "transnational code of civil procedure."[50] The proponents of adjudication, focused on the state and relying on the personage of the professional judge, sometimes working in conjunction with lay judges or with juries, and empowered to generate remedies, could well claim victory as that model of decision-making can be found around the world.[51]

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47. *See, e.g.*, OPEN SOCIETY INSTITUTE, MONITORING THE EU ACCESSION PROCESS: JUDICIAL INDEPENDENCE IN THE EU ACCESSION PROCESS (2001), *available at* http://www.eumap.org/reports/content/20. *See also* THE WORLD BANK, LEGAL AND JUDICIAL SECTOR ASSESSMENT MANUAL (2002), *available at* http://www4.worldbank.org/legal/publications/ljrmanualLowres.pdf; THE WORLD BANK, LEGAL AND JUDICIAL REFORM: OBSERVATIONS, EXPERIENCES, AND APPROACH OF THE LEGAL VICE PRESIDENCY (2002), *available at* http://www4.worldbank.org/legal/publications/ljrobservations-final.pdf; THE WORLD BANK, ARGENTINA: LEGAL AND JUDICIAL SECTOR ASSESSMENT (2001), *available at* http://www4.worldbank.org/legal/publications/argentina-final.pdf. *See generally* Maria Dakolias, *Legal and Judicial Development: The Role of Civil Society in the Reform Process*, 24 FORDHAM INT'L L. J. S26 (2000).

48. *See e.g.*, Reference to the Public Sector Pay Reduction Act, P.E.I., 150 D.L.R. 4th 577, 692-93 (Can. 1997) (holding that the Canadian Charter of Rights and Freedoms required that salaries of provincial court judges be protected from political manipulation); Starrs v. Ruxton, 2000 J.C. 208, 226 (H.C.J. 1999) (interpreting the European Convention on Human Rights provision in Art. 6, para. 1, of rights to public hearings before an independent tribunal, and other materials to hold that temporary judges on the Sheriff Court of Scotland, were not permitted. *Cf.* Clancy v. Caird, 2000 Sess. Cas. 441 (Sess. 2000) upholding other judgeships appointed by judges rather than prosecutors.

49. *See, e.g.*, Alvarez-Machain v. Sosa, 331 F.3d 604 (9th Cir. 2003), *cert. granted sub nom.* Sosa v. Alvarez-Machain, 124 S.Ct. 807 (2003); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); R v. Bow St. Metro. Stipendiary Magistrate et al, *ex parte* Pinochet Ugarte (No. 3), 2 All E.R. 97 (H.L. 1999). *See generally* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002).

50. *See generally* Gerhard Walter & Samuel P. Baumgartner, *Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard-Taruffo Project*, 33 TEX. INT'L L.J. 463 (1998).

51. The shift is sometimes accompanied by concerns. Phrases like "juridification" and "government by judiciary" are marked by a critique that democracies should not entrust too many decisions to adjudicatory processes. *See, e.g.*, Ran Hirschl, *Resituating the Judicialization of Politics:* Bush v. Gore *as a Global Trend*, 15 CAN. J.L. & JURIS. 191 (2002); Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91 (2000).

B. *Adjudication's Collapse*

But not everyone has been happy with these developments, and thus I turn to the nature and the sources of discontent. Reconsider the last one hundred years by thinking about how frequently the word "crisis" is used in conjunction with justice systems around the world.[52] A host of complaints are leveled at the expansion of and the reliance on adjudication.

One complaint is that the adversary model itself is a form of "junk science,"[53] relying on biased information produced by parties, ignoring or exploiting cognitive biases, and resulting in suspect decisions. Such critics claim that adversary trials require extravagant investments of resources to yield flawed states of knowledge. A related objection argues that adjudication (especially in the United States) provides too much by way of opportunities for process, enabling strategic opponents to engage in manipulations that work to the detriment of their adversaries and the public.[54]

These critics regard twentieth century aspirations for lawyer-based production of information as simplistic, superseded, or wrong. For example, rules of discovery, crafted before photocopying and computers were commonplace, did not envision the massive amounts of information that could be generated, stored, or hidden. Such rules have provided incentives for profits that lawyers garner from production and obfuscation and may well have played a role in restructuring the legal profession, now dominated by large law firms dependant on hourly billing.[55] Similarly, through revisions of class action and other aggregation rules, capacity was enhanced to group similarly-situated individuals together. The hope was that such collectives could be adequately represented by a single lawyer or through small numbers of self-elected or designated advocates. But large groups may also have diverse or con-

52. *See, e.g.*, ADRIAN A.S. ZUCKERMAN, CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES ON CIVIL PROCEDURE (1999); ESSAYS ON ACCESS TO JUSTICE (Adrian A.S. Zuckerman & Ross Cranston eds., 1995).

53. This term has gained currency as critics claim that allegations by plaintiffs of harms caused by products or substances are based on a lack of high-quality scientific knowledge. *See, e.g.*, PETER HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991). Others argue that the claim of "junk science" is itself a strategic attempt to insulate defendants from liability for their failures to protect consumers from such hazards.

54. *See, e.g.*, John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

55. George B. Shepherd & Morgan Cloud, *Time and Money: Discovery Leads to Hourly Billing*, 1999 U. ILL. L. REV. 91 (arguing that revisions of procedural rules, and specifically the introduction of discovery by the 1938 Federal Rules of Civil Procedure, created the conditions for the emergence of hourly billing). *See also* Dennis E. Curtis & Judith Resnik, *Teaching Billing: Metrics of Value in Law Firms and Law Schools*, 54 STAN. L. REV. 1409 (2002). *See generally* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000).

flicting goals, and the strategic behavior of attorneys for plaintiffs, coupled with defendants in search of "global peace," sometimes yields judgments protecting both sets of interests at the expense of many of the injured and of the public.[56]

Another set of complaints are more technocratic, fastening on problems of sloppiness, inattention, ineptitude, inexperience, and misuse, caused by lawyers with a range of motives and skills and engaged in strategic interaction. Some of the spokespersons for this position are judges, who have come to argue that, as the pre-trial process provided multiple opportunities for adversarial exchange, judicial oversight was needed to monitor attorneys.[57] Yet others have a different kind of complaint, seeing adjudication as unduly formalistic and therefore as impoverished in its lack of humanity. Arguing for more user-friendly, less adversarial processes, posited as capable of producing more useful remediation, these critics want to re-center process on the disputants' voices and goals. They object to the degree of dependence on lawyers, which, they say, results in adversary adjudicatory processes that depersonalize, objectify, and distance claimants.[58] This wing of the ADR movement stresses reliance on processes such as mediation and arbitration and argues that such procedures are more generative than adjudication. Illustrative is the name — "Just Resolutions" — chosen by the American Bar Association's Section on ADR for its newsletter.[59]

A different kind of objection, intuitively friendlier to adjudication,

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56. *See* Samuel Issacharoff, *"Shocked": Mass Torts and Aggregate Asbestos Litigation After* Amchem *and* Ortiz, 80 TEX. L. REV. 1925 (2002). *See generally* DEBORAH R. HENSLER, NICHOLAS M. PACE, BONITA DOMBEY-MOORE, BETH GIDDENS, JENNIFER GROSS & ERIK K. MOLLER, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000); John Coffee, *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation,* 100 COLUM. L. REV. 370 (2000); John Coffee, *Commentary Conflicts, Consent, and Allocation After* Amchem Products *— Or, Why Attorneys Still Need Consent to Give Away Their Clients' Money,* 84 VA. L. REV. 1541 (1998); John Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 COLUM. L. REV. 1343 (1995); Susan Koniak & George Cohen, *Under Cloak of Settlement,* 82 VA. L. REV. 1051 (1996).

57. *See, e.g.*, Robert Peckham, *The Federal Judges as a Case Manager: The New Role in Guiding a Case from Filing to Disposition,* 69 CAL. L. REV. 770 (1981).

58. *See* Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference,* 33 UCLA L. REV. 485 (1985); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving,* 31 UCLA L. REV. 754 (1984); *see generally* STEPHEN B. GOLDBERG, FRANK E.A. SANDER & NANCY H. ROGERS , DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES (3rd ed. 1999). *But see* E. Allan Lind, Robert J. MacCoun, Patricia A. Eberner, William L.F. Felstiner, Deborah R. Hensler, Judith Resnik & Tom R. Tyler, *In the Eye of the Beholder: Tort Litigants' Evaluations of their Experiences in the Civil Justice System,* 24 L. & SOC'Y REV. 953 (1990) (describing an empirical study of litigants who found both arbitration and adjudication to be dignifying of their concerns and who reported themselves as feeling some control over those processes).

59. *See, e.g.*, JUST RESOLUTIONS (Newsletter of the American Bar Association Section of Dispute Resolution), Jan. 2003.

is angered by adjudication's failure to make good on its own promises. The adversary model assumes a relative equality of combatants who have the wherewithal to engage in combat. Given the centrality of lawyers and other repeat players to adversarial processing, large segments of the middle class — let alone the poor — are precluded from turning to process because of its costs.[60] Even in the arena of constitutionally mandated criminal defense services, legislative funding does not meet documented needs. Horrid examples — such as lawyers who do not investigate evidence in advance of murder trials, or who represent a victim and then an assailant, or who sleep while the case is ongoing in front of the jury — populate the case law about "ineffective assistance of counsel," which tolerates some of these very failings.[61] On the civil side, well-heeled opponents have succeeded in convincing Congress to limit funding and to impose severe restrictions on lawyers for the poor.[62] Similarly, courts have narrowed fee-shifting rights, have refused to compensate attorneys for the risk of taking contingent claims,[63] and have curbed access enabled through class actions.[64]

The denouement is that these divergent critiques have, over the past forty years, worked significant changes in the rules, doctrine, and processes of courts, both domestically and transnationally, as the anti-adjudication movement has succeeded in several respects. The 1938 Rules have been substantially amended to direct judges to promote alternative dispute resolution.[65] Congress has written new statutes to authorize court-annexed arbitration programs[66] and has mandated the use of ADR in agencies as well as in courts.[67] Institutions supporting ADR have proliferated, convening conferences (on topics such as "Court

60. *See generally* HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW (1999); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

61. *See generally* Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

62. *See* Act of Ap. 26., 1996, Pub. L. No. 104-134, 504(a), 110 Stat. 1321 (1999); 45 C.F.R. 1612 (1999); *See generally The Future of Legal Services: The Arthur Liman Colloquium Papers*, 17 YALE L. & POL'Y REV. 281 (1998).

63. *See, e.g.*, Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001); City of Burlington v. Dague, 505 U.S. 557 (1992).

64. Rulings limiting class actions and perceptions that the federal courts are unwelcoming of class actions has fueled some to seek to increase federal jurisdiction over class actions. *See* Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Case and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559, 1564 (2000) (discussing then-pending legislation, styled "The Class Action Fairness Act," to limit state court powers).

65. *See, e.g.*, FED. R. CIV. P. 16 as amended by the 1993 amendments.

66. *See* Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (1998), (codified at 28 U.S.C. §§ 651-658 (2000)).

67. *Id.*

ADR"), proffering services (from firms with names such as "EndDispute" or "JAMS" — Judicial Arbitration and Mediation Services, Inc.), teaching law school classes,[68] and shaping model rules.[69]

Moreover, just as the expansion of civil processes did not stem exclusively from within the domain of rules, so the efforts at constriction have not come solely through revision of civil processes. Bodies of substantive law — tort, contract, consumer, environmental, civil rights — are also means by which to alter civil processes.[70] As I wrote this essay, newspapers headlined congressional efforts to limit medical malpractice litigation.[71] Rules on liability and remedy have been narrowed across a range of subject matters.[72]

Clarification of the different modes of limiting adjudication's reach is required, as different kinds of alternatives exist. One prominent form is court-based ADR,[73] creating a "new" civil procedure. Techniques such as mediation, arbitration, and settlement conferences — once termed "extrajudicial"[74] — have become regular features of civil

68. Several casebooks are now available. *See, e.g.*, LAURA J. COOPER, DENNIS R. NOLAN & RICHARD A. BALES, ADR IN THE WORKPLACE (2000); LAURA J. COOPER & DENNIS R. NOLAN, LABOR ARBITRATION: A COURSEBOOK (1994); EMERGING ADR ISSUES IN STATE AND FEDERAL COURT (Frank E.A. Sander ed., 1991); GOLDBERG, SANDER & ROGERS, *supra* note 58; KATHERINE VAN WEZEL STONE, ARBITRATION LAW (2003); KATHERINE VAN WEZEL STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION (2000).

69. *See, e.g.*, UNIFORM MEDIATION ACT (2001). The National Conference of Commissioners on Uniform State Laws, Uniform Mediation Act has approved and recommended the Act for enactment in all the states as of August 2001. *See* National Conference of Commissioners on Uniform State Laws, *Mediation Act*, *at* http://www.nccusl.org. As of this writing, the UMA has not been enacted.

70. *See, e.g.*, the Private Securities Reform Act of 1995, Pub. L. No. 106-554, §1(a)(5), 114 Stat. 2763 (1995), 15 U.S.C. § 78u-4 (Supp. III 1997); Prison Litigation Reform Act Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 801, 110 Stat. 1321 (1996) (codified as 42 U.S.C. § 1997).

71. *See, e.g.*, *House Acts to Limit Malpractice* Awards, N.Y. TIMES, Mar. 14, 2003, at A1; Sheryl Gay Stolberg, *Democrat Pulls Her Support For Senate Malpractice Bill*, N.Y. TIMES, Mar. 26, 2003, at A21; Sheryl Gay Stolberg, *Bush Plan to Curb Malpractice Awards Advances to Full House*, N.Y. TIMES, Mar. 7, 2003, at A21.

72. *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) (holding that alleged violations of a federal statute protecting student privacy did not give rise to a private action for damages); Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that regulations promulgated pursuant to Title VI were not enforceable by private litigants). *See generally* Resnik, *Constricting Remedies*, *supra* note 12, at 231-71.

73. *See generally* Wayne D. Brazil & Jennifer Smith, *Choice of Structures: Critical Values and Concerns Should Guide Format in Court ADR Programs*, DISP. RESOL. MAG., Fall 1999, at 8; Wayne D. Brazil, *Court ADR 25 Years After* Pound*: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93 (2002); Wayne D. Brazil, *Continuing the Conversation about the Current Status and the Future of ADR: A View from the Courts*, 2000 J. OF DISP. RESOL. 11 [hereinafter, Brazil, *A View From the Courts*]; Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999).

74. The word "extrajudicial" was used in 1983 in Fed. R. Civ. P. 16(c)(7) to refer to such

processes. Through rule changes, training and educational programs, the definition of the "good judge" became a judge focused on and able to achieve dispositions with as low an investment of time as possible. What is judicial (and judicious) is no longer equated with adjudication, with public processes, with reasoned deliberation. This shift is also affecting the appellate process.[75]

Another form of ADR is external to but also dependent on courts. Judicial doctrine enforced obligations to pursue resolutions outside courts. Of course, organized alternatives to courts predate the twentieth century. While the full history of dispute resolution has yet to be written, we know that various trade groups as well as some religious and ethnic communities have long provided their own stylized dispute resolution processes for conflicts arising inside self-contained communities.[76] But the law had been ambivalent about them, as judges guarded their own monopoly power and regularly refused to enforce contracts to arbitrate.

During the twentieth century, legislators and court-based adjudicators shifted their attitudes towards their competitors. In 1925, Congress enacted the Federal Arbitration Act (FAA), recognizing arbitration contracts to be enforceable obligations.[77] In 1946, Congress enacted the Administrative Procedure Act (APA), relying heavily on agency-based

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processes. The rule then stated that the purposes of a pretrial conference included consideration of "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." The Notes of the Advisory Committee on Rules—1983 Amendment then explained that the reference was to "exploring the use of procedures other than litigation to resolve the dispute." *See* Fed.R.Civ.P.16(c) and accompanying Notes, in 28 U.S.C. App. Rule 16 (1982 ed., Supp. I, Jan. 15, 1093-Jan. 22, 1984).

In 1993, the rule was again amended and the term "extrajudicial procedures" was deleted. As the Notes to the 1993 amendments explained, their purposes were to

> describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. The rule acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties.

See Note to subdivision (b), paragraph 9, 1993 Amendments to Fed. R. Civ. P. 16.

75. *See* William Reynolds & William Richman, *Studying Deck Chairs on the Titanic,* 81 CORNELL L. REV. 1290 (1996).

76. *See, e.g.*, Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 132-33 (1992). *See also* ROBERT ELLICKSON, ORDER WITHOUT LAW (1991).

77. *See* Federal Arbitration Act of 1925, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1-14 (2000)).

hearings as an alternative to adjudication.[78] Yet federal courts retained oversight in a variety of ways. As to adjudication within agencies, such decisions often required enforcement through the courts or could be challenged in and reviewed by the courts. As to contracts to arbitrate, judges declined to enforce such agreements if entered into before conflicts arose and if waiving enforcement of federal rights in federal courts. Judges objected, seeing arbitration as too flexible, too lawless, too informal. They contrasted it with adjudication, praised for its regulatory role in monitoring adherence to national norms.[79]

However, by the last decades of the twentieth century, the federal courts had embraced alternatives both from within and from without. In the 1980s, the Supreme Court upheld broad grants of authority to agencies and arbitrators for adjudication, and the Court reversed earlier rulings and enforced arbitration contracts, even when federal statutory rights were at stake.[80] Instead of objecting to the informality of arbitration, judges praised its flexibility. Importantly, judges also argued that arbitration was similar to adjudication, now reconfigured as just one of several techniques appropriate for resolution of disputes. More generally, judges and lawyers celebrate dispute resolution premised on parties' negotiation by assuming that parties possess the requisite information and can, at lower costs, obtain appropriate resolutions.

Today, law increasingly sends contracting parties, such as employees and consumers, to mandatory arbitration programs created by employers, manufacturers, and providers of goods and services.[81] Concepts of "rights to sue" have given way to enforcing obligations to use alternatives, many of which do not permit aggregate processing and do not require public disclosure of the decisions rendered.[82] Turning to trial rates, and holding aside the complexity of measurement for the

78. Administrative Procedure Act of 1946, Pub. L. No. 404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1994 & Supp. IV 1998).

79. *See, e.g*, Wilko v. Swan, 346 U.S. 427 (1953). *See generally*, Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995).

80. *See, e.g.*, Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568 (1985); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (both relating to adjudicatory processes in agencies or through arbitration); Dean Witter Reynolds v. Byrd, 470 U.S. 213 (1985); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (both upholding *ex ante* arbitration agreements as sufficient to vindicate federal statutory rights).

81. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001), Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000). *See also* Linda Demaine & Deborah Hensler, *Arbitration Clauses in Consumer Contracts: The "Average Joe's" Experience* (forthcoming 2004; manuscript on file with the author).

82. The obligations of processes substituted for court are not yet clear. *See id.* Green Tree Fin. Corp., 531 U.S. at 92 (placing the burden on opponents of arbitration to show that its costs, as contrasted with those of adjudication, undermine an alternative dispute process's utility as a forum in which one can vindicate federal statutory rights); Green Tree Fin. Corp. v. Bazzle, 123 S. Ct.

moment, the decline has been impressive. Soon after the federal rules were launched, about fifteen percent of cases ended with a trial.[83] Sixty years later, fewer than three percent did.[84] Yet, even those few trials prompt criticism, for trials are "failures" in a system geared to producing settlements.[85]

These developments are not limited to the United States.[86] To use England as one example, a 1996 report, "Access to Justice"[87] (often referred to as the "Woolf Report" after Harry Woolf, its author and now the Lord Chief Justice) concluded that the time had come to curb adversarialism by limiting lawyers' options, by calling for increased use of ADR, by focusing on settlement, and by giving greater authority to judges to manage cases. The 1996 report sought to have lawyers "front load work" through requirements that they undertake efforts, before filing, to reach agreements with opponents.[88] The report urged that judges be given managerial powers to help them to make the costs of proceedings "proportionate" to the amount at stake.[89] To do so, the report called for detailed "protocols" (to be developed through bench/bar committees) for different kinds of cases, which in turn would be assigned to "tracks" (with proposed time tables) depending on their anticipated complexity.[90] The Woolf Report also sought to empower judges to police compliance and to sanction misbehavior by authorizing judges to alter the allocation of costs at the dispute's conclusion based on assessments of the reasonableness of positions taken during proceedings. In 1999, new rules became effective in England and Wales that detail pre-action procedures (requiring claimants to serve demands on opponents, who must investi-

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2402 (2003) (requiring that the question of whether arbitration contracts preclude class actions is one to be decided initially by the arbitrator rather than by the courts).

83. *See* Stephen Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WISC. L. REV. 631, 633 (1994).

84. *See* Patrick Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1409-13 (2002). In light of this change, the Litigation Section of the American Bar Association has created a project, *The Vanishing Trial*, to obtain and to assess the data. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts* (preliminary version, Oct. 24, 2003), *available at* http://www.abanet.org/litigation/taskforces/cji/nosearch/home.html. *See also* Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U. SAN. FRANCISCO L. REV. 17 (2003).

85. *See* Resnik, *Trial as Error*, *supra* note 14, at 925-26 (describing case law and commentary preferring settlements to trials).

86. *See* Theodore J. St. Antoine, *ADR Without Borders*, LAW QUADRANGLE NOTES, Fall/Winter 2003, at 77.

87. HARRY WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1996). *See also* Lord Harry Woolf, *Civil Justice in the United Kingdom*, 45 AM. J. COMP. L. 709 (1997).

88. *Id.* at 107-15.

89. *Id.* at 46-47.

90. *Id.* at 20-71.

gate and reply) and three tracks ("small claims," "fast," and "multi-track").[91] And there, like here, revisions are also underway to limit access to appeal.[92] Similarly, international and regional treaties, some related to human rights and others focused on commercial transactions, also often turn to arbitration or settlement-focused processes.[93]

As a consequence, we now face a tension quite different from the one invoked by Bob Cover, who focused three decades ago on the desirability of uniformity of procedure as contrasted with particularization and variation in procedural rights to respond to demands for substantive justice.[94] As he explained, trans-substantive rules may ignore distinctions among kinds of litigants and of claims. Cover's questioning proved prophetic, for the aspiration for trans-substantive uniformity of the 1938 Rules has (in many instances) been rejected, but not always (as he had proposed) to seek greater access to justice and more just results. Rather, content-specific regimes have been created through amendments made by the judiciary (placing additional burdens on certain kinds of litigants, such as prisoners), through local rulemaking by individual districts, and by Congress, requiring that claimants under particular legal regimes use special processes.[95] Further, the national federal procedural rules themselves have also been revised to focus parties on conclusions without adjudication. Moreover, through doctrinal developments, one can be read out of court on the basis of signing a boilerplate provision in a form contract or in a job application[96] or because of forms accompany-

91. These proposals have occasioned a good deal of debate. *See generally* MICHAEL ZANDER, THE STATE OF JUSTICE (2000); ROGER SMITH, JUSTICE: REDRESSING THE BALANCE (Legal Action Group, 1997)]; Michael Zander, *The Woolf Report: Forwards or Backwards for the New Lord Chancellor?* 16 CIVIL JUSTICE QUARTERLY 208; The Rt. Hon. Lord Woolf, M.R., *Medics, Lawyers, and the Courts*, 16 CIVIL JUSTICE QUARTERLY 302 (1997)' Adrian A.S. Zuckerman, *Lord Woolf's Access to Justice: Plus ca Change . . .* , 59 MODERN L. REV. 773 (1996).

92. In the late 1990s, a committee filed its report on civil appellate procedures. Like the Woolf Reforms, this group saw the problems as expense, delay, and complexity, and focused on responses to enhance efficiency. The report raised concerns about rising numbers of appeals and too lenient grants of leave for appeal. Opining that there should be "no automatic right of appeal," the report called for a change in culture through court management, the creation of a fast track for certain appeals, and extension of the requirement for leave to appeal — all to result in process deemed proportionate to the scope of a given controversy. *See* JEFFREY BOWMAN, REPORT ON COURT OF APPEAL (CIVIL DIVISION), REPORT TO THE LORD CHANCELLOR (Sept. 1997).

93. *See generally* MICHAEL J. MUSTILL & STEWART C. BOYD, COMMERCIAL ARBITRATION: 2001 COMPANION VOLUME TO THE SECOND EDITION (2001); JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION (2002).

94. *See* Cover, *On Reading the Rules*, *supra* note 1.

95. *See, e.g.*, Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).

96. *See, e.g.*, EEOC v. Waffle House, Inc. 534 U.S. 279 (2002) (holding that, while signing a form job application can bar individuals from pursuing discrimination claims, the EEOC has an independent cause of action, created by statute, and is not barred); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (enforcing an arbitration agreement that precluded the employee from pursuing state-based anti-discrimination claims).

ing the purchase of a computer or a cell phone.[97]

Through these developments, a third mode of civil processing has come into being that melds aspects of privately-based dispute resolution with the public processes. As described above, adjudication has never been the sole or the dominant means of conflict resolution; communities and trade groups shaped many means of dealing with conflict other than going to court. But during the last forty years, the state itself has embraced such private dispute resolution models as appropriate for a wide array of conflicts. Governments now insist that many litigants who come to court use non-adjudicatory mechanisms that resemble private dispute resolution but stem from state-based rules of process (rather than from disputants' contractual agreements) and that include not only disputants with preexisting and ongoing relationships but also strangers.[98]

The development of this "third way" could be assimilated into a story heralding the triumph of adjudication, but it could also be used as a marker of adjudication's decline. The legalization of private processes brings with it professional domination and greater complexity, making these processes mimic adjudication and collapse into it. Moreover, the contemporary multiplication of adjudicatory-like proceedings could be evidence of the success of twentieth century reforms. Civil processes — relying on individual entrepreneurialism to enforce public norms — opened courthouses to individuals formerly excluded. The legal profession, when pressed, also began to admit those (of all colors and both sexes) whom it had previously prevented from gaining membership.[99] Rising demands prompted the invention of whole new sets of judges and processes — a proliferation of the juridical form that includes all the forms of ADR. Yet, at the same time, the turn to ADR — in both U.S. domestic institutions, in other countries' courts, and in global agreements — also represents the privatization of public processes, the diminution of transparency, and the decline of regulation.

III. RECONCEIVING THE ADJUDICATORY PROJECT

I have just provided the outlines of competing narrations of devel-

97. *See generally* Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999); Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

98. *Cf.* Owen Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW AND HUM. BEHAV. 121 (1982).

99. *See* Deborah R. Hensler & Judith Resnik, *Contested Identities: Task Force on Gender, Race, and Ethnic Bias and the Obligations of the Legal Profession*, *in* ETHICS IN PRACTICE, LAWYERS' ROLES, RESPONSIBILITIES AND REGULATION (Deborah Rhode ed., 2000).

opments of the last century. Of course, the two versions are embedded in each other, but a debate is ongoing about which theme will become dominant. As I assess the trends, judging as it is currently understood is at risk. Despite growing numbers of persons who use the title "judge" and growing numbers of 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.

One explanation of why discontent with adjudication has begun to put it into eclipse can be put simply: backlash. Under this analysis, the increase in access to adjudication had an enormous effect, and those who felt its power did not like it. Owen Fiss speaks of the availability of discovery under the Federal Rules of Civil Procedure as creating a "poor person's FBI." That power to use adjudication to make visible wrongdoing yielded many defendants uncomfortable with the glare of public inquiries. Some of them had the power to "play for the rules," to borrow Marc Galanter's now classic explanation of why the "haves come out ahead."[100] Repeat players, with the ability and resources, and now with the personnel in Congress and in the federal courts, have been able to limit adjudication because it has proved so effective in curbing those groups' prerogatives.[101]

I think, however, that a second and more complicated explanation is required for what has caused the many dents in the adjudicatory model. My analysis does not rest on adjudication's laurels but rather questions some of the underlying normative premises of the decades of developments that I have sketched. The twentieth century built an edifice of adjudication with a thin layer of very well equipped judges at its top — the life-tenured federal judiciary. The federal rules helped that group generate its own persona, and over time, that group became a source of norm production of a sort not much in focus in conventional discussions of procedure, courts, and constitutional adjudication. Federal judges, in their collective voice, have become advocates for less judging and less rightsholding.

I have already alluded to one of the apparatuses for socialization: the 1938 Federal Rules of Civil Procedure as a font of normative education, initially schooling federal judges about anti-formalism, access, and judicial discretion. More recently, these rules have come to focus judges on curbing lawyers and promoting settlement. The anti-adjudication elements now within the Federal Rules of Civil Procedure come in large

100. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1972).

101. As to the need to curb such power, see Owen Fiss, *Why the State?*, *supra* note 11. As to some of the techniques, see Resnik, *Constricting Remedies*, *supra* note 12.

measure from judges themselves.[102] Many judges, working in close proximity with lawyers (and to a much lesser extant with litigants) do not like the very processes of adjudication with which they work on a daily basis. Judges have become a major part of the ADR lobby.[103]

Those who have styled judging as a heroic activity[104] failed to focus on the discontent of some of the would-be heroes, who have rejected the job in whole or part. Further, to the extent some of the heroes embraced that role, they did so for the "big case" and rebelled at spending too much time on events they viewed as comparatively trivial. Moreover, judges came to realize that they could do more than protest work demands. They could develop legal doctrine and they could work collectively to influence congressional decisions about the production and allocation of judicial resources.

As to doctrine, life-tenured judges have permitted the devolution of cases deemed to be uninteresting to decision makers, often called "hearing officers." Early on in the twentieth century, those individuals were understood not really to be "judges" but rather government officers of lower ranks to whom routine tasks were delegated. Further, life-tenured jurists held the power not only to review but to decide anew jurisdictional facts.[105] But, by century's end, the life-tenured judiciary had come to rely on so many lower tier judges for so much work of a kind and nature so like what Article III judges were doing that the Court had to reread Article III to permit devolution of "the judicial power" of the federal courts to scores of non-life tenured judges.[106] Thousands of federal adjudicatory decisions are made by these actors, who are located in agencies and in courts but who lack the constitutionally prescribed markers of independence and the political and cultural capital that flows from them.

Further, in terms of activism, the leadership of the federal judiciary has used the Judicial Conference of the United States as a lobby against increasing access to federal adjudication for many would-be claimants. From its creation in the 1920s until the mid-1950s, the judges sitting on the Judicial Conference (the governing body of the federal judiciary) took the position that the Conference ought generally not comment on the wisdom of pending proposals to create new causes of action. But by century's end, the leadership of the Judicial Conference had moved to

102. Judges have become the dominant participants in drafting and revising the Federal Rules. *See* Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229 (1998).

103. *See, e.g.*, Peckham, *supra* note 57; Wayne Brazil, *A View From the Courts*, *supra* note 73.

104. *See, e.g*, RONALD DWORKIN, LAW'S EMPIRE (1986); Fiss, *Forms of Justice*, *supra* note 8.

105. *See* Crowell v. Benson, 285 U.S. 22 (1932).

106. *See* Resnik, *Inventing the District Courts*, *supra* note 22, at 625-43 (detailing the shift in understanding of the need for life-tenured judges and the doctrinal evolution).

the front lines — suggesting to Congress not to create rights of access to the federal courts for certain consumers, for veterans, for victims of violence based on gender.[107]

Under this approach to federal adjudication, some kinds of claimants gain the privilege of access to the prestigious federal courts and others are sent to lower level decision-makers. Certainly, and despite the obstacles, those with economic clout and able lawyers often find their way into federal court. Moreover, an array of other litigants enjoy some access to federal court, such as students seeking or opposing desegregated schools and affirmative action, prisoners challenging conditions of confinement, many mass tort plaintiffs and defendants proceeding in aggregates, and a subset of criminal defendants sentenced through state processes to long term confinement or to death. Those litigants become the subject matter of law professors' articles and of popular narratives. Their problems, identified with federal adjudication, are readily assumed to constitute "federal cases."

Out of sight (although *on* the federal docket) are many ordinary litigants in diversity cases, social security recipients claiming wrongfully withheld benefits, those defaulting on loans and in breach of or seeking rights under federal programs. Others, such as battered women (fearful while sleeping in their homes) or consumers (objecting to health care provisions) may aspire to become federal rightsholders. Some of those litigants can be found in state courts, and many are dealt with in low visibility administrative proceedings over which low status judges preside. These administrative law judges conduct proceedings in rooms that are hard to find, and render decisions that are not readily made available through federal law reporters in either the electronic or print forms.[108] The general public does not have regular means to learn about what norms are being applied, nor systematic means of checking for erroneous decisions.[109] Further, we cannot use the thousands of judg-

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107. *See* Resnik, *Trial as Error*, *supra* note 14. at 949-99. *See also* Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, And Invalidating The Violence Against Women Act*, 74 S. CAL. L. REV. 269 (2000) [hereinafter Resnik, *The Programmatic Judiciary*].

108. A major debate in academic and legal circles relates to whether appellate courts must publish their decisions. *See, e.g.*, Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 200) (en banc). *See generally* Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002). That debate is focused on the production of decisions by the life-tenured judiciary, and it leaves unaddressed the availability of decisions rendered by non-life tenured judges in courts and agencies in the federal system.

109. To ascertain how these systems work, on-site empirical studies are required. *See, e.g.*, JERRY MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983); JERRY MASHAW, SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM (1978); Restructuring the SSI Disability Program for Children and Adolescents: Report of the Committee on Childhood Disability of the Disability

ments to develop new norms through the interaction between legal regimes and the problems encountered by individuals.

Although the title "judge" has now become attached to many of these decision-makers, the élan of "the federal judge" has not. Many of these judges work in cramped spaces, do not publish opinions, and do not often see retained lawyers. Further, these judges are sometimes subjected to efforts by agencies to affect their decisions, and increasingly, agencies are seeking to use employees other than the Administrative Law Judges commissioned under the APA to render decisions.[110] A contemporary and powerful example comes from recent efforts by the Attorney General of the United States to treat "immigration judges" as ordinary employees of the Department of Justice and to subject them to reassignment at his directive.[111]

Life-tenured judges have not used their clout in either the roles of adjudicator or of lobbyist to export their relative material privileges (larger courtrooms, higher salaries, law clerks, smaller case loads) to those with fewer resources. Rather, life tenured judges — Warren Burger, famously — have opposed conferring life tenure on these "other" judges and have insisted on maintaining status hierarchies even as they support expansion of the roles and responsibilities of non-life tenured judges.[112] Indeed, the leadership of the life-tenured judiciary opposed the suggestion that administrative hearing officers be given the title of "administrative law judge," and then objected again when magistrates gained the appellation "magistrate judge."[113]

In short, as the market for adjudicatory services expanded (in terms of demand and supply) and as it diversified (in terms of the kinds of disputes eligible for legal resolution, the range of tasks for third parties, the kinds and quality of processes provided, and the remedies envi-

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Policy Panel, (Jerry L. Mashaw, James M. Perrin & Virginia P. Reno, eds., 1996); SOCIAL SECURITY: BEYOND THE RHETORIC OF CRISIS (Theodore R. Marmor & Jerry Mashaw eds., 1988). *See also* GENEVRA RICHARDSON & HAZEL GENN, ADMINISTRATIVE LAW AND GOVERNMENT ACTION (1994).

110. *See, e.g.*, Act of Nov. 29, 1999, Pub. L.No. 106-113, app. C, 124, 113 Stat. 1501A-160 (providing authority for reducing backlog to have Indian Probate decisions made by non-APA judges); Ronnie A. Yoder, *The Role of the Administrative Law Judge*, 22 J. NAT'L A. ADMIN L. JUDGES 321 (2002); Ann Marshall Young, *Judicial Independence in Administrative Adjudication: Past, Present, and Future*, 38 JUDGES J. 16 (Summer 1999).

111. *See* Lisa Getter, *Response to Terror: Immigration Judges Call for Independent Court*, L.A. TIMES, Jan. 31, 2002, at A1. *See generally* J. Dana Marks Keener & J. Denise Noonan Slavin, *An Independent Immigration Court: An Idea Whose Time Has Come*, Position Paper by the National Association of Immigration Judges (Jan. 2002), *at* http://www.ifpte.org/federal/pdfs/Immigration.pdf.

112. *See* Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47 (1997).

113. Resnik, *Trial as Error*, *supra* note 14, at 986-90.

sioned), choices emerged about which disputes deserved what form of process. Many of those choices have been left to a small cadre of judges and lawyers who, in the language of political economy, have a set of incentives shaped by their own situations. They developed a hierarchy of adjudicators, and they relegated low status litigants to low status judges.

The legal academy has also played an important role in influencing choices about allocating judge services. Scholars assumed that the "important" lay in the constitutional or in the high profile high value end of the federal docket.[114] Return for a moment to *Goldberg v. Kelly*,[115] a case that Owen Fiss much admires.[116] Recall that Justice Brennan's majority opinion outlined an adjudicatory model for welfare recipients who were facing a loss of their very livelihood.[117] But Justice Brennan termed the constitutionally required elements — notice, a hearing before an agency officer, no right to state-paid counsel — to be "rudimentary due process"[118]: a form of minimal due process that was less than what a litigant would get were he or she to come to court.

Of course, many of us read Justice Brennan's 1970 opinion as signaling that he hoped, when a majority was willing, to expand the rights provided.[119] But what proponents of *Goldberg* have failed to appreciate

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114. As legal academia itself grew, it focused on and helped to develop an understanding of the federal judiciary as an elite group. *See* Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 980-82 (1926) (arguing that the Constitution does not require Article III judges or juries to determine "petty" criminal cases, yet disavowing taking a position on whether, as a matter of policy, Congress should alter its jurisdictional rules). *See also* Arthur E. Sutherland, Jr., *Federal Police Courts, with Appendix Containing a Comparative Study of the Criminal Business in the United States Court for the District of Massachusetts in 1913 and 1924*, MASS. L.Q. 43, 46-48 (Aug. 1926). Many decades later, Patricia Wald commented on the limited vision of the academy, unwilling to attend to the range of disputes before the federal courts and the many decisions that lay outside of constitutional law. *See* Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 621-22 (1993).

115. 397 U.S. 254 (1970).

116. *See* Owen M. Fiss, *Reason in All its Splendor*, 56 BROOK. L. REV. 729, 789 (1990); Owen M. Fiss, *The Other* Goldberg, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 229 (Michael J. Meyer & William A. Parent eds., 1992) [hereinafter Fiss, *The Other* Goldberg].

117. 397 U.S. at 266-69.

118. *Id.* at 267.

119. Specifically, in a paragraph denying recipients counsel as of right, Justice Brennan explained that the right to cross examine "would be of little avail" without a concomitant right to counsel. *Id.* at 269-71. He quoted Powell v. Alabama, 287 U.S. 45, 68-69 (1932): "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Justice Brennan continued, however, by saying:

> "[w]e do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interest of the

is that which could not be delivered by constitutional right had, through statutes or practices, to be provided. Worse than that, by failing to focus on administrative adjudication — not in its high profile version but in the context of low level ordinary disputes — we have tolerated second class judging rather than finding ways to turn second class judges into first class adjudicators and to distribute quality adjudication across an array of institutional providers.

Consider Owen Fiss's commitment to what he has termed the "instrumental rationality" of judges,[120] a form of disciplined deliberation captured for him by Hannah Arendt's image of "the soundless dialogue between me and myself."[121] Herein lies the justification for the great powers of judges to act, in the name of the state, to alter peoples' lives so profoundly.[122] And herein lies the failure to take seriously the need to equip the administrative state with actors sufficient to do the volume of adjudicatory work that has been produced by the laws of the administrative state.

Owen Fiss recognized several years ago that bureaucracy was an inevitable and indeed a desirable aspect of a substantial judiciary.[123] Further, he offered specific suggestions for making bureaucracy work better to serve adjudicatory ends. For example, he proposed that the judge who rendered a decision had to be exposed to the underlying problem directly rather than through intermediaries, such as special masters and staff attorneys, and that judges had to take personal responsibility for decisions made.[124] But while attentive to the demands imposed by the large institutional reform litigation, neither he nor many others focused on the dreariness of much of adjudication — on its dailiness, its ordinariness. Little academic writing attends to judging as a job and as a social service replete with a host of mundane problems rather than a feast of exotica.[125] But many individuals seek legal attention for

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recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing." *Goldberg*, 397 U.S. at 270-71.

Justice Black's dissent also interpreted Justice Brennan's discussion as providing the basis for subsequent decisions finding necessary a right to counsel. *See* 397 U.S. at 278-79 (Black, J. dissenting) ("it is difficult to believe that the same reasoning process would not require the appointment of counsel . . . ").

120. Fiss, *The Other* Goldberg, *supra* note 116, at 231.

121. *Id.* at 229, 230 (quoting HANNAH ARENDT, THE LIFE OF THE MIND 185 (1971)).

122. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (examining the force of law, as contrasted with other forms of interpretation).

123. Fiss, *The Bureaucratization of the Judiciary*, *supra* note 43.

124. *Id.*. at 1454-57.

125. For example, Justice Scalia has complained that, while once the federal docket was mostly "exotica" with a touch of the "mundane," it was being taken over by more ordinary cases. Antonin Scalia, *Remarks Before the Fellows of the American Bar Foundation and the National Council of Bar Presidents*, 3, 6 (Feb. 15, 1987). That assessment was, as a factual matter,

problems related to their employment, their government benefits, their families, and their safety. And many jurists, some sitting in administrative agencies and others in lower tier state courts, deal day in and day out with such problems. But absent the aggregation of such claims into high impact lawsuits, these interactions do not come to the fore within many academic environments as the prototypical demands for justice.

When responses to such conflicts become less visible, potential champions for adjudicatory processes are lost. It is commonplace to note that many who are recipients of welfare do not vote. A few impressive welfare rights movements, spearheaded by recipients, have in fact been able to reframe legal and political policies.[126] But many recipients lack the resources necessary to have significant impact. But veterans do vote. And so do many litigants in diversity cases, and women, in significant numbers. And yet, they are the very constituencies often rebuffed by the elite lawyers and judges shaping federal rights.[127] Judicial proposals to limit access to the federal courts have become particularly vivid during William Rehnquist's tenure as Chief Justice, but its roots go back to the Warren Court era.[128] Thereafter, under the leadership of Warren Burger and William Rehnquist, and through both case law and commentary, the federal judiciary has increasingly placed obstacles to access for many claimants. Specifically, the Judicial Conference supported the elimination of most of federal diversity jurisdiction and also opposed proposals to create a variety of new causes of action and to locate adjudication of certain kinds of extant claims in Article III courts.[129]

Of course, choices have to be made to distribute goods and services. But the issue is about who shapes those policies and what understandings guide those decisionmakers. The federal judiciary's approach has increasingly been to guard its own gates, perhaps serving to create and to preserve its own special character. But it has not helped to promote broad support for the genre of work so central to its identity. And poignantly, many people around the world do have aspirations for law to play a significant role in their daily lives. Consider, for example, the analysis done by Hazel Genn and her associates at the Socio-Legal Insti-

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inaccurate, as demonstrated by Professor Marc Galanter's comparative assessment of dockets. *See* Marc Galanter, *The Life and Times of the Big Six; or, The Federal Courts Since the Good Old Days* 1988 WISC. L. REV. 921.

126. The National Welfare Rights Organization is one example. *See* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 40-45 (1993).

127. *See* Resnik, *The Programmatic Judiciary, supra* note 107.

128. For details of the changing postures adopted by the Judicial Conference of the United States, see Resnik, *Trial as Error, supra* note 14, at 996-82; and Resnik, *Constricting Remedies, supra* note 12, at 275-81.

129. *See* Resnik, *Constricting Remedies, supra* note 12, at 224-31; 256-70; 272-81.

tute at Oxford, England, when asked to inquire about the potential effects of reforms on civil justice processes there. According to those researchers, while ordinary individuals believed that law was relevant to their lives, almost none used court-based processes to remedy the many problems they had encountered (which ranged from accidental injuries to disputes with employers, from interactions with the police to monetary disputes).[130] Eight out of ten of those surveyed used neither ADR, nor court, nor sought assistance from an ombudsperson.[131] For such persons, the two stories — adjudication's triumph and its death — are both irrelevant because no one has access to courts, or to agencies, or to ADR. This empirical work reveals that many self-styled "reforms" of civil processes are not much more than minor variations on the theme, unresponsive and therefore irrelevant to many disputants who have no ability to participate in any of the various procedural options.

In short, during much of the twentieth century, an expansionary era for federal adjudication, national elites of lawyers and judges were proponents of access to federal courts. But, as the composition of those elites changed, potential beneficiaries of judicial remedies were shifted to administrative processes that were both less visible and less powerful in remediating widespread injuries. And those institutions, (and particularly administrative adjudication) are increasingly vulnerable, for they receive less by way of funding and their jurists have less by way of structural protection than do Article III judges. While trial lawyers are currently a major voice for access to courts,[132] other potential constituencies have not been built through personal positive experiences with federal adjudication. Opportunities to shape nationally important constituencies for judging have been missed.[133]

Adjudication's proponents in the academy have been a part, sadly, of the story of adjudication's eclipse. First, by overstating the heroic proportions of the job of judging, they created expectations that the job did not often met. As large-scale litigation came to the fore, coupled

130. HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW (1999).

131. *Id.* at 177.

132. *See, e.g.*, Public Citizen, *Common Good's Radical Proposal to Alter the Contingency Fee System Should Be Rejected* (July 18, 2003), *available at* http://www.citizen.org/congress/civjus/attorney/articles.cfm?ID=10096 (raising objections to limiting the availability of contingency fees because of the harm to those needing assistance in bringing cases); Trial Lawyers for Public Justice [need add cite to TLPJ?.

133. In contrast, individuals are gaining the ability to bring claims to major international juridical institutions, as such tribunals are beginning to permit such direct applications, often after conditioned on that claimant's exhaustion of national remedies. *See, e.g., Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. GAOR, 54th Sess., Agenda Item 109, U.N. Doc. A/RES/54/4 (1999). *Cf.* Anne Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003).

with the high profile litigation against government or involving large sums of money, many judges became restless with the ordinariness of other cases and became reluctant to invest time and resources in them. Further, judges felt oppressed by the volume of decisions required. They pressed for faster resolutions to move many cases out of (their) courts. Second, adjudication's proponents have failed to export its heroic aspects of the activity to the ordinary judges, to the presiding officers, the hearing officers, the administrative judges, who deeply affect the fabric of the lives of so many, whether by deciding questions of benefits for veterans and social security recipients or by dealing with those seeking protection of rights as employees, consumers, or contracting parties. Adjudication's supporters need to return to their claims for adjudication and ask how adjudication can be refashioned to deliver its promises more broadly.