Customized Litigation: The Case for Making Civil Procedure Negotiable

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Abstract:
This article calls for a complete re-conceptualization of the procedural rules governing modern litigation. Specifically, it suggests that litigants ought to be given the opportunity to customize their litigation experience—that procedural rules should be treated as default rules from which parties can mutually negotiate deviations. Although they are not typically labeled as such, modest examples of customization already occur both within the rules of civil procedure and extra-judicially. This article argues that much greater tailoring is possible, and it suggests three criteria for assessing how much deviation from the current baseline is tolerable. This article argues that a judicial system that presents an opportunity for customized litigation would be more procedurally just, more efficient, and more accessible than one with only a set of non-negotiable procedural rules.

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INTRODUCTION

Henry Ford once said, in reference to his Model T automobiles, "Any customer can have a car painted any colour that he wants, so long as it is black."[1]

Our judiciary has unfortunately embraced Henry Ford's sense of consumer choice. Courts today essentially tell disputants that they can have any color of litigation they want, so long as it's the one that already exists. Observers on both sides of current debates about litigation seem to share in this vision of litigation as a unitary, choice-less process. Proponents of litigation extol its truth-seeking and justice-providing virtues. Critics point to the delay, expense, and uncertainty that accompany litigation. And underlying both of these commentaries is a relatively uniform vision of litigation—as if litigation necessarily has a (single) color, with the only argument being about whether that color is the best (single) color.

This article argues for a fundamentally different conception of the rules governing litigation. I argue that the current set of procedural rules should be treated as default rules, rather than as non-negotiable parameters. My thesis is not that our rules of civil procedure do not work. The current system of litigation may work well for some disputants, but the system is not ideally designed for *every* disputant in *every* context. And the market indicators available to us—for example, the rates at which disputants opt to pursue traditional litigation through its completion—bear this out.[2] If litigants mutually want to change the shape of their litigation, as long as the modifications do not disrupt the fundamental procedural criteria I describe below, we ought to let them have their procedural way.

Consider litigants' current experiences in the following scenarios.

Scenario One. Two businesses enter into a complex agreement to launch a joint venture that will span dozens of states. They wisely anticipate the possibility that a dispute may arise at some point regarding the implementation of the joint venture, and they both would like to pre-identify the venue in which any future disputes will be adjudicated. They also would prefer to specify ahead of time the set of substantive laws that would be applied in adjudicating any future dispute. And they mutually would prefer for any such dispute to be heard by a

[1] HENRY FORD, MY LIFE AND WORK 72 (Doubleday 1923).
[2] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL L. STUD. 459 (2004) (civil trial rate in federal courts dropped from 11.5% in 1962 to 1.8% in 2002.).

judge, rather than by a jury. Can these parties enter an agreement that would provide the litigation experience they seek? Broadly speaking, yes.[3]

Scenario Two. A financial services firm files suit in federal district court against a multinational corporation who was formerly a client. Both parties express a strong interest in speeding the litigation along and would prefer to have a magistrate judge hear the case because they fear that the district court's calendar may be unpredictable. The parties would prefer to use a mutually-agreed-upon set of jury instructions that deviate somewhat from the pattern jury instructions for their jurisdiction. They also want to enter a side-agreement that has the effect of controlling the parameters of the eventual recovery, because they fear the jury might return an extreme verdict on one side or the other. Can these parties enter an agreement that would provide the litigation experience they seek? Broadly speaking, yes.[4]

Scenario Three. Two former business partners are enmeshed in a bitter dispute that already involves claims and counterclaims alleging breach of contract and fraud. Both litigants fear that the costs and the scope of the litigation will spiral out of control. They would like to enter a binding agreement that caps the scope of the litigation, so that neither can engage in any further joinder. They would like a guarantee that the court will enforce their mutually-established boundaries on the scope of discovery. The litigants anticipate that some of the rules of evidence will unnecessarily prolong the trial, so they mutually would prefer to conduct the litigation under a more relaxed set of evidentiary standards. They also want finality, and would like to limit, or even eliminate, the prospect of post-judgment appeal. Can *these* litigants enter agreements that create the kind of litigation experience they seek? No.

What prevents the litigants in the third scenario from customizing these and many other aspects of litigation? The narrow answer is that these litigants cannot customize because current procedures do not provide a specific invitation to revise the aspects of litigation the litigants have identified as problematic. The broader and more important answer, however, is that the current rules of litigation are not broadly conceived of as a baseline. If this assumption about customization were turned on its head—if the rules were conceived of as defaults from which litigants could negotiate deviations—such customization would be presumed legitimate. This article argues that the assumption should be in favor of customization.

The idea of customized litigation offers at least three important benefits to litigants and to society. First, it promotes justice. The literature on procedural justice is staggeringly lengthy, but its fundamental lesson is fairly simple:

[3] As I describe more fully in section III.A, *infra,* our current system enforces certain kinds of contractual, pre-dispute customization agreements such as these.

[4] As I describe more fully in section III.B., *infra,* current procedural rules permit a certain measure of customization even after litigation has commenced.

participants in a dispute resolution process think that procedure matters, and not all procedures are alike in terms of making participants believe that justice has been done. One of the most effective ways to increase a disputant's satisfaction with a dispute resolution process is to permit the disputant to have some say in how the process will unfold. Second, customization offers the prospect of greater efficiency within litigation. Rather than being confined to a generic model of litigation, parties would have an opportunity to mold the procedures to best fit the contours of their particular dispute, minimizing unnecessary expenditures. Finally, increased opportunities for customized litigation may "save" society from the much-publicized demise of the civil trial. The overwhelming modern trend is away from litigation as the primary means of resolving disputes. Many scholars and observers debate whether this trend is positive or negative, on the whole. But virtually all acknowledge that courts play a vital role in promoting the rule of law—a role that would be threatened if civil cases cease to proceed through public litigation. More disputants might opt to take their cases to court if courts offered more of the flexibility that is currently offered in processes outside of litigation.

Customization has its limits. I articulate three criteria for sorting that which is truly essential to litigation from that which disputants ought to be able to negotiate themselves.[5] The first is the most mundane: Does the proposed procedural variation violate the Constitution or the statutes that create the court overseeing the litigation? Clearly, for example, the parties cannot—even with consent—create subject matter jurisdiction in a court that otherwise has none. Second, does the rule affect the public's interests in the litigation? For example, because some rules are designed to foster efficiency, we would reasonably not want to permit private litigants to construct publicly-subsidized litigation in a way that wastes public resources. Third, does the rule affect non-participants in the litigation? For example, we would want to guard against a circumstance in which a customized rule would affect or bind anyone (for example, through the preclusion doctrines) who did not agree to the customized rule.

This article argues for a radical expansion of litigants' customization options, and the prospect of such an expansion raises important questions. Would the transaction costs inherent to the process of customization be so onerous that litigants would see no benefit? Would customized procedures confuse or overwhelm the judiciary? Would customization become a tool of the powerful to strip trials of procedural devices aimed at protecting the weak? Should the judiciary concern itself with offering customized litigation, given the wide-spread availability of private arbitration? In the final section of this article, I acknowledge and address the most pressing fears, questions, and complications arising from the prospect of customized litigation. I argue that the risks and uncertainties involved with the customization experiment would be manageable and that its enormous potential benefits make customization imperative for the future of litigation.

[5] For more on the limits of legitimate customization, see Section IV, *infra*.

Ford would fare poorly in the crowded marketplace today if it persisted in offering customers only one color of automobile. With the meteoric rise of both mediation and arbitration, the marketplace for dispute resolution processes is also increasingly crowded. The time has come for our courts to offer prospective litigants more choices.

I. OPPORTUNITIES TO CUSTOMIZE LITIGATION

Mechanisms by which disputants arrive at resolution have almost limitless variations. Even within the narrow category of dispute resolution mechanisms referred to as litigation, one sees tremendous potential variation on a range of different questions. Virtually every topic in an introductory Civil Procedure course describes some aspect of litigation that our system of justice handles one way, but which one could imagine being handled in some other way by some other court system. How is an action commenced? Who sets the scope of the dispute, and how? In what forum must the litigation take place? What evidence is considered, and how is it gathered? On what basis are decisions made? Who makes the decisions? What effect does a decision have on the litigants? What effect does a decision have on non-litigants? And so on.[6]

Each of these questions has one or more answers in our court systems, but a Civil Procedure course must spend time exploring them precisely because the answers are not self-evident.[7] We have a system for joinder, for discovery, for dispositive motions, for evidence, for appeals, and for dozens of other issues critical to the functioning of our litigation system. We have designed each of these sub-systems in the best way we can currently think to design them. Each looks different now than it did in some previous version of our court system,[8] and each looks different from the system in place in some other country's court system. No one would imagine that our current version of the rules of litigation have now, finally, reached a state of immutable perfection. Virtually every year, we make some revisions to the procedures in place in federal courts, and a

[6] For an overview of the relationship between the procedural components of litigation and other mechanisms of dispute resolution, see Jeffrey R. Seul, *Litigation as a Dispute Resolution Alternative,* in THE HANDBOOK OF DISPUTE RESOLUTION 13-31 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

[7] Virtually the entire body of literature falling under the umbrella label "comparative civil procedure" serves as an illustration of this point. In the global community, one sees variations on virtually every aspect of procedure. *See generally* ARTHUR VON MEHREN, LAW IN THE UNITED STATES: A GENERAL COMPARATIVE VIEW (1992); JAMES A.R. NAFZIGER & SYMEON C. SYMEONIDES, LAW AND JUSTICE IN A MULTISTATE WORLD (2002); MIRJAN DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986); MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE (1989).

[8] *Cf.* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 1030 (1984) (describing procedural development as "a series of attempts to solve the problems created by the preceding generation's procedural reforms.").

similar pattern exists in the states.[9] We will continue to amend the rules of adjudication as we learn more about what methods best address our shared interests in the judicial system.

What would it look like to permit litigants to customize the rules of litigation? Below, I describe the possibility of customization in four different aspects of litigation procedure. These are illustrative only. Though I describe what the customized rules might contain, I do not intend to suggest that these are the precise variations that litigants would necessarily prefer. And I certainly do not suggest that these are the only categories of variations one could imagine litigants preferring. My purpose in describing them is to help give shape to the concept of customized litigation. I have chosen these potentially provocative examples, in part, because they help to illustrate customization's opportunities and outer boundaries.

A. Joinder

Certain litigants might reasonably prefer to have a different set of rules regarding the scope of their litigation. The Federal Rules of Civil Procedure and virtually every state procedural system present the opportunity for liberal joinder of both claims and parties. One can imagine circumstances in which the parties might mutually fear a joinder arms race—a piece of litigation that explodes into a mess of parties and claims. In some cases, permissive joinder resembles a prisoner's dilemma, with the act of joining a claim or a party roughly resembling "defection" in the well-known game theoretic construct.[10] One way out of a prisoner's dilemma, of course, is to create a mechanism for public, mutual, binding commitments, so that neither side is able to defect nor fears defection from the other side. What if litigants wanted to preclude permissive joinder by "freezing" the scope of a piece of litigation at some very early point in time?

The current rules provide no reliable mechanism for parties to assure themselves early on that the scope of litigation has been (and will remain) contained. Indeed, in modern litigation, parties routinely change the scope of their claims or defenses. Rule 15 routinely permits formal amendment even well after the commencement of the litigation, indicating that "leave [to amend] shall be freely given when justice so requires."[11] Under the "relation back" doctrine, added claims or defenses may even be treated as if they were part of

[9] *See* Carl Tobias, *The Past the Future of the Federal Rules in State Courts,* 3 NEV. L.J. 400, 403 (2002).

[10] For an interesting application of the prisoner's dilemma to basic civil litigation, see Orley Ashenfelter & David Bloom, Lawyers as Agents of the Devil in a Prisoner's Dilemma Game (Working Paper No. 270, Princeton Univ. Indus. Rel. Sec. 1990) (concluding that the decision to hire a lawyer constitutes a "defection" in prisoner's dilemma terms, because outcomes produced by two unrepresented parties are statistically indistinguishable from those in which both parties had lawyers, except for the attorneys' fees).

[11] Fed. R. Civ. P. 15(a).

the original pleadings, so that even the statute of limitations does not act as a complete bar.[12] In fact, even at trial, the rules contemplate that issues that were never previously raised will *still* be treated as if they had been in issue all along, unless the opposing party objects. Even if an opposing party objects, however, the court will permit the new issue or evidence to be introduced, unless the objecting party can demonstrate "prejudice."[13]

One can imagine why litigants might want courts to enforce a mutual agreement *not* to file amended pleadings or to bring about permissive joinder in any other way. One litigator I interviewed in connection with my research for this article indicated that if a reliable mechanism along these lines existed, he could envision "some cases when I would include a proposed, customized joinder-limitation in my demand letter to the other side," before the litigation even began.[14]

The strongest objection to the enforcement of such a customized procedural arrangement likely stems from the efficiency argument underlying modern procedure's liberal joinder policy. One of the strongest motivators for requiring joinder along transactional lines is the assumption (most likely correct) that it is wasteful to permit litigants to bring multiple lawsuits over the same transaction or occurrence. The Federal Rules and most state procedural systems, therefore, provide for compulsory counterclaims and have res judicata doctrines that functionally require litigants to raise all claims related to a single transaction in one lawsuit. As to compulsory joinder, therefore, the efficiency rationale is compelling.

Customization limiting permissive joinder, however, raises a different set of issues. If the plaintiff has five completely unrelated claims against the same defendant, how much more efficient is it to permit all of the claims to be joined together in one lawsuit?[15] The fact that courts commonly wind up holding separate trials in these cases suggests that the opportunities for efficiency are more limited than with compulsory joinder.[16] Furthermore, by their very nature, opportunities for permissive joinder are just that—permissive. We do not require litigants to bring unrelated claims together; we merely invite them to do so. To the extent that they have created a customized procedure in which they have agreed not to do so, why not enforce that agreement?

Some litigants might prefer the wholesale rejection of further joinder I describe in this section. Others might prefer simply to confine joinder in a more modest, pre-determined manner. And it is easy to imagine that one or both of the parties

[12] *See* Fed. R. Civ. P. 15(c).
[13] *See* Fed. R. Civ. P. 15(b); Fed. R. Civ. P. 15(c).
[14] Interview with Robert Tsai (January 2006).
[15] I suspect that one of the bases for suggesting that permissive joinder is more efficient has to do with the likelihood of settlement. In other words, perhaps it is more efficient to *settle* five cases all at once, rather than separately.
[16] *See* Fed. R. Civ. P. 42(b).

in some circumstances might prefer the rules of joinder just as they are. That is the beauty of customization—it would permit litigants to tailor the rules in ways they consider to be mutually advantageous, when such an opportunity arises.

B. Discovery

Many discovery-related circumstances are already fully within the parties' control.[17] Yet more room for customization exists, particularly regarding the circumstances in which a court will overturn litigants' private agreements regarding discovery. What if litigants wanted to limit the circumstances in which courts would intervene in the litigants' decisions about how discovery should unfold?

Federal Rule of Civil Procedure 29 provides an example of the kind of judicial intervention contemplated by modern discovery rules. It provides that litigants' agreements with respect to discovery timing are subject to "the approval of the court," if the customization would disrupt a previously adopted calendar or timetable.[18] In the modern era of "managerial" judges, the policy can be understood as an effort to curtail indefinite litigation. Once a modern judge establishes a deadline for dispositive motions, for discovery closure, or for trial, receiving an extension of time becomes quite difficult. If one envisions courts' dockets as being cluttered with perpetually-neglected cases, then the opposition to extensions is sensible.

In at least some circumstances, however, cases linger on the docket because of haste, rather than the opposite. One litigator I interviewed called this trend toward judges rejecting joint motions to extend discovery deadlines, "the worst, most inefficient, single most annoying thing judges do these days."[19] Many of the procedural hurdles over which litigants must leap are aimed at preparation for adjudication, rather than at facilitating settlement.[20] Sometimes, the way to get a case off the docket (if that is the concern driving the tight deadlines) is to give the disputants more time to find non-adjudicative resolutions. In such circumstances, why not permit litigants to customize the calendar? If they both agree that more time would help, why not let them have it? Nothing in the statutory or constitutional structures underlying the courts demands discovery of

[17] For a description of the circumstances in which litigants already customize some aspects of discovery practice, see section III.B.3., *infra*.

[18] Fed. R. Civ. P. 29(2).

[19] Interview with Jeffrey Krivis in Los Angeles, California (February 2006). I acknowledge the possibility that judges engage in managerial decisions that are simultaneously important *and* unpopular with the targeted litigants. Courts' dockets cannot be held hostage by litigants who protract litigation through mutual neglect, sloth, or inattention. That some litigants believe judges erred in their exercise of discretion on timing is not evidence that the judges in fact erred. It is evidence, however, that some litigants hold the *perception* that they would be better served by a different treatment of litigation calendars.

[20] *See*, *e.g.*, Moffitt, *supra* note ___ (arguing that the timing and structure of modern pleading rules complicate, rather than facilitate, efficient settlement discussions).

a particular shape or timing. Mutually-acceptable extensions would not create any meaningful burden on non-litigants, nor would they affect the symbolic or functional public interests associated with the judiciary. If the real concern is the integrity of the court's docket, perhaps we could allow them to post some "bond" of sorts, so that if the extra time does not produce settlement, some other trigger (financial or time-related) kicks in. In all events, more room exists for litigants to explore mutual customization of discovery devices and deadlines.

A second example of potential customization stems from the prospect that some litigants will have precisely the *opposite* interests of those described above. Some litigants do not want extensions of time. They do not want the court to grant extra interrogatories or extra depositions. Instead, they want true security that discovery will not run amok. If both sides prefer a tight discovery schedule, of course, they are free to craft one under Rule 26(f) and have the judge enter their mutual request as an order pursuant to Rule 16. For many litigants, this may be sufficient assurance that the discovery will be as quick and as streamlined as they initially negotiated. The problem, however, lies in the prospect that the trial court may (as many do) subsequently grant a motion *by one litigant* to permit discovery beyond that which was mutually negotiated at the outset. "For good cause," a court may alter the provisions of a scheduling order, and the non-moving party would face almost impossible odds in having the trial court's decision to extend or expand discovery reversed on appeal.[21]

What if the litigants mutually wanted a more binding commitment at the outset of discovery? In Homer's Odyssey, Ulysees so feared that he would be lured by the seductive and disastrous call of the sirens that he instructed his sailors to lash him to the masts (so that he could not turn the boat) and to fill their own ears with wax (so that they would not heed his subsequent requests to take the boat in that direction). What if litigants wanted to enter an Odyssean commitment regarding discovery at the outset of litigation?[22]

Discovery represents such a significant component of modern litigation expenses that one can easily imagine why litigants might want a reliable mechanism for limiting its use.[23] A firm-and-durable ceiling on the availability

[21] *See* Barwick v. Celotex Corp., 736 F.2d 946, 954 (4th Cir. 1984) (scheduling orders "are not set in stone, but may be relaxed for good cause, extraordinary circumstances, or in the interest of justice"); *O'Connell v. Hyatt Hotels of Puerto Rico*, 357 F.3d 152, 155 (D.P.R. 2004) (contrasting the "good cause" standard of discovery schedule revisions with the "freely given" standards of pleading amendment).

[22] The idea that one might reasonably seek to preclude certain options that would otherwise be available is well-established. *See*, *e.g.*, JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 168 (2000); ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 36 (1984).

[23] For more on discovery costs, see John D. Shugrue*, Identifying and Combating Discovery Abuse,* 23 LITIG. 2 (1997); Thomas E. Willging, Donna Stienstra, John Shapard, Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C.L. REV. 525 (1998); THOMAS E. WILLGING ET AL., FEDERAL

of discovery would be troublesome if it were *imposed* on litigants, but most of those concerns evaporate if both parties are sophisticated and knowingly entered the agreement at the outset of the litigation.

Nothing about enforcing such a customized rule would create inefficient expenditures of public resources. Indeed, it would likely curtail costly discovery disputes. Indeed, except for the relatively rare discovery dispute that actually winds up before the court, most of the expenses involved in discovery practice are borne solely by the litigants as private expenses. When the scope of discovery explodes beyond control, it is not the courts who are burdened, it is the litigants and their checkbooks. Efficiency concerns, therefore, present no legitimate barrier to this form of customization.

In different circumstances, litigants might reasonably want different kinds of discovery systems. In some, litigants might think the current system operates just fine. In others, the litigants might want to expand (or curtail) the circumstances in which the court would intervene and disrupt the litigants' discovery plans. Discovery practice presents a clear opportunity for litigants to customize their litigation experience, provided they can assure themselves that the court will support their customization decisions.

C. Evidence

Modern rules of evidence depend heavily on the incentives of adversarial adjudication. In a crass vision of litigation, each side may try to "get away with" introducing evidence that arguably (or even certainly) does not conform to the standards set forth in the Rules of Evidence. Curtailing this behavior is the ability of the other side to raise an objection to the court, inviting the court to decide on whether the proposed evidence is admissible. As a result, in some cases, litigants must spend considerable time laying foundation for certain testimony, fighting about the admissibility of other evidence, and so on. For centuries, many have viewed this adversarial clash as the most reliable and efficient mechanism for discerning the truth. It is worth highlighting that this is a process largely driven by the parties. The court's role is fundamentally passive—it typically waits for the opposing litigant to object before ruling on the admissibility of a particular piece of evidence or testimony. Absent an objection, therefore, evidence that might not have survived a challenge almost certainly gets in front of the jury.

What if litigants wanted mutually to present evidence in a manner that deviated from the norms established by the Federal Rules of Evidence? One attorney I interviewed in connection with this article described a case in which he and opposing counsel discussed the question of evidentiary rules in advance of the litigation. The case involved a contest over the valuation of a particular piece of

JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE (1997).

property in an eminent domain case. Each planned to put an expert on the stand to testify as to certain aspects of the property's value, but each expert's testimony would have considerable components that would be nothing more than hearsay. The lawyer and his counterpart agreed *ex ante* that neither would object on the basis of hearsay when either expert was on the stand. The two mutually approached the bench and informed the judge of their private arrangement, and the judge did nothing to stand in the way of the arrangement. In the words of one, "What would have otherwise taken days took no more than a couple of hours of trial time."[24] Litigants may have reason to want to customize the rules of evidence.

One trend supporting the view that litigants might mutually disfavor the rules of evidence can be seen in modern arbitration. Arbitrators may (or may not) apply the rules of evidence in adversarial arbitration hearings, depending on the contractual terms negotiated by the disputants themselves. This feature of arbitration is commonly cited as a comparative advantage. One attorney I interviewed explained his preference for arbitration's customized evidentiary standards by saying, "The rules of evidence don't actually keep anything from getting in; they just make it take longer to get it in."[25]

Should the court system permit such customization? In the eminent domain case described above, the litigation proceeded on the basis of a mutual understanding. Both sides agreed not to object on the basis of hearsay, and neither did. But what if one side *had* objected in open trial? Should the court have enforced the prior agreement? In all likelihood, the customization agreement would not have withstood an attack on public policy grounds. The agreement would likely have been considered void and unenforceable. I am not convinced that should be the result.

Mutually crafted adaptations of the rules of evidence would not change the courts or their functions in any intolerable way. Courts have not engaged in unconstitutional behavior if they permit objectionable-but-unobjected-to evidence to go before a jury. Nothing in a revised set of evidentiary rules would prevent a court from serving the important functions of resolving disputes or articulating the laws relevant to that dispute.[26] Efficiency concerns do not stand in the way of customization, because if anything, adjudicative proceedings with

[24] Interview with Maurice Holland in Eugene, Oregon. (October 2005).

[25] Interview with M. J. Tedesco in Cambridge, Massachusetts (June 2004). In at least one respect, this may overstate the case because one might expect a legally-trained arbitrator to handle hearsay (or some other unreliable form of evidence) differently than a lay jury. We might have greater confidence in an "open-season" approach to evidence in arbitration (or in a bench trial) than in a civil jury trial.

[26] A court's interpretation of substantive laws relevant to a case would not be affected. The only aspect of law-articulation that would be curtailed would be the laws of evidence, since those would not be the focus of the litigation.

customized evidentiary standards would likely proceed more quickly. Customized litigation holds no prospect of harming non-litigants.[27]

Perhaps the best argument against permitting customized evidentiary standards stems from the public's symbolic interests in the functioning of the courts. In short, might it sully the public's good image of the courts if the public somehow found out that the court was permitting hearsay to go before a jury in a given case? I think not, for two reasons. First, I doubt seriously that most casual observers of the court system would be capable of discerning hearsay from permissible testimony.[28] Second, it is not clear to me why it would make the *court* look bad, since it was based on the affirmative agreement of the litigants. The public may have a diminished view of one of the litigants—the one ultimately harmed by the agreement not to have the same evidentiary standards—but that does not argue against permitting the customization.

As with the other aspects of litigation I have described in this section, it is easy to imagine litigants crafting a great number of possible variations on the rules of evidence. Some might dispense with them broadly, and some might carve out only narrow deviations from the current rules.[29] And surely some would prefer to proceed through litigation applying the existing rules. If evidentiary standards were treated as default rules, each of these litigants would have its way.

D. Appeals

Appeals present a fourth illustrative example of an area of litigation in which litigants might conceivably seek to customize their experience. For evidence that litigants might place value on the ability to limit, ex ante, their subsequent opportunities for appeal, one need look no further than modern trends in arbitration. Though arbitration proponents proclaim its virtues on many different levels,[30] most of the distinctions between arbitration and litigation are

[27] Even the common law preclusion doctrines are structured in a way that would largely accommodate customized litigation. The Restatement (Second) of Judgments provides that collateral estoppel does not attach in cases in which "A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts." RESTATEMENT (SECOND) JUDGMENTS §28 (c)(3).

[28] In fact, if we were confident that jurors were consistently able to sort reliable forms of evidence from unreliable forms of evidence, were unaffected by prejudicial materials, etc., then we would have little need for the Rules of Evidence at all. The Rules' function, keeping certain forms of evidence from being submitted to a jury, presumes that jurors cannot be trusted to do that sorting on their own.

[29] For example, I can imagine a scenario in which litigants each wanted to present medical testimony from an expert witness solely in the form of competing affidavits. Customizable evidentiary standards would permit them to proceed according to their preference.

[30] Among the frequently claimed advantages are speed, informality, expertise of the decision maker, and cost-effectiveness. The evidence is mixed regarding at least some of these claims. *See, e.g.,* H.R. REP. NO. 97-542, at 13 (1982) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and

lost on the average (or even the sophisticated) arbitration consumer. The one thing they are quick to point to, however, is the *finality* arbitration offers, because of the extraordinarily limited opportunities for judicial review of arbitral awards.[31] What if litigants wanted similar assurances about the finality of a judgment entered by a trial court?

Our court system makes appellate review available to litigants for a number of reasons. We have an interest in assuring that the litigated outcome was the "correct" one, by the relevant legal standards.[32] We have an interest in making litigants believe that justice has been done. We want trial courts to operate within the rules of the law, and we assume that the prospect of subsequent appellate review encourages trial court judges to behave appropriately. And we value appellate courts' ability to make pronouncements of law that will be both publicly educative and binding on a broader set of courts.

Despite these societal interests, however, we leave the matter of appeals entirely in the hands of individual litigants. We do not *require* appellate courts to review every lower court decision. Indeed, appellate courts are essentially passive bodies, sitting idly until a litigant with appropriate standing invites them into a dispute. The typical litigant's decision to seek review by an appellate court is made after the conclusion of the trial court's work. We permit litigants to bargain over whether they will exercise this right. Indeed, we often *encourage* them not to pursue appeals, through things like appellate mediation programs.[33] There is nothing remarkable about the idea that a losing litigant might not raise an appeal.

Pre-litigation customization that reduces or eliminates the prospect of appeal would merely change the timing of the decision whether or not to appeal. Why not allow litigants pre-commit to waive their rights to appeal? Why not allow them to enter litigation knowing that the outcome in trial court would be final?

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evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices . . . ."), *cited in* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (citing arbitration's simplicity, informality, and expedition); Jennifer Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Litigation*, 84 N.C. L. REV. 123 (2005) (naming "expertise of the arbitrators" as a primary advantage over litigation, but suggesting that in the securities arbitration context, such expertise may be overstated).

[31] *See* Federal Arbitration Act, 9 U.S.C. § 10 (2000) (describing limited circumstances under which judicial review of arbitral awards is possible).

[32] Our system assumes that an appellate court, with its ability to focus more narrowly on each legal decision by the trial court, will render a more accurate decision than the previous decision. At some level, of course, Robert Jackson's observation "We [the Supreme Court] are not final because we are infallible, but we are infallible only because we are final" holds true. Brown v. Allen, 344 U.S. 443, 540 (1953).

[33] *See* Gilbert J. Ginsburg, *Essay: The Case for a Mediation Program in the Federal Court*, 50 AM. U.L. REV. 1379, 1382-90 (2001) (surveying existing federal appellate court mediation programs).

Appellate customization would not run afoul of the constitutional or statutory foundations of the courts. Civil litigants have no constitutional right to appeal, though virtually all court systems provide at least one opportunity for appeal as of right. Nevertheless, we routinely let litigants waive or bargain away this right. Binding litigation, without the prospect for appeal, would not cause trial courts to exceed their constitutional or statutory authority. The trial court would merely oversee the litigation as usual. I can imagine that litigants might agree not to disclose the no-appeals customization to the trial court, so that the trial court would continue to operate *as if* appellate review were an option. In function, however, customization of litigation would not disrupt the operation of the trial courts in any objectionable manner. One might object that such agreements would strip *appellate* courts of their jurisdiction,[34] but again, appellate courts' jurisdiction relies on parties bringing a case before them. A private customization agreement would not divest courts of their jurisdiction. Instead, it would act as a waiver of the right to appear before that court.

The most potentially troublesome aspect of the prospect of customization of appeals may stem from its effects on the public's interest in hearing appellate courts' pronouncements on the law. Might a limit on appeals result in an inadequate flow of appellate decisions, and thus contribute to an under-developed body of law? At some level, this is an empirical question to which no ready answer is available. Taken to an absurd extreme, of course, the public would surely object if the river of Supreme Court petitions for certiorari dried up because of customization upstream. On the other hand, no recent visitor to a law school library's stacks could credibly assert that we are suffering from a dearth of appellate opinions.[35]

Permitting customization of appeals, like all forms of customization, would be no more than a mutual choice by the litigants in a particular dispute. From the Rawlsian position, behind the veil of ignorance, before the litigation begins, neither party necessarily has reason to believe that *its side* will be the one to suffer from some judicial malfeasance. Imagine that the plaintiff and defendant each gaze into their respective crystal balls, and that each determines that it is equally likely to benefit from as to suffer from some appealable trial court error.

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[34] In some ways, such an argument would parallel some of the arguments made in opposition to enforcing arbitration agreements in earlier times. Arbitration was said to strip courts, impermissibly, of their jurisdiction. *See, e.g.,* Dean Witter Reynolds Inc. v. Byrd , 470 U.S. 213, 220 n.6 (1985) (citing reference in the legislative history of the FAA to some courts' historical refusal to enforce arbitration agreements on the ground that they "ousted" courts of jurisdiction); Allied-Bruce Terminix Cos., 513 U.S. at 270-71 (tracing historical development to English courts' hostile relationship to arbitration on the grounds of jurisdictional interference) (1995).

[35] *Cf.* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L. J. 2619, 2644 (1995) (suggesting that continued increases in litigation rates and opinion generation risks creating "babel, with thousands of decisions issued weekly and no one judge capable of comprehending the entire corpus of federal law").

In that case, at that moment in time, the prospect of appeals appear as nothing more than a transaction cost, because the appellate decision would do nothing more than redistribute (at a cost) the endowments the trial court bestowed on the parties. We would not blink an eye at the prospect of litigants settling a case *following* the entry of judgment, before appeals occur. Indeed, we spend some public resources trying to encourage them to do precisely that. Why not allow these parties to agree, before litigation, that the trial court's decisions will be final? Subject to the constraints articulated in Section ___, we should permit such customization.

Some litigants would be too nervous to foreclose all opportunities for appeal. They might prefer, for example, to curtail only one category of appeals. Still other litigants—for example those whose interests are in legal reform—would likely resist any effort to restrict access to appellate courts. Each of these options should be available to litigants.

My purpose in this section is not to suggest a particular structure for customizing appeals or any other procedural process. What would customized litigation look like? In short, it would look however the litigants wanted it to look.[36]

II. THE CASE FOR PERMITTING BROAD CUSTOMIZATION

Increasing litigants' opportunities for customization would improve the civil justice system in at least three ways. First, customized litigation holds the promise of outcomes that are more just—and more recognized as just—than the current system. Second, treating modern procedural rules as defaults from which parties can mutually negotiate deviations holds the promise of more efficient expenditures of both private and public resources. The third part of my argument for changing the litigation structure stems from the rapid decline in rates with which disputants use jury trials to resolve disputes. Although I do not ascribe to the overly-romanticized vision some paint of the jury trial system,[37] I believe that juries play a critical function in our democratic system of justice.[38]

[36] In Section IV, below, I describe the parameters of customization. Litigants' options are not as boundless as this phrase might suggest.

[37] I first encountered the term "litigation romanticism" in the writings of Carrie Menkel-Meadow. *See, e.g.,* Carrie Menkel-Meadow, *Whose Dispute is it Anyway? A Philosophical and Democratic Defense of Settlement,* 83 GEO. L. J. 2663, 2669 (1995) (hereinafter Whose Dispute is it?); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founder of ADR,* 16 OHIO ST. J. ON DISP. RESOL. 1 (2000); Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context,* 54 J. LEGAL ED. 7, 22 (2005); Carrie Menkel-Meadow, *Narrowing The Gap By Narrowing The Field: What's Missing From The Maccrate Report--Of Skills, Legal Science And Being A Human Being*, 69 WASH. L. REV. 593 (1994). *See also* Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. OF EMPIRICAL LEGAL STUDIES, 689 (Nov. 2004).

[38] *See* section ___, *infra*.

Customized litigation would help to preserve and promote those aspects of the modern jury system that are most important. The time has come for litigants to have more choices about how their litigation unfolds.

A. Customization Supports Procedural Justice

A substantial body of research, spanning several decades, demonstrates that disputants care not only about the outcomes they receive, but also about the process(es) that led to the outcome of their dispute.[39] This literature, which falls under the broad umbrella of "procedural justice," suggests that disputants commonly prefer certain alternatives to litigation, for example, even if those alternatives do not produce more favorable substantive outcomes than litigation.[40] Most research suggests that the distributive outcomes—who got how much—have only a modest effect on how disputants perceive the fairness of the procedures they went through. In fact, important causal effects seem to run in the opposite direction. "Disputants' perception of the justice provided by a procedure affect their judgments of the distributive justice provided by the outcome."[41]

The lessons of procedural justice research have important implications for the prospect of customized litigation. Evidence suggests that disputants consistently value certain features in a dispute resolution mechanism. For example, they want "voice"—an opportunity to tell their stories.[42] Disputants also want fair decision makers and a process that treats each disputant with dignity and respect.[43] These factors each speak to a feature of a particular process. Another aspect of procedural justice—another variable in assessing whether disputants view an outcome as fair—is the degree to which the disputants had control over the process itself.[44] Providing disputants with process control increases the disputants' perceptions of justice. Customized litigation *is* a form of process control, suggesting the prospect of increasing procedural justice.

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[39] For a survey of this literature, see E. ALLEN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 2 (1998) ("[D]issatisfaction [in the face of a favorable outcome in a social situation] is difficult to understand if it is assumed that people are concerned only about outcomes but is often easily explained if it is assumed that people are concerned about process.")

[40] *See* Tom R. Tyler. *Citizen Discontent With Legal Procedures*. 45 AM. J. COMP. L. 871, 881-883 (1997) (describing research in which fathers in child custody disputes preferred mediation over litigation—even though they received no better substantive outcomes in mediation).

[41] Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?,* 79 WASH. L.Q. 787, 817 (2001).

[42] *See id.*

[43] *See id;* LIND & TYLER, *supra* note ___, at 214.

[44] *See* LIND & TYLER, , *supra* note __, at 94 (1988) ("One of the central themes of Thibaut and Walker is that procedures that provide high process control for disputants tend to enhance procedural fairness. More recent research has confirmed this general finding.").

We cannot reasonably expect all forms of customization to affect procedural justice and perceptions of fairness equally. At least two factors could serve to dampen the potential benefits of customization. First, in the litigation context, most of a disputant's activity is conducted through an attorney. The distinction between an agent and a principle almost certainly matters, for purposes of gauging potential benefits from procedural justice. There is a limit on how much procedural justice "trickles down" to those who occupy a less prominent role. A procedure that gives a litigant's *attorney* "voice" surely provides more procedural justice than one that fails to provide the attorney with voice. One would expect, however, that the fact that the procedural benefit is focused on the attorney, rather than on the litigant, would dampen the potential benefits.[45] If customization occurs, therefore, merely as the product of behind-the-scenes negotiations between opposing counsel, the procedural justice argument is weakened. The process control aspects of procedural justice are strongest when the principle is the party exercising control over the process.

A second limit on the capacity of litigation customization to deliver procedural justice depends on the timing of the customization. Modern forms of so-called "mandatory" arbitration provide the cautionary tale that illustrating this point.[46] The original picture of arbitration—two disputants mutually agreeing to submit an existing dispute to an arbitrator of their choice, applying a mutually negotiated set of arbitral procedures—raises few significant concerns. In the past two decades, however, the tide has shifted dramatically toward enforcing pre-dispute arbitration agreements. Today, it is difficult to purchase a consumer good, accept employment, or receive health care treatment without having been deemed to have consented to a form of arbitration, thereby waiving any right to a trial.[47] Whatever procedural justice claim arbitration might have had is undermined both by the adhesion manner in which they are commonly imposed

[45] *See*, *e.g.*, Welsh *supra* note ___, at 838 (arguing that excluding parties from mediation, as a cost-saving mechanism, decreases perceptions of procedural justice); Donna Shestowsky, *Procedural Preference in Alternative Dispute Resolution*, 10 PSYCHOLOGY, PUBLIC POLICY, AND LAW 240 (2004) ("[Participants] preferred a process that granted disputants direct control over the presentation of evidence (rather than allowing a representative to do so).")

[46] *See*, *e.g.*, Jean Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration*. 72 TUL. L. REV. 1, 6 (1997) ("[A]lthough theoretically the arbitration is not mandatory, effectively the consumer/employee has no choice but to sacrifice her right to a fair day in court if she wants the job, service or product in question."); Jay Folberg, *Arbitration Ethics—Is California the Future?*, 18 OHIO ST. J. ON DISP. RESOL. 343, 359 (2003) ("[Mandatory arbitration' clauses effectively restrict access to courts and attempt to limit class actions on behalf of claimants, who are unlikely in great numbers to pursue individual arbitration proceedings or obtain lawyers to challenge arbitration clauses.")

[47] *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*. 74 WASH. U. L. Q. 637, 637 (1996). ("Large companies such as banks, hospitals, brokerage houses and even pest exterminators are increasingly including mandatory binding arbitration clauses in the fine print contracts they require all customers, employees, franchisees and other little guys to sign.")

on one party and by the temporal distance between the agreement and its implementation. Broad, anticipatory customization is not what I envision.[48]

Perceptions of justice stand to improve, however, if litigation customization provides a role for the actual disputants and is conducted in the context of a specific piece of litigation. And perceptions of justice are important. As I describe in section ___ below, we ask our courts to play a range of different functions, including clarifying and publicizing laws, resolving disputes, and articulating collective norms. Courts' ability effectively to perform these functions depends, in large measure, on their ability to occupy a place of legitimacy in the public mind. If courts are, in fact, acting in a legitimate manner, then it is in the interest of democratic governance that the public perceive the courts to be legitimate. Disputants' assessments of procedural justice influence "their compliance with the outcome and their faith in the legitimacy of the institution that offered the procedure."[49] Assuring the presence of procedural justice is critical to the judiciary's basic functions, and permitting litigants say in the design of the litigation system holds promise for increasing perceptions of procedural justice.

B. Customization Promotes Efficiency

In recent years, many have proposed to change the civil litigation system, citing the need to improve its efficiency. Calls for reform have been broad and loud. For example, in 2005, Robert J. Grey, then President of the American Bar Association wrote, "The opportunity to modernize, streamline and provide a more efficient process for resolving disputes can only produce positive results for society and the profession. There are no losers, only winners, in this effort."[50] One proposal calls for greater use of timed trials, with each side's allocated time ticking down every time it stands to speak or present a witness.[51] Other proposals are aimed at limiting discovery expenses, at streamlining the jury selection process, or at improving juror comprehension.[52] Many of these ideas have merit and would probably improve the overall efficiency of the litigation system. However, they all still assume a single, immutable set of procedures for all disputes.

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[48] For more on the relationship between arbitration and customized litigation, see section ___, *infra*.

[49] Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?,* 79 WASH. L.Q. 787, 817 (2001).

[50] Robert J. Grey, *Striving for a Just Solution: Our Work to Improve the Dispute Resolution System Benefits Society and the Profession ABA Journal*, 91 A.B.A.J. 6 (July 2005).

[51] For a discussion of the legal and practice implications of timed trials, see Martha K. Gooding & Ryan E. Lindsey, *Tempus Fugit: Practical Considerations For Trying A Case Against the Clock,* 53 FED. LAW. 42, 45 (2006).

[52] *See* American Bar Association, Principles for Juries and Jury Trials 21 (2005), *available at* http://www.abanet.org/juryprojectstandards/principles.pdf.

Customization offers the prospect of increasing litigation's efficiency, regardless of the fate of the current set of reform efforts. Whether customization would, in fact, lead to more efficient expenditures by disputants is an empirical question for which we currently have no data. We can anticipate, however, the conditions that would have to exist for customization to produce efficiencies. (1) The court system's caseload would have to include different kinds of disputes or disputants—some reason why one pair of litigants might have preferences different from another pair of litigants. (2) The current court system would have to impose the same general rules on all litigants. (3) Some pairs of litigants would mutually have to prefer some other set of procedural rules, in at least some circumstances. And (4) the costs of customizing those rules would have to be less than the costs created by applying the default rules.

The first two conditions clearly exist in the current system. Most courts see a great variety of disputes and disputants. The same federal district court will hear a discrimination claim, a complaint about a hazardous waste cleanup, a patent infringement action, a breach of contract claim between multinational corporations, and a voter rights complaint. The same federal district court will hear cases brought by pro se litigants, by sole practitioners representing litigants of modest means, and by corporate counsel for multinational corporations. And under the current system, it will apply identical procedures to each lawsuit.[53]

As I described in Section ___ above, we also have reason to believe that some disputants might sometimes mutually prefer a set of procedural rules that deviate from the current rules—often for reasons related to efficiency. For example, some litigants might mutually want to dispense entirely with the possibility of any appeals, because of the cost and delay they entail. Others might prefer to remove choice from some later stage in the litigation process by entering a Ulysses-like commitment up front. Parties might prefer to have a hard cap on discovery, a limit on joinder, or even a restriction against raising certain evidentiary objections—all in the name of efficiency. Whatever degree of admiration is due to the drafters of the civil procedure rules—and I personally think we owe them very considerable admiration—even they would not claim that current procedures are all things for all disputes. Instead, the current rules represent our best guess at the procedures that will produce the best justice, the best way, for the most cases. We can expect no more of a single set of procedural rules. It stands to reason that litigants might sometimes mutually prefer some other variation on the rules.

[53] In specialized courts, one might credibly argue that these procedures have been tailored to meet the particular dynamics and incentives of that kind of dispute. Perhaps traffic courts have perfectly efficient procedures for processing traffic tickets. Perhaps domestic relations courts have procedures that waste no resources in the adjudication of parental rights claims. Most courts, however, hear a broad array of different cases.

The efficiency question, therefore, boils down to a matter of comparative costs. Would the cost of customization ever be less than the cost of applying the general rules to a dispute in which both litigants would prefer a customized rule?

If all of the relevant costs were borne uniquely by the litigants themselves,[54] the equation would be simple, involving only three variables.

C = the litigants' anticipated costs operating under the current, general rule.

C′ = the litigants' anticipated costs operating under their customized rule.

N = the costs of discovering a potentially mutually preferred procedural rule and negotiating its terms.

In mathematical terms, customization would produce attractive efficiencies for the litigants if $C > C' + N$.

The transaction costs involved in the search for potential efficiency may, in certain contexts, outweigh the potential benefits that might derive from customization. I would not expect, therefore, that we would see sweeping customization agreements in small claims courts, for example. The dollars at stake and the marginal efficiencies the parties might realize through some adjusted procedure would not justify the expenditures involved in crafting the customized rules.

We should not, however, overestimate the potential costs involved in searching for customization agreements. First, the existence of the underlying, default procedural rules provides considerable protection against wasteful investment in the search for agreement. Because either side can pull the plug at any time during the exploration and return to the default rules, parties will only invest the time and effort of looking for customization if the discussions are promising. Could a plaintiff convince a defendant to agree to a procedural modification that would dispense with all dispositive motions and proceed directly to jury trial? Could a defendant convince a plaintiff to a rule that would subject the injured plaintiff to unlimited medical examinations? Neither seems terribly likely in most cases, but we should not confuse the idea of *permitting* customization with the image of *requiring* customization. The search for customization would proceed only as long as both litigants saw reason to continue the search.

Second, one can easily imagine that with experience, one or more procedural variants would gain popularity, decreasing the marginal cost of customization. The investment required to draft a procedural customization from whole cloth is vastly higher than the cost of simply adopting an existing variation by reference. The experience of arbitration agreements is informative in this regard. In theory, every party wishing to include an arbitration agreement can sit down and negotiate the precise terms of every aspect of the arbitration that is to

[54] In Section IV.D. *infra*, I address the concern that customization might cause less efficient expenditures by the courts. In this section, I focus exclusively on the question of whether the *disputants* would realize any efficiency gains from customized procedures.

follow. What most do, instead, is incorporate by reference an existing set of publicly-available arbitration rules, with perhaps a few modifications or details relevant to their particular dispute. I would expect that, with experience, the choice to customize a litigation procedure would present only marginal transaction costs because of the availability of information about what previous litigants have chosen to customize.[55]

In at least some circumstances, therefore, litigants would likely discover and codify opportunities for procedural variations that create mutual benefit.[56]

C. Saving the Civil Trial (By Changing It?)

In 2004, Marc Galanter published his long-awaited final report on the "Vanishing Trial,"[57] and much of the legal community has reacted with alarm. The Vanishing Trial Project was the largest ever undertaken by the American Bar Association Section on Litigation, and it has spawned numerous conferences, symposia, and follow-up efforts. Galanter's data-intensive survey of the landscape of modern litigation, the foundation of the project's report, traced trial rates in federal courts over four decades. The statistic most cited from these studies showed that the civil trial rate in federal courts dropped from 11.5% in 1962 to 1.8% in 2002.[58] During the same years, courts have witnessed a five-fold increase in cases initiated,[59] and a dramatic increase in the number of judges[60] and lawyers.[61] Many have suggested, therefore, that the data show a more complex picture than that initially suggested by the theme of a "vanishing trial."[62] Nevertheless, all empirical evidence suggests that the judiciary and the litigation process have undergone fundamental changes in the recent past.

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[55] In many respects, this has been the experience of the "public good" represented by corporate law. Much of corporate law is essentially a default rule, from which investors and corporations are free to negotiate deviations, if they are so inclined. Most do not, but the option exists and some standardized variations have developed. *Cf.* Daniel J.H. Greenwood, *Markets and Democracy: The Illegitimacy of Corporate Law,* 74 UMKC L. REV. 41, 62 (2005) ("standard corporate law . . . is open to all sorts of unusual arrangements: virtually all of its key requirements are merely default rules, waivable at the option of the individual firm or its participants.") Perhaps the experience will parallel the development of the Uniform Commercial Code, whose provisions have been guided in large part by developments in private commercial practices.

[56] A customized procedure is value creating, of course, only if it creates benefit for the litigants *without* merely externalizing costs on others. It would not do, for example, for litigants to create rules they favor but which intolerably disfavor non-disputants or the public at large. For more on the limits of customization, see Section IV, *infra*.

[57] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL L. STUD. 459 (2004).

[58] *Id.* at 459.

[59] *Id. a*t 461.

[60] *Id. a*t 5001-501.

[61] *Id.* at 521.

[62] *See* John Lande, *Replace "The Vanishing Trial" With More Helpful Myths*, 23 INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION 168 (Nov. 2005);

Many observers of the legal system view the decline of jury trial rates as unfortunate, with some even treating it as catastrophic. To some observers, the decline in rates of civil trials is most troubling because it means a decrease in the frequency with which juries operate. Building on de Tocqueville's observation that juries are "political institutions," rather than merely components of the judicial bureaucracy, some fear a decline in the "republican" function of juries: "placing the real direction of society in the hands of the governed."[63] Proponents of the jury system also point to the unique capacity of juries to play a socializing role, through deliberation and pronouncements about important shared values.[64] The random make-up of juries makes them distinct from any other actors within the political system. They are more diverse than judges, lawmakers, or even private factfinders such as arbitrators. In short, juries may serve a critical democratic function as "the whole community's spokesman,"[65] and a decline in civil trial rates means that they have fewer opportunities to perform that function.

Others see the decline in civil trial rates as troubling because it signals a move away from the norm-establishing function of trials. Trials are set up as clashes between right and wrong. In most instances, trials typically produce a clearly-identifiable winner and loser. Some see this as one of the biggest weaknesses of trials, particularly in a complex, post-modern world.[66] Others, however, see the move away from these bold pronouncements of truth and right as an unacceptable slide toward moral relativism.[67] Trials demand line-drawing, an outcome superior to compromise or silence in many contexts.[68]

Still others mourn the apparent decline of the role of the civil trial because of the decline's impact on the legal profession. In the wake of declining

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Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL L. STUD. 689 (2004).

[63] Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. EMPIRICAL L. STUD. 973, 974 (2004) (quoting ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 291 (Philips Bradley trans., [1848] 1945); *see also* Patricia Lee Refo, *The Vanishing Trial*, 1 J. EMPIRICAL L. STUD. VI ("The cost of losing that citizen participation in government [provided by jury service] is impossible to calculate.").

[64] *See* ELLEN E. SWARD, DECLINE OF THE CIVIL JURY TRIAL 52-65 (2002).

[65] Landsman, *supra* note ___, at 975.

[66] See e.g. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World,* 38 WM & MARY L REV (1996).

[67] *See* Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL L. STUD. 627 (2004) ("The rejection of trials may also evidence a new and troubling cultural preference for compromise over standing on principles."); Refo, *supra* note ___, at 58 ("Settlement and compromise can be viewed as just another step toward moral relativism.").

[68] The contrast between settlement-as-compromise and litigation-as-no-compromise is not nearly as stark in practice. *See, e.g.* Jeff Seul, *Settling Significant* Cases, 79 WASH. L. REV. 881 (2004) (pointing out that many litigated cases produce results that involve negotiation and compromise, with judges rather than litigants doing the compromising); Whose Dispute is it?, *supra* note ___, at 2669.

opportunities to try a case to its conclusion, "firms now routinely elect new litigation partners who have never even second-chaired a trial."[69] As fewer attorneys have experience litigating cases, some suggest that a self-perpetuating phenomenon arises. The less experience a lawyer has with trial, the more hesitant that lawyer will be to take a case all the way to trial. As a result, still fewer attorneys receive trial experience, augmenting the dynamic.[70] Furthermore, the distribution of litigated cases is not evenly spread among all attorneys. It is not that every lawyer has an equally reduced chance of going to trial. Instead, some have suggested that an increasingly small percentage of attorneys is handling virtually all of the litigation. Describing this move toward a smaller, more insular bar as the "ghettoization of trials," some commentators believe that the trend points toward the decline of the profession.[71]

Why are trials vanishing? No consensus has emerged that trials are, in fact, vanishing, but the data unmistakably reflect a change in the patterns of litigation. In the federal courts, at least, far fewer disputes result in trials. If in fact, the civil trial is in need of rescue, it is important to understand why. The cause(s) of these complex phenomena, of course, elude simple identification.[72]

Some have suggested that the meteoric rise in the use of alternative dispute resolution (ADR) procedures is the reason that fewer cases survive in the litigation system long enough to conclude in a jury trial.[73] Arbitration clauses are now nearly ubiquitous in consumer products, employment agreements, and health care contracts. Their routine enforcement has meant that a certain category of disputes rarely remains in a trial court.[74] Private mediation has proliferated, with virtually every area of the law now seeing routine use of mediators to resolve disputes in a non-adjudicatory setting.[75] In some jurisdictions, litigants are now required to engage in mediation or other ADR mechanism before proceeding through various stages of litigation.[76]

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[69] *See* Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, 30 LITIGATION 1, 1 (Winter 2004).

[70] *See* Refo, *supra* note ___, at 4.

[71] *See, e.g.,* Landsman, *supra* note ___, at 981.

[72] For a well-articulated cautionary note regarding our limited ability to reliably draw causal inferences from the data currently available, *see* Stephen Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 571 (2004).

[73] Despite this widely-held perspective, the empirical data have thus far delivered a more complex picture of the interactions between ADR and litigation. For a survey of that literature, see Tom Stipanowitch, *ADR and the "Vanishing Trial"*, 10 DISP. RESOL. MAG. 7 (2004). *See also* John Lande, *The Vanishing Trial Report, An Alternative View of the Data*, DISP. RESOL. MAG. 19 (2004).

[74] *See, e.g.,* Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 17 (2003).

[75] *See* SARAH R. COLE, CRAIG A. MCEWEN, NANCY H. ROGERS, MEDIATION: LAW, POLICY & PRACTICE, § 2:1, 2-1 (2nd ed. 2005).

[76] *See Id.* at §§ 7:1-7:2. For a survey of the institutionalization of dispute resolution mechanisms, *see* Nancy Welsh, *Institutionalization and Professionalization* in THE

Others explain the decline in civil trial rates by pointing to procedural changes in the litigation process—changes that have made jury trials less attractive to litigants.[77] The increasing expense of discovery practice, for example, often makes the prospect of full-blown litigation unjustifiable from a cost-benefit perspective.[78] Furthermore, the privatization of discovery embodied in the Federal Rules of Civil Procedure decreases litigants' incentives to use trial as a device for uncovering information relevant to the resolution of the dispute.[79] "Before 1938, trial was often the only real way to do discovery … so all things being equal, extensive discovery will lower the trial rate because it produces information."[80]

Some point also to the bench as responsible for the decline in civil trial rates. Judges have undeniably taken on a far more "managerial" posture when overseeing cases. Multiple aspects of Rule 16 make this role clear. Judges manage discovery schedules, dispositive motion timetables, witness lists, and information exchanges.[81] Judges also now more commonly engage personally in settlement conferences and other efforts at resolving the dispute before trial.[82] Furthermore, judges are now far more likely to grant summary judgment motions, making trial considerably more infrequent.[83] Finally, some have suggested that a fundamental change in judicial temperament explains the decline in civil trials. Specifically, one hears of an increasing number of trial court judges who have lost faith in trials as an appropriate dispute resolution

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HANDBOOK OF DISPUTE RESOLUTION 487 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

[77] Not all procedural changes should have necessarily resulted in a decline in trial rates. Relaxing the pleadings standards, for example, allows more litigants into the system. These additional litigants would be less likely to survive subsequent dispositive motions than their counterparts. Therefore, one part of the explanation for a decline in trial rates would also properly point to the increase in cases entering the judicial system. *See* Stephan c. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, J. EMPIRICAL LEGAL STUD. 943, 948 (2004); Galanter, *supra* note ___, at 478.

[78] *See* Refo, *supra* note ___, at 3.

[79] Yeazell, *supra* note ___, at 950 ("By privatizing the uncovering of historical facts we have placed the power in the hands of the parties—power they regularly employ to settle their cases without adjudication on the merits.").

[80] *Id.* at 951.

[81] *See* Fed. R. Civ. P. 16.

[82] *See*, *e.g.*, Carrie Menkel-Meadow, *For and Against Settlement*, 33 UCLA L. REV. 485 (1985) (discussing the role of judges in settlement conferences); E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES (1989).

[83] *See, e.g.* Stephen Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?* 1 J. EMPIRICAL LEGAL STUD. 591, 591 (2004) (citing one study that found rate of summary judgment granting going from 1.8% in 1960 to 7.7% in 2000).

mechanism.[84] And some judges have even come to view trials as a "failure," something to be avoided if at all possible.[85]

One more potential contributor to the decline in trial rates, though surely not the only one, stems from the relatively unattractive picture of litigation our courts currently offer disputants. In the past two years, the American Bar Association has devoted enormous resources to a project re-examining the rules governing jury trials. In 2005, the ABA adopted a set of "Principles for Juries and Jury Trials" aimed at modernizing the jury trial, bringing added efficiency, and promoting justice.[86] Many other reforms are under consideration or are being adopted in isolated jurisdictions.[87] The procedural barge, however, is slow to turn.[88]

And even if the procedural barge turns in a direction that makes trial more favorable to a larger percentage of disputants, it still suffers from its immutability. There will always be a segment of the disputing population who would prefer a modified version of litigation over whatever the current single procedural vision might be. Perhaps the problem is not that our single set of rules is not what it should be. Perhaps the problem is that *no* uniform set of rules will be adequately attractive to all litigants, leading them to an alternative means of resolving their dispute.

The opportunity for specific disputants mutually to customize their litigation experience, however, changes that calculation. Sophisticated business transactions routinely include arbitration agreements in part because of the flexible procedure such agreements offer.[89] To the extent that disputants have

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[84] *See* Judith Resnik, *Failing Faith* 53 U.CHI.L.REV. 494 (1986).

[85] *See* Butler, *supra* note ___, at 627; Landsman, *supra* note ___, at 984. ("The rhetoric describing trials as a systematic failure or pathology must be challenged, especially among sitting judges.")

[86] American Bar Association, *supra* note ___.

[87] *See, e.g.,* Robert J. Grey, Jr., *Striving for a Just Solution: Our Work to Improve the Dispute Resolution System Benefits Society and the Profession ABA Journal* , 91 A.B.A.J. 6 (July 2005) (stating that "[i]nnovative, creative approaches include limitations on discovery, setting reasonable time limits for civil trials, reducing the number of expert witnesses, and more discipline by judges and lawyers in managing the costs and time associated with litigation").

[88] Procedural changes have occurred more rapidly at the state court level. The initial vision of inter-state uniformity in state court procedures has been all but abandoned, with an increase in "localism." One observer suggested that this trend might signal a new federalism in state civil procedure. *See* Glen Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167 (2005).

[89] Arbitration agreements appearing in transactions between sophisticated business parties do not run the same set of risks one sees associated with the arbitration clauses that appear with increasing frequency in consumer and employment contexts. Arbitration clauses appearing in adhesion contract may represent nothing more than a crass calculation by the more powerful party (the business) that the weaker party will be bound by arbitration's less advantageous terms (for example, limited remedies). Between sophisticated parties, however, I have less

mutually lost faith in some aspect of the trial system, customization affords them an opportunity to re-craft the litigation experience in a way that makes it more attractive. In short, customization may help to preserve those aspects of the jury trial system that are most important to our system of justice, by inviting disputants back into the courthouse.

III. CURRENT EXPERIENCES WITH CUSTOMIZATION

Some descriptions of litigation hold it up as a well-defined, predictable sequence of pre-determined stems, applied equally to all disputants appearing in court. This vision of litigation is, in some ways, the fantasy of first year Civil Procedure students, eager to grasp solid answers about how the litigation process unfolds.[90] At a broad level of abstraction, it is certainly true that every piece of litigation includes predictable, rule-driven components. Disputants define the scope of the dispute, courts make determinations about the scope of their authority, disputants engage in information exchange, the factfinder makes determinations of the facts which are then compared to the relevant substantive legal standards, and so on. In the details, however, one finds considerable variation, even within the same court system, even with cases that share outward similarities. The fact that litigants already make choices that shape their litigation experience is important to note because it suggests—accurately—that we have already begun the customization experiment. Though perhaps not explicitly, we are already exploring the appropriate boundaries of customization.

Isolated and relatively modest versions of customization are already available to litigants, providing us at least a partial window onto the experiences we might expect with broader customization. Customization currently takes shape in one of two ways. Some forms of customization occur before litigation commences, through contractual agreements between the parties regarding an aspect of the litigation process that is yet to come. Other forms of customization take place during litigation, either contractually or through existing procedural devices that

concern that one side is simply pulling the wool over the other side's eyes. Instead, I suspect that the attraction is based, in part, on arbitration's opportunities for customization.

[90] I have no empirical data to support my assertion that this is among the things about which my first year students fantasize. I make this inference based on their questions and comments. This vision of trial as a singular phenomenon, however, is not limited to first year law students. For example, in offering a contrary perspective to those who view current trial rates as demonstrating that the civil trial is vanishing, John Lande writes, "The vanishing trial myth has three elements: (1) The, (2) Vanishing, and (3) Trial. 'The' implies, inaccurately, that there is a single uniform phenomenon of trial." John Lande, *Replace "The Vanishing Trial" with More Helpful Myths*, 23 ALT. HIGH COST LITIG. 161 (2005). *See also* John Lande, *Shifting the Focus from the Myth of the "Vanishing Trial" to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution From Marc Galanter*, ___ CARDOZO J. CONFL. RESOL. ___, 4 (forthcoming 2006) (copy on file with author).

provide explicit opportunities for parties to tailor their litigation experiences. I provide several examples of each kind of customization below.

A. Pre-Litigation Customization

Contracts containing choice of forum clauses provide one example of private, pre-dispute customization by prospective litigants. With increasing frequency, parties drafting a contract anticipate the possibility of a dispute arising out of the contract. As their names suggests, choice of forum clauses specify the forum in which the contracting parties agree to bring any complaints within the scope of the contractual term.[91] Courts generally enforce choice of forum clauses, holding the litigants to their previous agreement about the location of the litigation.[92] The result is customization, in the sense that the disputants are experiencing litigation as they envisioned it should proceed. Litigants who agreed to a choice of forum clause may have an experience quite different than the one they would have had in the absence of the clause. Their litigation may take place in an entirely different court than it would have in the absence of the pre-dispute contractual provision. In short, this is the litigants' fight, and the enforced choice of forum clause allows the fight to take place where the litigants decided they wanted to fight.

Just as parties entering a contractual relationship sometimes specify the forum in which any subsequent disputes are to take place, parties sometimes agree to the substantive rules that are to govern any such disputes. Using "choice of law" provisions, parties are able to control with reasonable certainty the substantive legal standards against which their subsequent behaviors are to be assessed. Many perceive states' baseline conflict-of-laws rules as uncertain,

[91] An expansive choice of forum clause might read, "Any and all disputes arising out of or related to the creation, performance, or breach of any terms of this contract shall be litigated exclusively in a court in the state of X." This is an example of a so-called "mandatory" choice of forum clause because it provides that the *exclusive* forum for litigation is in the state of X. Other choice of forum clauses are merely "permissive," and courts routinely interpret permissive choice of forum clauses as an indication of the litigants' consent to litigation in the specified forum, but they are not viewed as barring litigation in other jurisdictions. *See* 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §3803.1 (2005).

[92] At one point, courts were reluctant to give the clauses effect. *See* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9-10 (1972) ("Forum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the grounds that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court."). Over the past several decades, however, courts have viewed choice of forum clauses with considerably more favor. Chief Justice Berger wrote, in *M/S Bremen v. Zapata Off-Shore Company*, that a "forum clause should control absent a strong showing that it should be set aside." *Id.* at 15. The question of whether a choice of forum is sufficiently "reasonable" to be enforced is one for which "there are no hard-and-fast rules, no precise formulae." D'Antuono v. CCH Computax Systems, 570 F.Supp. 708, 712 (D.R.I. 1983) (citing at least nine factors included in the determination of a choice of forum clause's reasonableness).

vague, or even litigation-inducing.[93] Parties understandably seek mechanisms like choice-of-law provisions to reduce the uncertainty associated with multi-jurisdictional transactions. They "want to know at the time of entering into a contract which state's law will be applied, rather than waiting for the judge to tell them when deciding a contract dispute."[94] The modern trend is for courts to enforce most choice-of-law provisions in contracts.[95] Choice-of-law provisions, therefore, represent an important opportunity for litigants to customize their litigation experience. In some cases, a choice-of-law provision may simply name the jurisdiction whose laws the court would have applied in the absence of any choice-of-law provision. In this sense, the provisions merely provide security or certainty to parties who may fear an unpredicted result from a court's choice-of-law analysis. In most cases, however, the function of a choice of law provision is to specify a set of substantive laws that are at least somewhat different from the laws the forum state's default conflicts-of-law rules would have otherwise specified. The provisions thus customize the disputants' litigation experience.

Litigants can also choose to waive the right to a jury in civil cases, providing another illustration of an existing opportunity for customization. By agreement, parties can waive the right to a jury.[96] For example, a contractual jury waiver clause might read, "Each party hereby irrevocably waives any right it may have to trial by jury in any action, suit, counterclaim, or proceeding arising out of or relating to this agreement."[97] If upheld, a pre-litigation[98] contractual jury waiver customizes the litigation experience of the disputants. As a general matter, federal courts will enforce contractual waivers of jury rights, though

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[93] *See* Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 366 (choice of law provisions help "reduce the uncertainty of vague conflict-of-laws default rules").

[94] *Id.* at 403.

[95] For a historical analysis of the enforcement of choice-of-law provisions in the United States, *see* Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. Chi. L. Rev. 1151 (2000); David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review,* 56 VAND. L. REV. 57, 58-65 (2003); Ribstein, *supra* note 93, at 370-371.

[96] *See* RDO Financial Services Co. v. Powell, 191 F.Supp.2d 811 (N.D.Tex 2002) ("Although the right of trial by jury in civil actions is protected by the Seventh Amendment to the Constitution, that right, like other constitutional rights, may be waived by prior written agreement of the parties."). However, in state courts, contractual waivers of jury rights may violate state constitutional provisions. *See, e.g.,* Bank South v. Howard, 264 Ga. 339, 340 (Ga. 1994) ("pre-litigation contractual waivers of jury trial are not provided for by [Georgia's] Constitution or Code and are not to be enforced in cases tried under the laws of Georgia."). Even in those states, waivers are permitted through stipulation or by open, oral declaration in court. *See id.*

[97] Paracor Finance, Inc. v. General Elec., 79 F.3d 878, 894 (9th Cir. 1996).

[98] In addition to the pre-dispute customization described in this section, jury waivers also can occur during litigation. Litigants can declare a waiver explicitly to a judge, and a litigant is deemed to have waived any right to a jury by failing to make an appropriate jury demand. *See* Fed. R. Civ. P. 38(d).

they will construe the contracts narrowly.[99] Pre-litigation contracts containing explicit jury waivers provide a third illustration of the opportunities litigants have to shape their experiences in court before a lawsuit even commences. If one or both of the litigants prefers to have a jury decide the facts, the litigation will look one way. If, however, the litigants mutually prefer to have a judicial factfinder, contractual jury waivers permit them to have their way. Their litigation experience is thus customizable.

To this discussion of existing, pre-litigation customization opportunities, I should add one clarifying note about arbitration. Arbitration clauses may represent the most conspicuous example of a jury-waiving contractual arrangement. To be certain, if parties agree to bring a dispute before an arbitrator, they are waiving their right to a jury.[100] However, an arbitration agreement does not customize the litigation experience of the disputants *within* the court system. Instead, it wrests the dispute out of the court and places it in the hands of an arbitrator, who acts as judge and factfinder.[101] Arbitral decisions return to the court system only if questions of enforcement or appeal arise, and the latter only in a narrow set of circumstances.[102] Arbitrations are appropriately conceived of as *alternatives to* litigation. Because they occur outside of the courthouse, outside of the litigation system, for purposes of this article, I do not consider them to be examples of customized litigation.[103]

B. Customization during Litigation

Once a lawsuit is commenced, the parties have numerous opportunities to coordinate in shaping the course of the litigation process. Some avenues for customization during litigation take the form of contractual agreements, paralleling the pre-litigation measures described immediately above. A simple illustration of this type of customization is found in the prevalence of so-called "high-low agreements," which serve to set parameters around the effects of various jury awards. Litigants also find a few explicit opportunities to engage in customization within current procedural rules. Most customization within the rules is currently relatively modest, particularly in contrast to some of their extra-judicial counterparts. For example, litigants make elections about references to magistrate judges, about discovery orders, and about jury instructions. Nevertheless, as these examples illustrate, modern litigation

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[99] *See* Pradier v. Elespuru, 641 F.2d 808, 811 (9th Cir. 1981) (contrasting the narrow construction of jury waiver provisions with courts' treatment of arbitration clauses generally).

[100] *See*, *e.g.*, Pierson v. Dean Witter Reynolds, 742 F.2d 334, 339 (7th Cir. 1984) (The "loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.").

[101] For an overview of the arbitration process, see Sarah Rudolph Cole and Kristen M. Blankley, *Arbitration,* in THE HANDBOOK OF DISPUTE RESOLUTION 318 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

[102] *See* Federal Arbitration Act, 9 U.S.C. §§ 9 – 10 (2000).

[103] I return to the question of arbitration and its relationship to customized litigation below in Section IV.D.3., *infra*.

procedure provides explicit opportunities for litigants to tailor some aspects of their experience in court.

1. High-Low Agreements

A high-low agreement is a form of a contingent settlement, with the eventual obligations of the parties being dictated by the result of a jury trial.[104] Litigants typically enter a high-low agreement during the course of a trial, or even while the jury is deliberating, having negotiated boundaries on the award the plaintiff will eventually recover. The "high" number represents a ceiling, the most the plaintiff can recover. If the jury comes back with an award in excess of the high number, the plaintiff recovers only the previously agreed-to "high" number. The "low" number sets out the minimum payment from the defendant to the plaintiff. The plaintiff recovers that minimum amount even if the jury awarded less—or even if the jury found for the defendant entirely. If the jury returns a verdict in between the high and the low numbers, most high-low agreements provide that the jury's verdict is the actual award.[105]

Disputants' motivation to enter high-low agreements stems primarily from nervousness that the jury's verdict might fall outside of the range both sides consider most likely. In a sense the defendant is "buying" the right to be free from the worry of a jackpot jury verdict against the defendant. The plaintiff is selling its lottery ticket in exchange for the certainty that it will recover no less than the "low" amount. One can easily imagine circumstances in which neither side can tolerate the risk of an award falling at one extreme or the other.[106] Both sides in a high-low agreement abandon the fantasy of a home-run verdict, in exchange for eliminating the prospect of a nightmare verdict.

As a general matter, courts have enforced high-low agreements.[107] Like any contract, high-low agreements can present ambiguity or conflicting

[104] For more on contingent agreements, *see* Michael Moffitt, *Agreeing to Disagree About the Future* 87 MARQ. L. REV. 691 (2004).
[105] *See* Molly McDonough, *High-Lows' Ups and Downs*, 2005 A.B.A. J., 12-13 (Aug. 2005).
[106] The nature of high-low agreements makes it difficult to know with precision how frequently they are used. One estimate suggested that disputants discuss the possibility in at least a quarter of litigated cases, with one in ten cases actually using them. *See* McDonough at 12. In addition to high-low agreements, parties routinely use a variety of other mechanisms for similar purposes. *See* Stephen C. Yeazell, Refinancing Civil Litigation, 51 DPLLR 183, 196 (2001) ("When settlements occur, they are, as compared with our reference point in 1925, as likely to look like a corporate merger than a cash sale at a supermarket. Just the set of names should convince most of us of this proposition: Mary Carter agreements, Sliding Scale agreements, High-Low agreements structured settlements, and cede-back agreements. Each of these is a staple not of bet-the-industry class actions but of run-of-the-mill tort litigation.").
[107] *See* Molly McDonough, *High-Lows' Ups and Downs*, 2005 A.B.A. J., 12 (Aug. 2005).

interpretations. What happens if the jury is hung or if a mistrial is declared?[108] What happens if the jury comes back with an award in one amount, but then also finds the plaintiff to have been contributorily negligent at a level that would substantially reduce the total?[109] Cases of contested high-low agreements are rare, and one experienced lawyer described their enforcement as more of "a gentleman's agreement" than a matter of precise contractual construction.[110] Nevertheless, all indications are that such agreements are routinely enforced by courts, making them an option for extra-judicial customization of the litigation experience.

2. Referrals to Magistrates

Magistrate judges play an increasingly important role in civil litigation within the federal courts.[111] Federal district court judges have the discretionary power to assign a wide range of judicial activities to magistrate judges. Civil litigants in federal court routinely find themselves appearing before a magistrate judge on evidentiary matters, for example.[112] Indeed with the exception of certain dispositive motions, motions to certify a class, and requests for injunctive relief, federal district court judges are empowered to refer "any pretrial matter pending before the court" to a magistrate judge.[113] In some cases, therefore, litigants have no control over the introduction of these non-Article III judges into the litigation process.

However, the judicial code also envisions opportunities for litigants to make customizing choices with respect to the roles of magistrate judges. Under 28 U.S.C. §636(c), litigants may consent to having "any or all proceedings in a jury or nonjury civil matter" determined by a magistrate judge, rather than a district

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[108] *See* Camarda v. Borman, 1997 WL 33344418 (Mich. App.) (1997) (court ordered defendant to pay costs associated with mistrial declared during first trial, notwithstanding the high-low agreement the parties reached during the subsequent trial).

[109] *See* Batista v. Elite Ambulette Service, Inc., 281 A.D.2d 196 (N.Y. App. Div. 2001) (Jury awarded pre-apportionment damages of $225,000, but found plaintiff 75% negligent. The court found that the high-low agreement silent on the question of comparative negligence and interpreted it to relate only to the pre-apportioned damages.).

[110] McDonough, *supra* note ___ at 12.

[111] *See* Philip Pro & Thomas Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503 (1995); Tim A. Baker, *Shifting Powers in the Federal Courts: Symposium Issue: The Expanding Role of Magistrate Judges in the Federal Courts*. 39 VAL. U.L. REV. 661, 661 (2005); Brendan Linehan Shannon, *The Federal Magistrates Act: A new Article III Analysis for a New Breed of Judicial Officer*. 33 WM. & MARY L. REV. 253, 253 (1991).

[112] *See* Tim A. Baker, *Shifting Powers in the Federal Courts: Symposium Issue: The Expanding Role of Magistrate Judges in the Federal Courts*. 39 VAL. U.L. REV. 661, 661 (2005) ("Lawyers and parties who have watched their cases progress through the federal courts no doubt can attest to the fact that more commonly it is the magistrate judges, rather than the district judges, who assume active, pretrial roles in case management and settlement--the mainstay of modern federal court civil practice.").

[113] 28 U.S.C. § 363(b).

court judge.[114] The process of referring a case to a magistrate judge varies by jurisdiction, with some districts engaging in more "encouraging" than others.[115] In all districts, however, section 636(c) invites litigants to make the fundamental choice about the person who will oversee their trial. References to magistrate judges are, therefore, an example of customization taking place within the existing rules.

In most important regards, magistrate judges and district court judges operate in identical ways. Magistrate judges apply the same legal standards and the same procedures as federal district court judges.[116] If parties consent to have a magistrate judge preside over the trial, appeals go directly to federal appellate courts, exactly as if judgment had been entered by a district court.[117] In many respects, therefore, magistrate judges mirror the functioning of district court judges.

Why then might parties decide to consent to have a magistrate judge preside over a trial, instead of an Article III district court judge? The answer stems primarily from differences between the dockets of district court judges and those of magistrate judges. Magistrate judges' calendars are more controlled, providing litigants with greater predictability and security with respect to trial dates.[118] For litigants whose mutual assessment of their case is that they each value the speed and certainty of magistrate judges' trial calendars more than they value whatever protections or benefits derive from having an Article III judge preside over the trial, section 636(c) provides an opportunity for beneficial customization.

3. Discovery

Among the most important characteristics of modern civil procedure is the extent to which it relies on individual parties' efforts in discovery to aid in the factfinding process.[119] The rules contemplate that virtually all of discovery will take place extra-judicially, with the courts intervening only when invited by the

[114] 28 USC § 636(c)(1).

[115] Pro & Hnatowski, *supra* note ___, at 1528 ("Several district courts have . . . employed innovative techniques to encourage section 636(c) consents in civil cases" including opt-out provisions, waiver approaches, or random default assignment to magistrate judges.).

[116] *See* 28 U.S.C. § 636(d).

[117] *See* 28 U.S.C. § 636(b)(3).

[118] Caseload relief also serves as a primary explanation for district court judges' openness to (and even enthusiasm for) referrals to magistrate judges. *See, e.g.,* Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered* Aspirations, 86 GEO. L. J. 2589, 2610 (1998) ("Given that federal judges . . . plead for assistance in their caseload without radical expansion of their ranks, it is nor surprising that federal judges . . . sanction the delegation of some of their work to an array of non life-tenured 'judges.'").

[119] At an early point in time, pleadings were used to develop facts, instead of discovery. *See* Michael Moffitt, *Pleadings in the Age of Settlement,* 80 IND. L. J. 727 (2005) (cataloguing the historical functions of pleadings within the litigation system).

parties, and even then, only reluctantly. The modern reality is that most judges hate to deal with discovery disputes, and the rules make it relatively easy for them to stay out of most discovery fights.[120] In short, discovery is essentially party-driven process.

To facilitate the parties' efforts in managing their own discovery processes, procedural rules include three different kinds of provisions related to discovery. The first (and probably most familiar) set of provisions sets out the shape of the discovery devices, along with limitations on their use, and procedures for complaining about misbehavior by others. For example, the rules specify that one may take a deposition upon written question of any person, but one can send interrogatories only to opposing parties.[121] The rules also tell litigants the circumstances under which they may seek to have a party undergo a mental examination; they spell out penalties for failure to comply with the various requirements; and so on.[122] This first category of rules is important, of course, because they set out the parameters of the discovery mechanisms available to parties.

The second category of provisions in the discovery rules are those that *require* the parties to engage in a certain degree of customization. For example, Rule 26(f) provides that prior to their scheduling conference, litigants "must … develop a proposed discovery plan," including any proposed adjustments to the default timeline, form, or content of discovery efforts.[123] In this sense, the procedural rules essentially force customization, or at least force an effort at customization. (If the parties cannot agree to a discovery plan, the rules contemplate judicial intervention.[124]) Recognizing the widely divergent set of cases that all must operate under the same basic discovery rules, customized discovery plans enable courts and litigants to agree mutually to treat a complex antitrust cases differently from they way they would treat a relatively simple breach of contract claim.

The third category of provisions in the discovery rules contemplate opening the doors to even greater customization, though the rules do not require it. Rule 29

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[120] Judges' distaste for discovery disputes is widespread and well known. *See*, *e.g.*, Robert W. Gordon, The *Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709, 723 (1998) ("[J]udges are supposed to enforce the rules (discovery rules), but they do not, partially because (as all the lawyers and the judges agree) they dislike discovery disputes, treating them as quarrels between bickering children..."); Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189, 198 (1992) ("judges tend to view discovery disputes with distaste and avoid dealing with them as long as possible.").

[121] *See* Fed. R. Civ. P. 31(a)(1); Fed. R. Civ. P. 33(a).

[122] *See* Fed. R. Civ. P. 35; Fed. R. Civ. P. 26(a)(5); Fed. R. Civ. P. 37 (failure to comply with discovery requirements).

[123] Fed. R. Civ. P. 26(f).

[124] *See* JAY E. GRENIG & JEFFREY S. KINSLER, HANDBOOK OF FEDERAL CIVIL DISCOVERY AND DISCLOSURE 26 (2d ed 2002); 6A WRIGHT, MILLER & COOPER, *supra* note ___, at §1522.1 (2005).

provides: "[u]nless otherwise directed by the court, the parties may by written stipulation … modify other procedures governing or limitations placed upon discovery," with the exception of certain changes that would affect the overall calendar or timeline of the litigation.[125] Rule 29 does not require customization.[126] It treats the rest of the discovery rules as default rules, off of which the parties may negotiate deviations. The idea of customization, therefore, is already well-established within discovery.

4. Jury Instructions

Crafting jury instructions presents a final example of the ways in which current procedural rules give litigants an opportunity to shape their litigation experience. In a simple case, litigants might opt for the straight-forward and appeals-tested pattern jury instructions for the jurisdiction in which the litigation is taking place.[127] And in many cases, to be certain, the process of crafting jury instructions is a purely adversarial undertaking, with each side hoping to frame the issues and legal standards in ways most favorable to its side. Nevertheless, litigants sometimes present a mutually-crafted set of jury instructions to the judge. These customized jury instructions represent a deviation from the "standard" instructions, and the parties' stipulations indicate that each party views the instructions as superior in the context of their particular litigation.

The process of customizing jury instructions holds at least two advantages for litigants. First, they present both sides with an opportunity to craft the instructions in a way they believe will be advantageous. Depending on the timing of these negotiations and the perceptions of each side, it is entirely possible that *each* side will believe a particular phraseology to be to its advantage.

Second, and even more significant, when civil litigants jointly present jury instructions to a judge, they are functionally waiving any right to appeal based on the inadequacy or inaccuracy of those jury instructions. A criminal defendant might be able to sustain an appeal if his or her counsel stipulated to an erroneous and damaging jury instruction without adequately involving the defendant.[128] In a civil context, however, clients will be bound by the decisions

[125] Fed. R. Civ. P. 29. Similar provisions appear in some state civil procedure codes as well. *See*, *e.g.*, Tex. R. Civ. P. 191.1.

[126] *See* Jay E. Grenig, Stipulations Regarding Discovery Procedure, 21 AM. J. TRIAL ADVOC. 547, 549 (1998) ("[i]n 1993, Rule 29 was amended to give greater opportunity for litigants to agree upon modifications to discovery procedures or to limit discovery.").

[127] Many treatises and practitioner guides provide pattern jury instructions. *See*, *e.g.*, Robin C. Larner & Eric Mayer, Pattern Jury Instructions 75A Am Jur 2d TRIAL § 1168 (2004).

[128] *Compare* United States v. Bustillo, 789 F.2d 1364, 1367 (9th Cir. 1986) (court can review jury instruction under a plain error standard, even when the defendant fails to object to them) *with* U.S. v. Ward, 914 F.2d 1340, 1344 n.4 (9th Cir. 1990) (citing U.S. v. Alexander*,* 695 F.2d 398, 402 (9th Cir. 1982), *cert. denied,* 462 U.S. 1108, 103 S.Ct. 2458, 77 L.Ed.2d 1337 (1983) ("A party is precluded from arguing on appeal errors which he invited.").

of their counsel. Even if the act of submitting the stipulated jury instructions did not constitute an express waiver of objection, the party submitting the instruction would surely not then turn around and raise an exception to those instructions. Absent an objection at the trial court level, no appeal would survive.

Judges are under no obligation to adopt the jury instructions proposed by the litigants—even if all litigants stipulate to the instructions.[129] As a practical matter, however, it is quite unlikely that a judge would stand in the way of a set of instructions both sides have crafted and accepted. Jury instructions, therefore, represent an opportunity for litigants to customize, by mutual agreement, their litigation experience.

IV. LIMITS ON CUSTOMIZATION

Legitimate opportunities to customize litigation are not infinite. Despite Henry Ford's quotation from the beginning of this article, Ford automobiles are now available in dozens of different colors, along with literally thousands of different combinations of other options. There is a limit, of course, to the amount of customization you can do to a car made by Ford and have it remain a Ford. If you paint it some color other than black, no one would seriously suggest that the car is anything but a Ford. But if you change the motor and the chassis to something other than Ford, at least some automotive enthusiasts would say that the car has ceased to be a Ford. Similarly, at some point, with enough tinkering, litigation would cease to be litigation and would begin to be something else. There are—and should be—limits on the kinds of customization litigants should expect to have enforced.

Whether one accepts my argument that we should *increase* opportunities for customization, it is important to recognize that customization is already happening—even if we have not previously labeled it as such. In the section below, I suggest *every* effort at customization must be consistent with at least three criteria: First, and most obviously, private litigants cannot re-shape the courts' roles in ways that contravene the constitutional or statutory authorities that created the court. Second, efforts at customization cannot circumvent the legitimate public interests in having litigation proceed in a particular fashion. Third, litigants cannot customize their litigation experiences in ways that prejudice the rights of non-litigants. I conclude this section by acknowledging and addressing some of the principal concerns generated by the prospect of customized litigation.

[129] *See*, *e.g.*, Whatley v. Crawford & Co., 15 Fed. Appx. 625, 632 (10th Cir. 2001) (court refused to submit stipulated instructions to the jury).

A. Constitutional and Statutory Limits

Courts, and the procedures they apply to litigation, are established through a combination of Constitutional provisions, statutes, and rules. These laws are the most conspicuous constraints on private customization. Unless these laws provide otherwise, litigants' individual or joint decisions have little effect on the structures within which the litigation takes place. Put differently, the laws establishing courts serve, implicitly or explicitly, as a ceiling on the degree to which private litigants can tailor their experiences.

Perhaps the easiest illustration of these parameters comes from the question of subject matter jurisdiction. Every court is created with limited subject matter jurisdiction. Federal courts' subject matter jurisdiction is limited both by the Constitution and by the statutes creating district and appellate courts. Even state court systems, which often include a court of "general" subject matter jurisdiction, are empowered to hear only certain kinds of disputes. Certain cases, such as patent or bankruptcy, are of exclusive federal subject matter jurisdiction and cannot be heard in any state court. For other types of cases, most states have established specific courts of limited subject matter jurisdiction—traffic court, family court, probate court, and small claims court, for example. No single court is empowered to hear all cases.

These court-establishing laws provide one non-negotiable limit on the ability of disputants to customize their litigation experience. It is axiomatic that the parties cannot create subject matter jurisdiction by consent.[130] Parties cannot waive objections to defects in subject matter jurisdiction.[131] No contractual provision can create subject matter jurisdiction where none exists statutorily. Neighbors involved in a minor dispute over a property line cannot effectively agree to appear in federal district court. Family members in a fight over a will cannot bring their dispute before a traffic court judge, even if everyone in the family consents to doing so. A family court cannot oversee litigation initiated over the validity of a patent, even if all of the disputants prefer that forum over the federal courts. Courts are created with certain limited powers, and those powers are not a function of the desires of the disputants.[132]

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[130] *See* Arbaugh v. Y&H Corp., ___ U.S. ___; ___ S.Ct .___, 2006 WL 397863 (2006); United States v. Cotton, 535, U.S. 625, 630 (2002) ("subject-matter jurisdiction, because it involves the court's power to hear a case, can never be forfeited or waived."); United States v. Griffin, 303 U.S. 226, 229 (1938); Commodities Futures Trading Com'n v. Schor, 478 U.S. 833, 851 (1986); Beers v. North American Van Lines, Inc., 836 F.2d 910, 912 (5th Cir. 1988) ("The parties cannot create federal subject matter jurisdiction either by agreement or consent.").

[131] Pennsylvania v. Union Gas Co., 491 U.S. 1, 25-26 (1989) (Stevens, J., concurring) (noting that, while a state may waive its sovereign immunity, a party may not waive defects in subject matter jurisdiction); *see also* Wisconsin Dep't of Corrections v. Schacht, 118 S. Ct. 2047, 2052 (1998) (citing Atascadero State Hosp. v. Scanlon, 472 U.S. 234, 241 (1985)).

[132] One could imagine a different set of statutes and rules establishing the court systems within which litigation takes place. For example, there is no *constitutional* reason why federal subject matter jurisdiction could not be at least partially customizable. Federal courts

Certain aspects of the court system are fixed for all litigants, whether by rule, by statute, or by Constitutional constraint. Distinguishing between these three types of constraints is important, because they are not equally difficult to change. The current rules of civil procedure and the current system of statutes governing court systems are more easily amended than the constitutional constraints within which litigation occurs. Nevertheless, the laws creating the courts and their procedures serve as an outer limit on the customization options for litigants.

B. Limits Based in the Public's Interest in Litigation

The public has at least three different kinds of interests in litigation and in the court system. The public has *functional interests*—we want courts to do certain things for society, including aid in the resolution of disputes and clarify the parameters of the law. The public has *efficiency interests*—we want courts to perform their functions in ways that are mindful that public resources finance the vast bulk of court expenses. The public has *symbolic interests*—we want courts to say something about who we are and what our shared norms are. Each of these public interests serves as a legitimate limitation on the scope of permissible customization.

1. Functional Interests

Courts perform a number of functions in society, at least two of which are directly relevant to the question of customization. First, courts are important as a mechanism for resolving disputes. Second, courts play a critical role in articulating rules and establishing meaningful precedents.[133] Customization that undercuts either of these functional interests would be troublesome.

Courts' roles in the resolution of disputes are undeniable in many cases. Courts resolve some disputes directly—either by ruling on a dispositive motion or by entering judgment following a trial. In the vast majority of these cases, the

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are currently statutorily empowered to hear diversity cases in which there is complete diversity and in which the amount in controversy exceeds $75,000. These are not constitutional parameters, however. Congress clearly has the power to provide federal subject matter jurisdiction in cases involving only "minimal" diversity, and it can clearly change the amount in controversy. Similarly, for example, Congress could provide that federal district courts would have subject matter jurisdiction in diversity cases in which (a) the amount in controversy exceeds $100,000, or (b) the amount in controversy exceeds $50,000 and both litigants consent to appearing in federal court. There are practical and policy reasons why such an approach might not be wise, of course, but such an arrangement would present no *constitutional* problems. It is the fact that Congress has not provided a statutory basis for such customization that bars such customization.

[133] *See* Luban, *supra* note ___, at 2622 ("[O]ur court system not only resolves disputes, but also produces rules and precedents.").

court's resolution is indeed a "resolution."[134] The case ends, one way or the other. Furthermore, although the vast majority disputes are resolved without trial,[135] efforts at settlement routinely occur "in the shadow" of the prospect of litigation.[136] The most conspicuous examples of this occur on the proverbial courthouse steps. Even in settlement discussions that take place well before any prospect of litigation, each side's calculations includes assessments of the risks and opportunities presented by litigation. To the extent that society is better off for having one fewer unresolved dispute, the court system typically earns the credit.

Given this dispute-resolution function, we would understandably resist most efforts at customization that would result in something other than the *resolution* of disputes. We would not want to provide a blank ticket for disputants to re-engage periodically in their arguments ad infinitum, for example. Of course, in some circumstances, the current rules provide for something short of a final, complete resolution. In institutional reform litigation, for example, (desegregating a school, overhauling a prison system, etc.) it is common for the disputants to enter a consent decree that anticipates continued judicial involvement over a period of years.[137] Such cases are the exception, however. Our clear preference is for our court system to provide final, binding resolution to disputes as quickly as practicable, given the other relevant constraints. Society would reasonably frown on customization efforts that caused the courts to abandon this function.

Similarly, in our common law system, courts serve an important function in articulating the boundaries of current rules, providing guidance to the public at large about the state of the law. An oversimplification of the dispute resolution function of courts would label it a wholly "private good"—something solely benefiting those who engage in the litigation. In the late 1970s, William Landes and Richard Posner argued that litigation should be viewed not only as a private good, but also as a "public good"—a product whose benefits are necessarily enjoyed by all, or at least most.[138] Underlying the view that courts are more

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[134] *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1082 (1984) ("The dispute-resolution story trivializes the remedial dimensions of lawsuits and mistakenly assumes judgment to be the end of the process. . . . Often, however, judgment is not the end of a lawsuit but only the beginning. The involvement of the court may continue almost indefinitely.")

[135] *See* Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); Galanter, *supra* note ___; Ross E. Cheit & Jacob E. Gersen, *When Businesses Sue Each Other: An Empirical Study of State Court Litigation,* 25 LAW & SOC. INQUIRY 789 (2000).

[136] *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

[137] *See* Fiss, *supra* note ___, at 1083.

[138] William Landes & Richard Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979). Owen Fiss echoes these concerns about preserving the norm-articulation function of courts in his article, *Against Settlement*, perhaps the most-cited critique of ADR generally. *See* Fiss, *supra* note ___.

than mere resolvers of disputes, David Luban observed that "our court system not only resolves disputes, but also produces rules and precedents. Though private judges may well be efficient purveyors of dispute resolution, they are terribly inefficient producers of rules."[139] In short, part of the bargain for society, part of the reason it agrees to pay so much for its court system is that, in return for its investment, the public receives the benefit of more clearly articulated laws and rules.[140]

Just as society does not always demand final resolution from its courts, nor does it always demand public articulation from its courts. The default operating assumption for courts is that they will make their proceedings, their decisions, and the reasoning behind their decisions available to the public. In limited circumstances, courts seal some aspects of their proceedings. Similarly, courts sometimes do not articulate their decisions fully—for example by not publishing an opinion or by placing some aspect of the decision under a protective order.[141] As a norm, however, the public has access to courts, both during the adjudication of a particular dispute and afterwards, in the form of a review of the written record and opinion.

The public would reasonably, therefore, resist efforts at customization that make it more difficult for the public to derive the benefits of publicity inherent in the current model of adjudication. We would not approve of sealing a record merely because it includes information that casts the litigants in unfavorable light. We would not approve of a rule inviting the trial judge to issue orders without any explanation—even if both litigants explicitly waived any objection. The public sees something to gain from the litigation process, and it would be loathe to invite private litigants to deny those benefits.

2. Efficiency Interests

The public has an interest in how much money is spent on the court system. Courts are expensive. The modest filing fees charged to litigants cover nowhere near the full costs of maintaining the judicial system. The functions listed above justify this level of expenditure, but the judicial branch is not immune to the budgetary challenges facing all other aspects of government.[142] And some

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[139] David Luban, *supra* note ___, at 2622.

[140] It is not clear that society is in need of more judicial opinions. *Cf. id.* at 2628 ("It is not hard to see where expanding the judicial system takes us: more trial courts generate more law, along with more inconsistent decisions, more appeals, more efforts by higher courts to reconcile inconsistencies, and – in short – a buzzing, blooming confusion of legal information. What began as the Tree of Life ends as the Tower of Babel."). For a thoughtful, and more complex, view of the functions of courts, see Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 32-37 (1986).

[141] For an overview of the issues related to the publication of judicial opinions, see Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property, 107th Cong. (2002) http://judiciary.house.gov/legacy/80454.pdf.

[142] *See, e.g.,* David L. Hudson, *Cutting Costs . . . and Courts,* A.B.A. J. at 17 (Apr. 2003).

of the arguments in favor of publicly subsidized ADR programs boil down to efficiency, cost-cutting, and docket management.[143] Given the important functions courts play, we have accepted the idea of providing public funds to create and sustain the litigation infrastructure for private litigants.

That society has approved of the expenditures of public money on court systems does not mean that it would subsidize them regardless of their structure or their cost. The public would almost certainly resist procedural changes that permitted private litigants to restructure the cadence of litigation in ways that caused a wasteful increase in the public expenses involved. We would not want a customization agreement that fundamentally changes the expenditures required for the court to oversee the litigation. So, for example, private litigants could not mutually agree to a process that triples the number of days spent in trial. Similarly, even if both litigants preferred to have a jury of one hundred jurors, the public would reasonably balk at the added expenditures such a customized procedure would impose. Although the public has seen fit to provide certain judicial resources to private litigants at an extraordinary discount, the public's subsidies are largely capped and are not a function of private litigants' decisions.

The concern over efficiency can be overstated, of course. Litigants routinely make decisions that cause increased expenditures of public resources. Refusing to refer a case to a magistrate causes the public to spend more money.[144] Taking a case to trial, rather than settling it, costs public money. We allow lawyers to file objections, to request extra time, and to raise appeals, even though each of these things results in the public spending some additional resources. It is not that *any* decision resulting in the expenditure of money is impermissible. However, each of these expenses is expressly contemplated in the current structure of the judicial system.[145] What the public would resist are

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See also Chief Justice John Roberts, *2005 Year-End Report on the Federal Judiciary* ("Escalating rents combined with across-the-board cuts imposed during fiscal years 2004 and 2005 resulted in a reduction of approximately 1,500 judicial branch employees as of mid-December when compared to October 2003"); William Rehnquist, *2004 Year-End Report and the Federal Judiciary* ("The continuing uncertainties and delays in the funding process, along with rising fixed costs that outpace any increased funding from Congress, have required many courts to impose hiring freezes, furloughs, and reductions in force.").

[143] *See* Carrie Menkel-Meadow, *Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution,* in THE HANDBOOK OF DISPUTE RESOLUTION 19 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

[144] Though cost savings are often cited among the reasons for using Magistrate Judges, I know of no empirical studies comparing the actual costs of using magistrate judges, as opposed to district court judges. Even if everything else were constant, however, the salary differential between the two suggests the prospect of at least some savings.

[145] Some decisions by litigants might cause added expenditures of public resources. For example, if courts upheld private parties' contractual provisions seeking to provide judicial review of arbitral award beyond that contemplated in the F.A.A., the courts would be shouldering additional expense. *Cf.* Lee Goldman, *Contractually Expanded Review of Arbitration Awards,* 8 HARV. NEGOT. L. REV. 171 (2003).

private customization efforts that cause significant expenditures beyond those already contemplated.[146]

3. Symbolic Interests

Courts sometimes serve as a voice of society's norms and as arbiter of certain fundamental social differences. To play that role, courts need to have a certain degree of status. Society has an important interest in preserving the public perception that courts are legitimate. Customization, therefore, cannot strip courts of the symbolic features that lend credibility and legitimacy to the institutions of the judiciary.

Customization cannot undermine the public's sense of the legitimacy of the courts. Allowing private disputants to convert the courtroom into a circus in one case would undermine the ability of the court to perform its important functions not only in that case, but in other cases as well. Even with the consent of the litigants, a trial court judge can not be made to preside over a pie-eating contest as the standard of victory, for example. It is not that society would necessarily refuse to enforce the results of a private dispute resolution mechanism that based its decision on the outcome of a pie-eating contest (or any other otherwise legal mechanisms).[147] It is that we would not tolerate dragging judicial officials into the fray, out of fear that their involvement would decrease the legitimacy with which their subsequent actions might be perceived.

These concerns would prevent, for example, customization that decreased the levels of candor required of litigants. Why not permit litigants to agree that everyone should be allowed to lie to the judge and to each other? Why not permit them to contract around Federal Rule of Civil Procedure 11 (veracity in pleadings) or Model Rule 3.3 (candor toward the tribunal), for example? The answer is not that we refuse to tolerate *any* dispute resolution mechanism in which knowingly false documents or testimony may be presented.[148] Instead, it

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[146] Perhaps we should contemplate a system that *would* permit even private litigants to increase the cost of the judicial function—as long as they underwrite the expenses involved. Even if litigants genuinely, mutually believed that it was important to have a jury of fifty members, we would normally refuse such customization, on the grounds of the expenses it would create. What if the litigants agreed to reimburse the system for the added expenses involved? Why not permit litigants to buy a "premium" process, if the result were cost-neutral (or better) for the public?

[147] In Spring 2005, Sotheby's and Christies engaged in a game of rock-paper-scissors to decide which of the auction houses would receive the right to sell a Japanese company's art collection, valued at more than $20 million. *See* Carol Vogel, *Rock, Paper, Payoff: Child's Play Wins Auction House an Art Sale, New York Times p.A1, April 29, 2005.*

[148] For example, within mediation, only the common law of fraud binds parties' behavior. For a discussion of the prospect of requiring "good-faith" participation in mediation, see Roger Carter, *Oh Ye of Little (Good) Faith: Questions, Concerns, and Commentary on Efforts to Regulate Participant Conduct in Mediation*, 2002 J. DISP. RESOL. 367; John Lande, *Why Good-Faith Requirement is a Bad Idea for Mediation*, 23 ALT. HIGH COSTS LITIG. 1 (2005).

is that we refuse to drag the good name of our *courts* into a process so expressly divorced from the fundamental images of truth-seeking and justice-promotion on which our courts rest. Put simply, some things "just wouldn't be proper."[149]

However, concern over preserving legitimacy does not mean that the public would, or should, resist every change to courts or to their procedures. Legitimacy is not necessarily derived from ancestry. Litigants no longer resolve disputes by battle, by compurgation, or by ordeal, even though these were once the procedures by which justice was seen to have been done.[150] Indeed, any court that did those things now would be seen as *illegitimate*, because of society's shifting assessment of the appropriate way for courts to conduct themselves. That we should preserve the courts' legitimacy does not mean that we should reject all customization any more than in means that we should resist updating procedural rules. We simply must be aware not to undercut the courts' important standing in society.[151]

C. Limits Aimed at Preventing Harm to Non-Litigants

In a simple lawsuit, the litigants are the only people whose rights may be affected by the outcome of the lawsuit. Recognizing that in some circumstances, non-litigants may have important, legally cognizable interests at stake, modern procedure affords certain limited protections to those who are not initially named as parties to a lawsuit. Such protections form a third category of limits on the scope of customization. In other words, litigants cannot mutually craft litigation rules that decrease the protections afforded to non-litigants.

For example, it would be inappropriate for litigants to restructure procedural rules in ways that would prohibit non-litigants from intervening in litigation in which their interests are at stake. Under certain circumstances, federal and state procedural rules allow a non-litigant to parachute into the middle of a fight,

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[149] Some, like Lon Fuller, might suggest that customization risks robbing litigation of its "moral integrity." *See* LON FULLER, THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER (Kenneth I. Winston ed., 1981). Fuller's notion of processes' moral integrity is that each possesses certain fundamental attributes, without which, they cease to hold together legitimately. Trial looks quite different today than when Fuller articulated litigation's moral integrity. It is not clear to me, therefore, that customization is the biggest challenge to Fuller's vision.

[150] *See* R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 63-67 (2d ed. 1988) (describing the development of various methods of trial).

[151] In the mid-1960s New Jersey trial court judges used to sit with litigants and counsel in an informal setting, often at a conference room table, to work out various aspects of litigation planning. After some years of experimentation, the judges were asked to return to wearing robes and to sit behind the bench for those same conversations. Apparently, litigants and counsel found it disconcerting to have judges appearing in such an informal manner. Interview with Dom Vetri in Eugene, Oregon (February 2006).

even if both of the initial litigants would prefer to keep the intervenor out.[152] In some circumstances, an absentee may be affected by practical harms stemming from the outcome of the litigation. In others, the risk of stare decisis may constitute a sufficient prospective harm to demand the compulsory joinder of an intervenor, even if it is against the will of the existing parties.[153] Courts would appropriately resist any effort at customization that would risk prejudicing those non-litigants who would enjoy protections under the current intervention rules. Litigants cannot lock the courthouse doors once they are inside, barring those who rightfully belong from entering.

Similarly, customization cannot eliminate the formal roles of those assigned to protect the rights of interested parties who are not otherwise represented. For example, in many actions involving juvenile and domestic relations, state court systems appoint a guardian ad litem to provide independent advice to the court and to promote the interests of the child or children potentially affected by the legal action.[154] The state interest in protecting these non-litigants is strong, and the guardian ad litem system exists precisely because of the risk that the existing litigants (for example, the parents) will make decisions that do not adequately account for the interests of the non-litigants (the children). Therefore, no private arrangement between the existing litigants can disturb the role of such a court-appointed actor.

A third example of customization efforts that would fall short on the basis of the interests of non-litigants involves the role judges assume in certain representative actions. For example, judges assume a different stance with respect to settlements in class actions. In a typical dispute, in which each person with a legally cognizable claim or interest appears as a party to the dispute, the disputants are essentially free to settle on whatever terms they prefer. The plaintiff(s) can agree to accept payment from the defendant(s) in exchange for dismissing the lawsuit, for example. When the underlying litigation has been certified as a class action, however, it is not merely the rights of the named parties that are at stake in a settlement. Instead, all members of the certified class who do not affirmatively opt out of the settlement terms will

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[152] *See, e.g.* Fed. R. Civ. P. 24(c); Cal. Code Cov. P. §387. For a review of the history of intervention, see Moore & Levi, *Federal Intervention: The Right to Intervene and Reorganization,* 45 YALE L. J. 565 (1936).

[153] For a colorful illustration of this principle, see Atlantis Dev. Corp. v. U.S., 376 F.2d 818 (5th Cir. 1967). One party who "claimed" a reef off the coast of Florida brought suit against the U.S., seeking recognition of the claim. A competitor, who also claimed the reef, sought to intervene. The court permitted compulsory joinder under 19(a) because the absent party "had no friend in the litigation" and would have been prejudiced with any outcome if not permitted to join.

[154] *See*, *e.g.*, Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. §§ 51101 et seq. (2000) (requiring states to provide guardians ad litem to children who are subject to abuse or neglect proceedings).

have their rights extinguished in exchange for the settlement terms negotiated by the class representative and class counsel.[155]

The fact that the settlement may affect un-named parties raises the prospect of inappropriate settlement terms in ways that disfavor absent class members. For example, a defendant could offer the representative of the plaintiff class a "sweetheart deal"—one that provides a disproportionately attractive benefit to the representative when compared with the benefit going to un-named class members.[156] We reasonably fear that a defendant may "buy out" the named plaintiff, prejudicing the interests of the numerous unnamed plaintiffs. As a result, Rule 23(e) provides that litigants involved in a class action are not free to settle privately on whatever terms they prefer.[157] Once a case is certified as a class action, the court overseeing the litigation has an obligation to review the terms of a proposed settlement agreement and to assess its fairness. Determining a proposed deal's fairness is, of course, a highly fact-specific, subjective determination, but it is a critical procedural requirement for assuring that the rights of class members are adequately protected. It would, therefore, neither be appropriate policy nor be consistent with Due Process to permit class representatives to customize litigation rules in a way that retains its status as a class action but removes the case from the purview of Rule 23(e) or its state equivalents.

Customized litigation processes do not necessarily need to protect non-litigants more than the current system does. The current system does not always protect the interests of all of those who may be affected by the outcome of a particular piece of litigation. The parties remain primarily in control of the scope of litigation, even under the current system.[158] However, customization cannot be an avenue for reducing the protections non-litigants currently enjoy. The interests of those who are not currently parties to the lawsuit, therefore, represent a third category of constraints on appropriate customization.

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[155] *See* Fed. R. Civ. P. 23. The results of a class action are binding on all class members, even if they did not participate in the litigation or its settlement. *See* Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874 (1984); Hansberry v. Lee, 311 U.S. 32 (1940). Note also that in some cases, courts may approve class actions settlements without any opt-out provisions. *See* Officers for Justice v. Civil Serv. Comm'n of City & County of San Francisco, 688 F.2d 615 (9th Cir. 1982).

[156] *See, e.g.,* Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CALIF L. REV. 685, 729 (2005) (calling collusive settlement "one of the greatest challenges facing class action courts"); David Rosenberg, *Adding A Second Opt-Out to Rule 23(b)(3) Class Action: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19, 37-39 (2003) (describing the risks of both "sweetheart" and "kickback" deals.).

[157] *See* Fed. R. Civ. P. 23(e).

[158] Just as a plaintiff is "master" of its complaint for purposes of choosing theories of recovery, for purposes of the well-pleaded complaint rule, a plaintiff is "master" for purposes of deciding which defendant(s) to name in the lawsuit. *Cf.* Fair v. Kohler Die & Spec. Co., 228 U.S. 22, 25 (1913) (Justice Holmes' first naming of the "master of the complaint" doctrine).

D. Concerns about Customized Litigation

Increasing litigants' opportunities to customize their litigation experience is no panacea. Like any policy change, it presents a combination of tradeoffs, and observers may disagree about whether the benefits outweigh the costs. Furthermore, because it represents a significant deviation from prior practices, some of the effects customized litigation would necessarily remain unknown until implemented and observed. In this final section, I articulate the three primary concerns I anticipate from those who would oppose expanding opportunities for customized litigation. Each objection highlights an important aspect of litigation. Correctly understood, however, none of them should stand in the way of permitting customized litigation.

1. The Complexity and Cost of Customization

Objection One. Customization could present unmanageable complexity for courts. It risks creating *more* litigation because litigants would now also face the prospect of fighting about *what* customized procedure they purportedly agreed to previously.

Would customization impose costs on the court? Would judges be able to "handle" the procedural variants litigants might present them? Would customization spawn an entirely new set of disputes—this time, disputes about the meaning of agreed-upon customized rules? At some level, each of the above questions presents an empirical question for which no reliable data exist. My suspicion, however, is that none of these represents a significant impediment to the realization of efficiencies—both private and public.

As an initial matter, I am skeptical of concerns that suggest that trial court judges may not be able to manage efficiently the complications presented by customized procedures. We routinely require judges to interpret a shifting patchwork of procedural rules, both because of the ascendancy of inter-system litigation and because we frequently amend procedural rules. Judges are, in many ways, ideally positioned to do precisely the task of interpreting agreements such as those represented by customized procedures.[159] The few areas in which significant customization already exists suggest that customized procedural rules neither clog nor confuse the judiciary. We have seen no flood of litigation over the contours of Rule 29 agreements, for example.[160] Those

[159] Anecdotally, the observers who have raised this concern have uniformly been academics. The admittedly small and non-random selection of sitting judges with whom I have spoken on the topic have not expressed this as a concern.

[160] I know of no easy way to document the *infrequency* with which a rule is at the center of a legal dispute. As a rough measure, I did a basic search in Westlaw and Lexis, seeking *any* reported cases in which Fed. R. Civ. P. 29 was cited at all, for *any* proposition. Despite the nearly eighty year history of the rule, the search yielded fewer than 150 cases. And on careful review, more one-third of those cases were actually criminal cases in which the court intended to refer to Fed. R. Crim. P. 29 but *erroneously* cited Fed. R. Civ. P. 29 instead. A

discovery disputes that arrive before a court for resolution rarely turn on the meaning of the discovery rules, and instead tend to turn on the highly fact-specific, contextual behavior of the parties. I see no reason to think that the nature of discovery disputes is made more complex by having litigant-crafted rules. If anything, the fact that the litigants individually crafted the rules would suggest that there would be less opportunity for disagreement about their meaning.

Furthermore, even if there were some initial expense involved in specifying the meaning of certain customized agreements, I would expect that the cost of doing so would decrease over time. With arbitration, a relatively small set of standardized deviations has become popular and is routinely incorporated by reference. If the same dynamic arises with customized litigation (as I expect it would), then the cost of each additional dispute would decrease over time. In short, it may be that an initial investment would be required, but would be justified by the captured efficiencies.

Finally, even if customized litigation were to produce some marginal increase in the expense of the judiciary's functioning, overall efficiency might still be possible, provided we permit a more creative allocation of the costs of litigation. Imagine a scenario in which the litigants expect a proposed customized rule to save each of them $100,000 in litigation expenses. If the customized rule would create an additional $10,000 in expense for the judicial system, it would be inefficient to deny the litigants their mutual procedural preference. Why not let the litigants *pay* for the "premium" procedures, from which they expect to derive more benefit than it would cost the courts to provide it? In short, if the efficiencies private parties expect from a customized procedure might exceed the increased public expenditures required to give the procedures effect, perhaps we should develop a mechanism that would allow the private litigants to "buy" the procedures, to the benefit of both the private and public interests involved.

The suggestion that customized procedures may confuse, overwhelm, or burden the court system holds intuitive logic. But currently available empirical data—for example, the experience of Fed. R. Civ. Pro. 29—suggest that the concern is overstated. And even if additional expense were involved, we have no reason to think that the costs would be so overwhelming as to outweigh the potential benefits of customization.

2. Fixed Procedures as Prophylaxis

Objection Two. The process of customization could strip litigation of procedures designed to protect the weakest, least sophisticated parties.

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review of the leading Civil Procedure treatises suggests the same conclusion: Rule 29 has not spawned much litigation at all.

Some formal aspects of modern civil procedure, of course, are designed to protect parties who may not be in a position to protect themselves effectively. Courts appoint guardians *ad litem* to protect the interests of children. Courts review proposed class action settlements to assess their fairness toward class members who are not named representatives. As I make clear in section ___, above, these aspects of litigation procedure are not among those amenable to customization. These rules exist precisely because we cannot trust the litigants themselves to protect the interests of these absent parties.

This objection, however, focuses not on absent parties, but rather on those parties who are titular participants in the litigation. Does customization risk stripping away formal procedures designed to protect unsophisticated litigants? The very bedrock idea of the rule of law is that the same laws should apply to all people. Under the rule of law, the rich do not operate under a different set of laws from the poor. Under the rule of law, justice is done by neutral application of pre-determined rules to the particular facts of a case. If we permit litigants to bargain over procedures, do we risk undermining the vision that every litigant receives equal treatment? Are formal litigation procedures not the last bastion of equality, the last aspect of modern life where all are treated equally?

As an initial matter, I might quibble with the characterization of formal trial procedures as necessarily protecting the weak and unsophisticated. Pro se litigants, for example, fare extraordinarily poorly in modern litigation, even when courts relax some of the rules in order to accommodate their status. Formal litigation procedures create considerable barriers to entering the justice system, and disparities in resources commonly affect how the litigation unfolds. No responsible observer of modern litigation would suggest that wealth is irrelevant.[161]

At the same time, instances of extreme disparities in sophistication *could* lead to disturbing customization agreements. An unsophisticated (but appropriately distrusting) litigant would likely simply reject any suggested customization offers from the opposing side, of course. The current system's protections would, therefore, apply. If one party has no basic understanding of how litigation's default rules would operate, however, how can that party assess the merits of any proposed customization? The result could be a customized procedure that would disfavor the unsophisticated party *even more* than the current procedures do.

This concern is most pronounced in contexts in which the litigant is operating without legal representation. If pro se litigants are the genuine focus of this concern, perhaps the answer is to limit customization agreements to contexts in which parties are represented by counsel. Such an approach might present some challenges in implementation, and it shows more paternalism than I might

[161] *See generally* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

generally prefer. Still, I can imagine a reason to address the nightmare of the pro se litigant being duped on the courthouse steps by a sophisticated opposing counsel.

I suspect, however, that the true nightmare underlying this critique is not the wily attorney on the courthouse steps strong-arming an unsuspecting litigant. Instead, the true nightmare—one I share—is the prospect that courts will find "consent" to customization in the same way they find "consent" for so-called "mandatory" arbitration agreements. Under modern arbitration jurisprudence, it is essentially impossible to turn on a computer, rent a car, use a cell phone, take a job, or receive medical treatment without being deemed as having accepted an agreement to arbitrate any and all disputes arising out of those activities. What would stop companies from inserting questionable "litigation customization agreements" into adhesion contracts just as they do with arbitration agreements?

To be clear, this kind of pre-dispute agreement is *not* my vision of customization. If the choice regarding the validity of pre-dispute customization were binary (either we permit it for everyone or we don't permit it for anyone), I would reluctantly come down on the side of *not* permitting it. The risks of mischief are too great. The benefits of customization are made too remote. One option, therefore, would be to restrict customization to post-dispute circumstances. Alternatively, I could imagine treating contracting parties differently. We could permit sophisticated business parties to enter anticipatory customization agreements, while at the same time refusing to enforce pre-dispute customization contracts in circumstances of more conspicuous power differentials. Customization need not disrupt the prophylactic function of formal procedures.

3. The Arbitration Alternative

Objection Three. Why should we care about this? If disputants want to customize everything, they can just go to arbitration.

Arbitration offers disputants almost unlimited opportunity to customize their adjudicative dispute resolution experience. Litigants could receive virtually any procedural variation I describe above in Section ___ by electing to go to arbitration. Arbitration parties can limit joinder, curtail discovery, dispense with the rules of evidence, and virtually eliminate the prospect of appeals. In fact, arbitration can involve customization unthinkable in litigation. For example, arbitration parties can reform pleading requirements, set their own calendar, and choose their own arbitrator. To be sure, therefore, arbitration offers prospective litigants many of the benefits of customization.[162]

[162] One of the benefits of litigation that is not available to arbitration parties is the depth and breadth of procedural rules. Arbitration providers have extensive procedures, covering the most common adjudication issues, but arbitration procedures are nowhere near as

For at least three reasons, however, the availability of arbitration as a private alternative to litigation does not negate the need for making litigation customizable. First, arbitration is not as accessible as the courthouse. Litigants seeking to enter the judicial system pay only a modest filing fee. Disputants proceeding through arbitration pay filing fees, administration fees, and arbitrators' fees, amounting to considerably more than court fees. If arbitration were available as a private alternative on the same terms as litigation, then I might be less concerned. I am not convinced, however, that the private market ("If people think arbitration is better, let them buy their way into arbitration.") is the full solution to providing appropriate dispute resolution mechanisms. We should be troubled by the prospect that our courts could be reduced to the poor-man's last resort.

Second, this objection assumes that dispute resolution is the only purpose or benefit relevant to the choice of process. If that were true, then the public and the litigants should be indifferent to the method used to resolve it. In fact, if it were only about resolving disputes, then the public might see great benefit to sending more litigants to arbitration, since it would ease the demand for (and presumably, the expense of) judicial services. But of course, more is at stake. Courts perform important functions in society beyond dispute resolution. Courts articulate community norms. Juries are part of our system of democratic governance. Courts are the visible symbol of the rule of law in society.[163] Making courts unattractive to disputants comes at a real cost.

Finally, I am not persuaded that saying "a private provider could do that" is really an argument *against* having the public judiciary providing that function. (By that logic, "Why pay for police? The mob is offering to protect me for a small fee, and they seem quite good at it.") Arbitration may handle some aspects of dispute resolution better than courts. Rather than deny this, or see this as immutable fact, we who care about courts should seek to find ways to have courts *learn* from arbitration. Courts play important public functions. If we can improve the way courts perform those functions, why not do so?

CONCLUSION

The idea that disputants ought to enjoy multiple options when it comes to the resolution of their disputes is not new. In 1976, Chief Justice Warren Burger convened a collection of judges, practitioners, and scholars for the Pound Conference on the Popular Dissatisfaction with the Administration of Justice. At that conference, Professor Frank Sander delivered a seminal speech entitled,

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comprehensive as the Federal Rules of Civil Procedure and other legal structures supporting litigation. Litigation, therefore, can offer a degree of certainty unavailable in arbitration.

[163] For more on the important roles of courts and juries in society, *see* sections II.C. and IV.B., *supra*.

"Varieties of Dispute Processing."[164] Sander's idea, which later took on the label "multi-door courthouses," was that disputants and disputes ought to be sorted as they enter the courthouse.[165] Some would proceed to litigation, but others would go to mediation, to factfinding, to arbitration, to a screening panel, or to some other designated dispute resolution process offered at the courthouse.[166] Many credit Sander's speech with "launching" the modern, institutionalized ADR movement as we now know it.[167] It is certainly rare for a modern litigant not to encounter opportunities to pursue alternative dispute resolution mechanisms. Indeed, many modern litigants are required to do so. The idea that one might choose from among different non-litigation processes is well entrenched. Process pluralism,[168] as some have called it, is the rule of the day.

My suggestion builds on the idea of process pluralism, but suggests that we ought to embrace and encourage pluralism *within* a particular dispute resolution mechanism—litigation. Frank Sander's idea of the multi-door courthouse (like virtually all of its modern ADR progeny) would transform litigants into something else. Litigants become parties to a mediation, or to an arbitration, or to a fact finding. They become participants in something other than litigation. For a while, at least, they cease to be litigants. My suggestion is different. I suggest that we look for ways to *keep* disputants as litigants, *but still offer them more choices.*

The idea of customized litigation is not quite as heretical as it may appear at first blush. Some may imagine that customization would do injury to our image

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[164] Frank E.A. Sander, *Varieties of Dispute Processing, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice,* 70 F.R.D. 79, 111 (1976).

[165] The phrase "multi-door courthouse" does not appear in the text of Sander's speech. The phrase is said to have made its first appearance in a magazine article shortly after the Pound Conference., describing Sander's speech. Interview with Frank E.A. Sander in Cambridge, MA (June 2005).

[166] *See* Sander, *supra* note ___ at 131.

[167] *See* Bobbi McAdoo & Nancy A. Welsh, *The Lawyer's Role(s) in Deliberative Democracy: A Commentary by and Responses to Professory Carrie Menkel-Meadow: Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 402 (2004) ("Sander is now a part of the historical lore of the ADR movement. Among other ideas offered to address the problems of court overload, Professor Sander introduced the multi-door courthouse."); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR,* 16 OHIO ST. J. ON DISP. RESOL. 1 (2000). ("Many think of Sander's speech delivered at the Pound Conference as the 'founding' of the ADR movement.").

[168] *See* LON FULLER, THE PRINCIPLES OF SOCIAL ORDER 125 (1972) (describing the need for different processes to address different disputes); Marc Galanter & John Lande, *Private Courts and Public Authority*, 12 STUD. IN L. POL. & SOC'Y. 393 (1992) (describing "process pluralism"); Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context,* 54 J. LEGAL EDUC. 7, 10 (2004) (defining process pluralism and exploring its relationship to the justice-seeking functions of courts).

of blind Justice, administering the laws equally to all who come into a court of law. Admittedly, in the abstract, litigants today enjoy the benefits of the uniform application of the rule of law. But the reality on the ground is that even today, no two trials look exactly alike—not only because the particular facts of the dispute are different, but also because some degree of customization already happens. Customization already occurs. We should be clearer in naming it as such, and we should have clearly articulated limits on the scope of permissible customization.

My argument is that litigants should have even more opportunities to customize their litigation experience. The current procedural rules should stand as a set of default rules. In the absence of any agreement to the contrary, the current set of procedural rules should govern the litigation. In some disputes, however, all litigants may mutually prefer a particular adaptation of those baseline procedural rules. In such cases, the customized rule should govern the litigation, provided the adaptation does not run afoul of the constitutional or statutory provisions empowering the court, does not hurt the public's legitimate interest in the litigation process, and does not prejudice non-litigants.

Within these proposed parameters, disputants have the opportunity to craft many different, legitimate processes for resolving their differences—all under the umbrella of litigation. In the interests of justice, efficiency, and the future of litigation's legitimate role within society, we should welcome and encourage customization.