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Designer Trials

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This article is a thought experiment, or maybe a nightmare, about the intersection of freedom of contract and the trials that have not vanished. Could contracting parties effectively agree in advance of a dispute that any litigation of the case will comply with certain rules? Would such an agreement be enforced even in a contract of adhesion? If so, parties with sufficient bargaining leverage could design away many of the characteristics of litigation that they find unappealing without the need to resort to private processes. The result: a designer trial with the procedural deck stacked in favor of the party with the greatest pre-dispute bargaining power.

Imagine a contract between a consumer or employee and an institutional repeat player that contains the following provision on the signature page.

> **Choice of Forum. Choice of Law. Pre-Trial Proceedings. Trial Process. Jury Trial Waiver.** In any dispute arising out of, or related to this contract, because litigation can be costly and time consuming, Acme Corporation and I agree as follows:
>
> 1. Acme Corporation and I both waive a trial by jury of any or all disputes, claims, or controversies arising from, or relating to, this contract or the relationships which result from this contract, and whether brought as claims or counterclaims (hereinafter "such disputes").
>
> 2. Acme Corporation and I both agree that any suit based on such disputes shall be brought only in a state or federal court of general jurisdiction in X County, X State, and the laws of X State shall apply to all issues arising under, or related to, this contract.
>
> 3. Acme Corporation and I both agree that in any suit based on such disputes, the following limitations on discovery will apply: all discovery shall be completed not later than six months after defendant appears in the case; no party may send more than ten interrogatories to any other party; and any discovery materials produced by Me or Acme Corporation will be maintained as confidential and returned to the party producing the material at the conclusion of the litigation.
>
> 4. Acme Corporation and I both agree that in any suit based on such disputes, we will not join our claims with those of any other party and will not seek to represent a class of persons similarly situated.
>
> 5. Acme Corporation and I both agree that we will not make any public statement regarding such dispute.

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6. Acme Corporation and I both agree that should there be a trial regarding such dispute, each party shall be limited to three hours to present its case in chief and one hour to present any rebuttal evidence.

7. Acme Corporation and I both agree that the only expert(s) who may testify at the trial of such dispute will be selected by the court and that the expert(s)' fees shall be taxed as costs.

8. Acme Corporation and I both agree that the judgment of the trial court regarding such dispute shall be final, and neither party will appeal the judgment on any ground. The trial judge will not make findings of fact and conclusions of law.[1]

9. Acme Corporation and I both agree that at the conclusion of the litigation of any such dispute, we will file a joint motion asking that the court's record be sealed in all respects, except that the docket sheet may reflect that a suit was filed and include the names of the parties.

By initialing here, I indicate that I have read and that I understand this paragraph.

Such a clause could appear in a contract with an employer, a bank, a cell phone company, an internet service provider, a credit card company, a stock broker, a landlord, a doctor, a hospital, a school, a gym, a travel agency or even an exterminator. With this clause, a potential institutional litigant has obtained many of the features that normally motivate businesses to require arbitration, but without the expense of arbitration fees, and without the necessity to litigate the validity of the arbitration clause or to sue to enforce an arbitrator's decision.

The contracting party who is a repeat player can tailor the litigation contract to suit its probable position in litigation. If the institutional party predicts that it would likely appear in court as a defendant, it can make choices that decrease the out-of-pocket cost of litigation, eliminate the threat of class actions, avoid a jury trial, and limit the bad publicity and proliferation of litigation made possible by public disputes. In addition, the contracting future defendant can include provisions likely to make it harder for the party with the burden of proof to prevail, such as limiting discovery and the presentation of evidence. If the institutional party predicts that it would likely appear in court as a plaintiff but is likely to be in a position in which it has pre-suit access to information, it will still want to limit discovery, speed the dispute resolution process, avoid publicity, and eliminate the jury. In either case, it can choose a favorable forum and the most attractive available law.[2] If courts follow precedent established in arbitration and jury waiver cases, they would likely enforce the contract.

1. This provision might not be enforceable in federal court where Rule 52(a) requires findings and conclusions, but could be valid in a number of state systems where findings and conclusions form a basis for appeal rather than an explanation of the court's reasoning. *See, e.g.,* TEX. R. CIV. P. 296 (request for findings and conclusions follows judgment).

2. Some have proposed that contracting parties should be permitted to craft designer law as well. *See* Frank Partnoy, *Synthetic Common Law,* 53 U. KAN. L. REV. 281 (2005).

In the context of arbitration clauses, courts have enthusiastically endorsed freedom of contract, particularly when those contracts result in a perceived efficiency gain for the courts themselves. They have dismissed the differences between court procedures and arbitration procedures as insignificant unless the chosen arbitration procedures effectively deny a remedy or are unconscionable under state contract law.[3] Yet restricting procedural choice within the public court system has implications beyond those of opting out of the system entirely. Ultimately, contractual modifications to court processes raise the issue of the extent and importance of the public purposes of the judicial system.

This article will begin to explore the parameters and policy implications of the Designer Trial. Part I will examine the most litigated area of contractual trial design: the waiver of trial by jury. It will consider the reasons that jury waivers are enforced and the expansion of the trend to enforce them. Part II will discuss the kinds of features that, consistent with those reasons, could be added to the designer trial. Part III will consider the policy issues implicated by allowing such contracts, including the impact on the role of trials as a public good and the function of judges and judicial discretion.

I. THE DESIGN BEGINS: CHOOSING THE JUDGE, REJECTING THE JURY

A. The Importance of the Civil Jury

It would be hard to overstate the importance of the jury in U.S. law. At the federal level, the right to a jury trial in civil cases is protected by the Seventh Amendment.[4] Each of the fifty states also has a right to jury trial guaranteed by constitution or statute.[5] The jury serves multiple roles. As a matter of procedural black letter law, the jurors are the finders of fact at trial. Guided by the judge's explanation of the law contained in the jury instructions, the jurors apply the law to the facts as they find them and render a verdict in the case.

As a political institution, the jury serves two functions that are relevant here: it serves as a check on the power of the less democratic judge, and it expresses community values and experience by incorporating them into legal decision making. As a part of democratic self-government, the jury is designed to serve the people by checking the judge "much as the legislature was to check the executive, the House to check the Senate, and the states to check the national government."[6] Early in the debate over the federal constitution, for example, the issue of the jury's political role loomed large:

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3. For general discussions of the evolution of the Supreme Court's treatment of the Federal Arbitration Act and its growing preference for arbitration, see IAN R. MACNEIL, AMERICAN ARBITRATION LAW 92-155 (1992); Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1243-46 (2001); Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1045-48 (1998); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 644-74 (1996).

4. U.S. CONST. amend. VII. *See also* FED. R. CIV. P. 38(a).

5. *See* Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1040 n.11 (1999).

6. *See* Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1174 (1995).

> Juries are constantly and frequently drawn from the body of the people, and freemen of the country; and by holding the jury's right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful controul [*sic*] in the judicial department. . . . [T]he democratic branch of the legislature and the jury trial are the means of effective and popular control.[7]

It is, therefore, not surprising that many of our modern debates about procedural devices are debates about the proper allocation of power between the judge and the jury.[8] The civil jury also affects the allocation of power among the branches of government. "Although the civil jury is of course an organ of government, it nonetheless has an antistatist quality because it allows the people to decide matters differently than the other institutions of government might wish."[9]

The jury's role in infusing the trial process with community values is both subtle and pervasive. First, in many cases the jury's decision is explicitly value-laden. For example, decisions such as whether a party's actions were reasonable, whether a product's social utility exceeds its risk, whether a contract term was unconscionable, whether a breach of contract should be excused, or whether a police officer's use of force was excessive, are not value-neutral inquiries into historical fact. The answers to these questions depend on societal norms, supplied by the jury.[10] Second, jurors apply community norms, in the form of each juror's experience of life in the community, in evaluating the evidence presented.[11] For example, jurors decide what witnesses they believe and do not believe, and which party's story is more consistent with their understanding of reality.[12] This function is enhanced when the jury reflects the broader community. "The jury is the most effective instrument for incorporating the diverse ethnic, economic, religious, and social elements of American society into the justice system."[13]

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7. *See* Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 112-13 (citations omitted).

8. "The vanishing trial is, in many regards, the vanishing jury. Power and discretion have shifted away from the jury and more and more now is in the hands of the judge. To put it another way, the long-term historical development is to shift decision making from amateurs to professionals." Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689, 698 (2004).

9. OSCAR G. CHASE, LAW, CULTURE, AND RITUAL 56 (2005).

10. *See* Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943, 966 (2004) ("[T]here's a strong historical case to be made for law reform through jury law making. . . . The important thing about these changes is that they evolved from long experience of juries confronting facts in which the commonsense of justice departed from that dispensed by law—and law yielded. In a world where trials are increasingly rare, we lose some analogous opportunities for evolutionary law making.").

11. *See generally* Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 FORDHAM L. REV. 1837, 1857-66 (1998).

12. *Id.*

13. Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. EMPIRICAL LEGAL STUD. 973, 974 (2004).

B. Waiver of the Right to Jury Trial

Despite the central function of the jury in the American judicial system, the parties can eliminate the jury's role.[14] If neither of the parties to a common law action chooses to request a jury trial, the right to jury can be waived by procedural default.[15] Although the jury protects public values, the right to a jury trial is treated as a private right and can be waived by the parties through agreement or through inaction during the course of the lawsuit. This is true of other due process rights as well.[16]

Parties may also waive their right to a jury trial by signing a pre-litigation contract with a waiver provision in it.[17] However, these waivers are only enforced if they are knowing, voluntary, and intelligent.[18] In deciding whether the waiver was intentional, courts consider factors such as the conspicuousness of the waiver clause (location, typeface, heading), the parties' comparative bargaining power and sophistication, the extent of actual bargaining, and whether the parties were represented by lawyers in the contract negotiation. Despite the multi-factor analysis, in most cases a sufficiently conspicuous jury waiver clause will be enforced even in a contract of adhesion.[19]

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14. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848-49 (1986) (noting that "personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried" are subject to waiver).

15. FED. R. CIV. P. 38(d). The same is often true in state courts. *See, e.g.*, TEX. R. CIV. P. 216 (requiring jury demand and payment of jury fee).

16. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (Florida forum selection clause on cruise line tickets); Nat'l Equip. Rental v. Szukhent, 375 U.S. 311, 316 (1964) (upholding a contractual agreement to submit to the jurisdiction of a particular court). This is true despite the state sovereignty component of personal jurisdiction jurisprudence. *See* Worldwide Volkswagen v. Woodson, 444 U.S. 286, 293 (1980) (citing "principles of interstate federalism embodied in the Constitution").

17. Originally, the Supreme Court had rejected jury waiver clauses as unenforceable. Home Ins. Co. v. Morse, 87 U.S. (20 Wall) 445 (1874). Although the Supreme Court has not definitively ruled on the issue, lower courts assume that such waivers are constitutional. *See, e.g.*, Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 837 (10th Cir. 1988); Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832 (4th Cir. 1986); Nat'l Equip. Rental v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) (holding that "it is elementary that the Seventh Amendment right to a jury trial is fundamental and that its protection can only be relinquished knowingly and intentionally"). *See generally* Debra T. Landis, Annot., *Contractual Jury Waivers in Federal Civil Cases*, 92 A.L.R. Fed. 688 (1989 & Supp. 2005). For a collection of state cases, see Jay M. Zitter, Annot., *Contractual Jury Trial Waivers in State Civil Cases*, 42 A.L.R.5th 53 (1996 and Supp. 2005). The only two states to reject pre-litigation jury waivers entirely did so because of the language of state statutes rather than for general policy reasons. Their results could therefore be changed by amending those statutes. *See* Grafton Partners v. Superior Court, 116 P.3d 679 (Cal. 2005); Bank South v. Howard, 444 S.E.2d 799 (Ga. 1994).

18. *Id.*

19. *See, e.g.*, *In re* Prudential Ins. Co., 148 S.W.3d 124 (Tex. 2004); Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., 56 F. Supp. 2d 694, 708 (E.D. La. 1999); Morgan Guar. Trust Co. v. Crane, 36 F. Supp. 2d 602, 604 (S.D.N.Y. 1999); Chase Commercial Corp. v. Owen, 588 N.E.2d 705 (Mass. App. 1992); Smyly v. Hyundai Motor Am., 762 F. Supp. 428 (D. Mass. 1991); Bonfield v. AAMCO Transmissions, Inc., 717 F.Supp. 589 (N.D. Ill. 1989); David v. Manufacturers Hanover Trust Co., 298 N.Y.S 2d 909 (1969).

C. Recent Cases

The jury waiver cases result from deference to party autonomy, as do recent cases enforcing pre-dispute arbitration clauses. In both situations, the parties' ability to agree to a forum and rules for dispute resolution is subject to very few limits. In fact, some cases rely on the arbitration clause cases to undergird their support of jury waivers.

One such case was decided recently in Texas. *In re Prudential Insurance Co.* involved a restaurant lease.[20] Prudential was the building lessor, and the tenants were Francesco Secchi, a native of Italy, and his wife Jane, a native of England.[21] Neither was educated beyond the eighth grade.[22] The lease contained a paragraph providing that "Tenant and Landlord both waive a trial by jury of any or all issues arising in any action or proceeding between the parties hereto or their successors, under or connected with this Lease, or any of its provisions."[23]

The Secchis argued that jury waivers are contrary to public policy, because they give non-government actors "the power to alter the fundamental nature of the civil justice system by private agreement."[24] The Texas Supreme Court rejected that argument, noting that precedent already allows parties to contract for the law that will apply and the forum in which litigation will take place, and lets them waive the due-process based requirements for personal jurisdiction.[25] The court was also persuaded to allow waiver of juries because courts enforce arbitration clauses: "Public policy that permits parties to waive trial altogether surely does not forbid waiver of trial by jury."[26] In fact, the court argued that the availability of arbitration clauses makes it even more important to enforce jury waivers:

> [I]f parties are willing to agree to a non-jury trial, we think it preferable to enforce that agreement rather than leave them with arbitration as their only enforceable option. By agreeing to arbitration, parties waive not only their right to trial by jury but their right to appeal, whereas by agreeing to waive only the former right, they take advantage of the reduced expense and delay of a bench trial, avoid the expense of arbitration, and retain their right to appeal. The parties obtain dispute resolution of their own choosing in a manner already afforded to litigants in their courts. Their rights, and the orderly development of the law, are further pro-

20. 148 S.W.3d 124 (Tex. 2004). *See also In re* Wells Fargo Bank Minnesota N.A., 115 S.W.3d 600 (Tex. App. 2003) (finding contractual waiver of jury trial right enforceable since arbitration agreements would be enforceable under the same circumstances).

21. *Id.* at 127.

22. *Id.*

23. *Id.* at 127-28.

24. *Id.* at 131.

25. *Id.*

26. *Id.* The Court did *not* note that while enforcement of arbitration clauses is mandated by preemptive federal law, enforcement of jury waivers is not. *See* Federal Arbitration Act, 9 U.S.C. § 2 (2000) (hereinafter "FAA"); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 689 (1996) (holding that the FAA preempts a state law requiring that contracts containing arbitration clauses provide notice of the clause on the first page of the contract). While this should be a major difference between contracting for arbitration and contracting for trial waivers, courts enforcing jury trial waivers do not tend to remark on the impact of preemption in the arbitration context or on its absence in the jury waiver context.

> tected by appeal. And even if the option appeals only to a few, some of the tide away from the civil justice system to alternate dispute resolution is stemmed.[27]

The court also addressed the issue of whether this particular jury waiver clause was sufficiently voluntary.[28] Its analysis demonstrated significant willingness to enforce the contractual terms despite disparities in power and comprehension, resembling the courts' analyses in the arbitration clauses cases.[29] The Secchis argued that the jury waiver should not be enforced because: 1) the waiver was in the fifty-third paragraph of a sixty-seven paragraph document, seven pages before the signature page; 2) the waiver heading was misleading, since it was called "Jury Trial" rather than "Jury Waiver"; 3) Prudential is a corporation with billions of dollars in assets while the Secchis were immigrants with limited educations; and 4) the Secchis did not read the jury waiver or bargain for it.[30] The Texas Supreme Court, while not questioning these contentions, rejected the argument. The court noted that the Secchis had negotiated commercial leases before, that Jane went over this lease with a lawyer, and that they did negotiate some changes in the lease.[31] Based on these facts, the court found that the waiver was knowing and voluntary as a matter of law.[32]

A 1998 Connecticut case also used arbitration precedent to make waiving a jury trial easier. In *L & R Realty v. Connecticut National Bank*,[33] a group of real estate developers sued a bank in connection with a dispute arising out of a loan to develop a commercial property.[34] The loan documents contained jury waivers, and the individuals who had guaranteed the loans challenged the enforcement of the waivers.[35] In discussing the proper procedure to be used to decide jury waiver issues, the court relied on arbitration law:

> We begin by noting that jury trial waivers entered into in advance of litigation are similar to arbitration agreements in that both involve the relinquishment of the right to have a jury decide the facts of the case. . . . Arbitration is favored because it is intended to avoid the formalities, delay, expense and vexation of ordinary litigation. . . . Arbitration agreements illustrate the strong public policy favoring freedom of contract and the ef-

27. In re *Prudential Ins. Co.*, 148 S.W.3d. at 132.
28. *Id.*
29. *Id.* at 134.
30. *Id.* at 133-34.
31. *Id.* at 134.
32. *Id.* at 133-34. The court also pointed out that the clause was not printed in small type and that the caption ("Counterclaim and Jury Trial") was in bold type. In re *Prudential Ins. Co.*, 148 S.W.3d at 134. Whether or not the Secchis had read the clause was immaterial: "Although the Secchis did not read the paragraph, they are charged with knowledge of all of the lease provisions absent some claim that they were tricked into agreeing to them." *Id.*
33. 715 A.2d 748, 753 (Conn. 1998).
34. *Id.* at 750.
35. *Id.* The loan agreement contained the following language, printed in boldface on the signature page: "Waiver of trial by jury: Borrowers and Other Obligors irrevocably waive all right to a trial by jury in any proceeding hereafter instituted by or against the Borrower or Other Obligors in respect of this note or collateral which may secure this note." *Id.* at 750 n.2.

ficient resolution of disputes. These policies are also furthered by a jury trial waiver clause.[36]

Because of this policy, the court decided to treat contractual jury trial waivers as "presumptively enforceable," and to enforce the waivers without the strong showing of intent that would be required in a criminal case.[37] Instead, a civil contractual jury waiver provision is "prima facie evidence that the party bound thereby intentionally has waived its constitutional right to a trial by jury."[38] In order to rebut the presumption of validity, a party seeking a jury trial despite the clause must "come forward with evidence that it clearly did not intend to waive the right to a jury trial."[39] The Connecticut court bolstered its pro-waiver position by noting that most courts reject contractual jury waivers only in cases involving "extreme bargaining disadvantage" or "gross inequality in the bargaining position of the parties."[40]

D. The Theoretical Underpinnings of Jury Waiver

1. Contract Theory

The assumption underlying courts' willingness to allow parties to customize trials is simple: lawsuits are just private disputes. From this assumption flows the turn to contract law.[41] Thus, as Professor Resnik documents, the values dominating procedural discourse have shifted from process to contract: "A good deal of contemporary doctrine on Contract Procedure assumes the wholesale application of extant principles of contract law."[42] Contract theory, in turn, is based in part on the free market concept that a person is legally bound by the bargains he has made.[43] The courts that enforce contracts as written because they were signed by adults reflect this part of contract theory—a deal is a deal.

The last thirty years have seen contract doctrine return to a formalist approach, sometimes called the "new conceptualism."

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36. *Id.* at 753.

37. *Id.* at 755.

38. *L & R Realty*, 715 A.2d at 752. For an argument that the burden should be placed on the party seeking to enforce the wiaver, see Chester S. Chuang, *Assigning the Burden of Proof in Contractual Jury Waiver Challenges: When can an Employer Take away an Employee's Right to a Jury Trial?*, *available at* http://ssrn.com/abstract=885579 (last visited Feb. 17, 2006).

39. *Id.* at 755. Absent such a showing, the court need not hold a hearing in determining whether the jury waiver clause is enforceable. *Id.* at 756. If the party opposing the clause comes forward with evidence of clear lack of intent, the court should hold a hearing at which "the party seeking to avoid the waiver carries the burden of proving, by a preponderance of the evidence, the lack of a clear intent to be bound by the waiver provision." *Id.* at 755-56.

40. *Id.* at 754 n.10. For a federal case relying on the analogy to arbitration clauses, see Smith-Johnson Motor Corp. v. Hoffman Motors Corp., 411 F. Supp. 670, 675-76 (E.D. Va. 1975).

41. Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 597 (2005) [hereinafter Resnik, *Procedure*]. *See also* Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 490-91 (2003) (examining the theory that procedure is fair if all parties would have agreed to the procedure had they been able to contract prior to their dispute).

42. Resnik, *Procedure, supra* note 41, at 599.

43. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 211-12 (1995).

> [Courts] embraced with fervor all the earlier-disdained incidents of classical formalism—the duty to read, the "plain meaning" rule, a vigorous parol evidence rule, a high tolerance for "puffing," etc.—with the effect, intended or not, of reducing or eliminating any constraints on the activities of the drafters of form contracts.[44] Further, in most areas, "courts are willing to rely on individual consent even as they know that such consent is given under conditions of profound inequality."[45]

Small wonder, then, that the courts which enforce waivers of substantive rights enforce waivers of procedural ones as well.

2. *Arbitration Jurisprudence*

Courts' use of arbitration cases to support jury waivers is both ironic and unsurprising. It is unsurprising because both draw on the courts' characterization of litigation as private and their application of contract theory to procedural issues.[46] The irony stems from a formative gap in the arbitration cases themselves. As Professor Sternlight has pointed out persuasively, a contract that agrees to mandatory binding arbitration has also agreed to waive a jury trial, and should have been unenforceable unless it satisfied the demanding standard of constitutional waivers: knowing, voluntary, and intelligent.[47] However, most courts did not make the connection between the two bodies of law, and upheld arbitration clauses "even when they are not knowing, voluntary or intelligent. To be valid, most courts state arbitration clauses need not be negotiable, actually negotiated, or conspicuous. Nor is a substantial disparity of bargaining power . . . usually sufficient to void an arbitration clause."[48]

Pre-dispute arbitration clauses, then, were treated as different from jury waiver clauses and upheld on a lesser showing of voluntariness than that required of a jury waiver. Having established the law on easy enforcement of arbitration clauses, the courts are beginning to stand the issue on its head by asking themselves this question: since a party can waive the right to a court completely under comparatively easy standards, should it not be just as easy to waive the right to a jury? At least the jury waiver clause keeps the dispute in the court system. Since by upholding mandatory arbitration we allow parties to waive the full spectrum of court procedures indirectly, courts are beginning to conclude that those procedures

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44. Charles Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 774 (2002). *See also* Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1206-07 (1995) (arguing that courts began to turn away from a more egalitarian view of contract doctrine in the 1980s and early 1990s); JAY M. FEINMAN, UN-MAKING LAW 78-172 (2004) (contending that conservatives seek to radically limit the protections of common law contract).

45. Resnik, *Procedure*, *supra* note 41, at 662.

46. For an argument that jury waivers in the arbitration context should not have to be "knowing and voluntary" see Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses and Other Contractual Wiavers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167 (2004).

47. Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 716-17 (2001) (arguing that arbitration clauses should only be enforceable if they meet the same requirements as jury waivers).

48. *Id.* at 674 (chart showing differences between jury waiver and arbitration jurisprudence).

can also be waived directly—if the system can be bypassed, it can also be manipulated.

3. *Efficiency*

The trend toward enforcing jury waiver clauses is unsurprising for an additional reason. Judges, during this same time period, have seen case filings increase while the supply of judges failed to expand at the same rate.[49] As the backlog of cases and the time between filing and trial grew, the judges adopted various methods to encourage more and earlier settlement of cases. In this environment, devices that save judges time have significant appeal. Arbitration clauses, which remove cases from the system entirely, were therefore attractive from the courts' own institutional perspective. Contractual terms that speed disposition by limiting process should be similarly appealing. Elimination of the need to try a case by jury could be seen as a time saving device. The jury waiver cases reflect this belief, hailing the "reduced expense and delay" of the bench trial.[50]

4. *Choosing Existing Processes*

Finally, courts find jury waiver clauses acceptable because, although they do involve private control over court procedure, it is a kind of private control that already exists within the judicial system. The clauses are not asking the judges to rule by reading entrails, throwing darts, or flipping coins. Nor are they requesting three-judge panels or some kind of administrative process. Instead, the parties are making the kind of choice they could make after a case is filed; they are simply making it ahead of time. Just as a party could agree to arbitrate a dispute after it has arisen, the arbitration cases allowed that choice to be made before a dispute arose. Just as a party could forgo the right to a jury by failing to request one at trial, the jury waiver cases allow that choice to be made in a pre-dispute contract.[51]

E. *From Commercial Entities to Employees and Consumers*

The early cases concerning the enforcement of pre-dispute mandatory binding arbitration clauses involved commercial parties and commercial deals. The first case in which the Supreme Court announced its preference for arbitration was a

49. Shari Seidman Diamond & Jessica Bina, *Puzzles About Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals*, 1 J. EMPIRICAL. LEGAL STUD. 637 (2004); Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL. LEGAL STUD. 783, 808 (2004) [hereinafter Resnik, *Morphing*] ("Between the 1960s and the 1990s, caseloads within the federal system tripled, as hundreds of new statutory causes of action were enacted").

50. In re *Prudential Ins. Co*, 148 S.W.3d at 132. In addition, the perceived time savings is not offset by policy qualms. Indeed, the jury waivers provide judges as decision makers, enabling parties to choose a professional judiciary rather than the lay jury as the finder of fact. "Although trial judges overwhelmingly profess admiration for juries, many in the judiciary are attracted by the prospect of making their realm more rationalized and systematic by eliminating or at least taming the element of lay spontaneity." Galanter, 2006 J. DISP. RESOL. 7.

51. Note that even when parties have waived a jury trial by default, the court can order one on its own motion. FED. R. CIV. P. 39(b).

dispute between a contractor and a hospital.[52] The case that applied the Federal Arbitration Act to the states involved a dispute between a franchisor and franchisee.[53] The case that began the rejection of public policy challenges to arbitration was an antitrust claim involving an international business transaction.[54] Once courts got into the habit of accepting the clauses, the acceptance trickled down into cases involving contracts between parties such as institutions and consumers, and employers and employees.[55] Enforcement of arbitration clauses has also expanded into tort claims arising out of contractual relationships.[56]

So far, most of the cases enforcing contractual jury waivers involve commercial contracts. Even where there is disparity of bargaining power, the weaker party is still a businessperson negotiating a business deal of some kind, and the disparity does not invalidate the waiver. For example, jury waiver clauses were enforced in cases involving a lease of photocopier equipment,[57] commercial real estate leases,[58] and commercial loans.[59] The most established line of cases, though, grow out of clauses in New York leases. In that context, they have come to be enforceable in residential leases, even when the lessees are individuals.[60] It would not be surprising if the jury waiver doctrine followed the same path as the arbitration cases, inexorably expanding contract enforcement into non-commercial contracts of adhesion.

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52. Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983).

53. Southland Corp. v. Keating, 465 U.S. 1, 15-16 (1984).

54. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985).

55. *See* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 82-83 (2000) (arbitrating consumer lending contract for mobile home purchase); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23-27 (1991) (requiring brokerage employee to arbitrate age discrimination claim). *See generally* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33.

56. *See, e.g.*, Fleetwood Enters., Inc. v. Gaskamp, 280 F.3d 1069, 1074-78 (5th Cir. 2002) (health problems caused by motor home); KFC Nat'l Mgm't Co. v. Beauregard, 739 So. 2d 630, 631 (Fla. App. 1999) (assault by a co-employee); Parsley v. Terminix, No. C-3-97-394, 1998 U.S. Dist. LEXIS 22891, *17-21 (S.D. Ohio Sept. 15, 1998) (health problems caused by exterminator's chemicals); Burton v. Mt. Helix Gen'l Hosp., No. 14210 1976 Cal. App. LEXIS 1280, *11-12 (Cal. App. 1976) (opinion originally published at 127 Cal. Rptr. 791, but ordered withdrawn from publication by California Supreme Court on April 12, 1976) (medical malpractice). *See generally* Elizabeth Thornburg, *Contracting with Tortfeasors*, 67 LAW & CONTEMP. PROBS. 253 (2004).

57. Great America Leasing Corp. v. Cozzi Iron & Metal, Inc., 76 F. Supp. 2d 875, 880-81 (N.D. Ill. 1999). *See also* Leasing Svc. Corp. v. Crane, 804 F.2d 828 (4th Cir. 1986) (equipment lease).

58. Amalgamated Trust & Savings Bank v. United Artists Eastern Theatres, Inc., No. 79 C 5153, 1980 U.S. Dist. LEXIS 14457, *5-6 (N.D. Ill. Oct. 29, 1980); Mall, Inc. v. Robbins, 412 So. 2d 1197, 1199-1200 (Ala. 1982); In re *Prudential Ins. Co.*, 148 S.W.3d at 130-31.

59. Oei v. Citibank, N.A., 957 F. Supp. 492, 523 (S.D.N.Y. 1997); Cooperative Fin. Ass'n v. Garst, 871 F. Supp. 1168, 1172-73 (N.D. Iowa 1995) (loan to two partners in ranching business); Chase Commercial Corp. v. Owen, 588 N.E.2d 705, 709 (Mass. App. 1992); *In re* Reggie Packing Co., 671 F. Supp. 571, 593 (N.D. Ill. 1987) (loan to individual owning meat distribution business).

60. *See, e.g.*, Pierre v. Williams, 431 N.Y.S.2d 249, 250 (City Civ. Ct. 1980); Dunbar Assoc. v. Mulzac, 403 N.Y.S.2d 846, 847 (City Civ. Ct. 1978). New York does, however, make such waivers inapplicable to tenants' personal injury and property damage claims. N.Y. CODE REAL PROPERTY § 259-c (2005).

II. EXPANDING THE DESIGN: CHOOSING OTHER PROCEDURAL LIMITS

Given the contractual power to design a congenial trial process, what would powerful parties desire? One way to gauge their wish list would be to examine the reasons that they are said to choose arbitration clauses: to choose law that minimizes their liability, to eliminate class actions, to eliminate the jury, to avoid publicity,[61] and to save time and money without sacrificing procedural advantage. Arbitration also avoids collateral estoppel and the creation of unwanted precedent. This section examines the kinds of contractual clauses that might help to achieve these objectives while leaving litigation in the publicly-financed court system. It considers both the kinds of options parties have been permitted to achieve by consent, and the kinds of rights that parties may waive by failure to claim them.[62]

It is clear that some of this is achievable under existing laws. In the federal courts and in many state courts, choice of forum clauses are enforceable absent evidence of significant overreaching.[63] Choice of law clauses are also enforced unless they offend a significant public policy of the state whose law would have applied absent the clause.[64] As the preceding section discussed, courts are also increasingly enforcing jury waiver clauses. This has already gone a long way toward achieving a friendly forum and the law that is most advantageous to the contract drafter. How else might court processes be customized?

In order to focus on the terms most likely to be approved, the discussion below will try to avoid those that create a probability of being rejected as unconscionable. Therefore, covenants will be mutual since one-way arbitration provisions are sometimes voided.[65] Similarly, this section does not discuss one-way privilege waivers,[66] waivers of the right to counsel,[67] or changes in the burden of

61. *See, e.g.*, National Arbitration Forum, *Arbitration FAQ*, *at* http://www.arbitration-truth.com /arbitration-faq.htm#2 (last visited Mar. 5, 2006) ("Why use arbitration over litigation? . . . . Arbitration results are only made public with the consent of the parties involved in the dispute. This differs from traditional court litigation in that courts are public forums and information about business and personal affairs may become public knowledge.").

62. Once litigation has begun, the Federal Rules provides numerous occasions on which the parties can choose procedures by agreement. *See* FED. R. CIV. P. 4 (service of process); 5 (service of pleadings and other papers); 15 (consent to amendments); 26 (stipulations about disclosures and the timing and sequence of discovery); 29 (stipulations regarding discovery); 30 (varying rules re depositions); 31 (depositions on written questions); 33 (number and timing of interrogatories); 34-36 (discovery timing); 39 (consent to bench trial after jury demand); 48 (stipulations re non-unanimous verdict or jury of less than six); 53 (consent to master); 73 (consent to trial by magistrate judge).

63. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991).

64. RESTATEMENT (SECOND) CONFLICT OF LAWS, § 187. That state must also have a materially greater interest in the issue than the state chosen in the choice of law clause. *Id.*

65. *See, e.g.*, Samek v. Liberty Mut. Fire Ins. Co., 793 N.E. 2d 62, 64-66 (Ill. Ct. App. 2003) (determining that a one-way arbitration clause permitting an insurer to seek trial de novo, given an award in excess of $ 20,000, violates public policy and effectively becomes substantively unconscionable); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 689-99 (Cal. 2000) (holding that it is unconscionable to permit an employer to select either litigation or arbitration in the event of a dispute while an employee's only option was arbitration); Pindeo v. Premium Tobacco Stores, Inc., 102 Cal. Rptr. 2d 435, 439-40 (Cal. Ct. App. 2000). *But see* Harris v. Green Tree Fin. Corp., 183 F.3d 173, 183-84 (3d Cir. 1999) (finding an arbitration clause not unconscionable for giving a drafting lender unilateral control of whether a dispute is arbitrated or litigated).

66. *But see* Adreveno v. Mutual Reserve Fund Life Ass'n, 34 Fed. 870, 871 (E.D. Mo. 1988) (waiver of physician-patient privilege in insurance policy).

proof. Nor does it consider rules not currently available in the courts, such as a contract-based change to the 1983 version of Rule 11.[68] Instead, this section will examine in detail two provisions that would make trials more like arbitration: class action prohibitions and confidentiality agreements. It will then briefly consider other provisions that a contract drafter might want to include.

A. Class Action Waivers

1. Contract Theory and the Arbitration Analogy

Some businesses require arbitration of consumer disputes primarily to prohibit class actions.[69] It should be similarly appealing if the class waiver were available even without arbitration. Most courts have upheld contractual prohibitions on class actions in the arbitration context.[70] The issue is often one of state contract law: are such waivers unconscionable? While a few courts have rejected

67. Note, however, that there is normally no constitutional right to counsel in civil cases. *See generally* Elizabeth Thornburg, *The Story of Lassiter: The Importance of Counsel in an Adversary System, in* CIVIL PROCEDURE STORIES 489-527 (Kevin Clermont ed., 2004).

68. Such a clause could, for example, change the definition of good faith, eliminate the safe harbor provision, make sanctions mandatory, and direct the payment of sanctions to the offended party.

69. Ron N. Dreben & Johanna L. Werbach, *Top 10 Things to Consider in Developing an Electronic Commerce Web Site*, 16(5) COMPUTER LAW. 17, 19 (1999) ("Companies should consider including dispute resolution clauses requiring arbitration, which may in some instances, serve as a defense to the certification of a class action against the site owner."). *See also* Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 268 (1995) ("Arbitration programs [imposed by financial institutions] were initially intended to avoid class action lender liability suits demanding punitive damages.").

70. The Supreme Court's recent decision in *Green Tree Financial Corp. v. Bazzle*, remanding the case for the arbitrator to decide whether class arbitration was prohibited by the contract, does not explicitly reach the issue of whether a contract may prohibit arbitration, but the reasoning of both majority and dissent treat the issue as one of contract construction. 539 U.S. 444 (2003). At least eight states have held class action waivers to be enforceable in the arbitration context. *See* Walther v. Sovereign Bank, 872 A.2d 735, 749-751 (Md. 2005); Strand v. U.S. Bank Nat. Ass'n ND, 693 N.W.2d 918, 924-27 (N.D. 2005); Tsadilas v. Providian Nat'l Bank, 786 N.Y.S.2d 478, 480 (N.Y.App.Div. 2004); AutoNation USA Corp. v. Leroy, 105 S.W.3d 190, 200-01 (Tex. Ct. App. 2003); Rains v. Found. Health Sys. Life & Health, 23 P.3d 1249, 1253-54 (Colo. Ct. App. 2001); Pyburn v. Bill Heard Chevrolet, 63 S.W.3d 351, 363-365 (Tenn.Ct.App. 2001); Gras v. Assocs. First Capital Corp., 786 A.2d 886, 889-93 (N.J. 2001); Brown v. KFC Nat'l Mgmt. Co., 921 P.2d 146, 166 n.23 (Hawaii 1996). Six federal courts of appeals have reached similar results. *See* Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 174-75 (5th Cir. 2004); Livingston v. Associates Finance, Inc., 339 F.3d 553, 558-59 (7th Cir. 2003); Adkins v. Labor Ready, Inc., 303 F.3d 496, 502-03 (4th Cir. 2002); L.L.C. v. Emerson, 248 F.3d 720, 728-29 (8th Cir. 2001); Dominium Austin Partners v. First Family Fin. Servs., Inc., 233 F.3d 1331, 1337-39 (11th Cir. 2000); Johnson v. W. Suburban Bank, 225 F.3d 366, 371-79 (3d Cir. 2000).

waivers of class arbitration,[71] in most states an arbitration clause that prohibits class actions is enforceable under local law.[72]

Even in states that find class action waivers to be unconscionable, careful contract drafting may nevertheless make the clauses enforceable. By using a choice of law clause and choosing the law of a state that allows waivers, the contract drafter can dramatically increase the chances of contract enforcement. For example, in *Discover Bank v. Superior Court*, a California resident obtained a credit card from Discover Bank, which is domiciled in Delaware.[73] The cardholder agreement contained a choice of law clause choosing Delaware and federal law.[74] Under Delaware law, class action waivers are enforceable; under California law, they are not. The court determined that the choice of law clause was enforceable, and so Delaware law applied to require individual arbitration of the plaintiff's claim, rather than the nationwide class that he had sought.[75]

Would class action waivers be enforced in court proceedings pursuant to a pre-litigation contract? Those states that find waivers enforceable in the arbitration context are likely to approve it in the courts. The arbitration cases have already determined that class action waivers are not unconscionable under those states' contract law. The courts will explain that they are simply enforcing the parties' agreement.[76] Those states that find such clauses unconscionable in the arbitration setting will likely reach similar conclusions regarding class action waivers for court proceedings – their decisions turn on the importance of the class action as a remedy, and this remains true for court actions. Here again, though, a choice of law clause could encourage the application of a pro-waiver law. This would be even easier if the choice of law clause is coupled with a choice of forum clause, choosing a forum that would enforce the choice of law clause.

2. Choosing Existing Processes

Like juries, class actions can be waived during litigation by default; simply by not filing a case as a class action, the plaintiff waives a right to represent a class as

71. *See* Ting v. AT&T, 319 F.3d 1126, 1151 (9th Cir. 2003) (applying California law). Class action waivers have been held unconscionable and unenforceable under the law of four states. *See also* Whitney v. Alltell Commc'ns, Inc., 173 S.W.3d 300, 311-14 (Mo. Ct. App. 2005); Eagle v. Fred Martin Motor Co., 809 N.E.2d 116, 1180-83 (Ohio 2004); West Virginia *ex rel* Dunlap v. Berger, 567 S.E.2d 265, 278-79 (W.Va. 2002). *See generally* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV., 125-26 (2000).

72. *See* Jack Wilson, *"No-Class-Action Arbitration Clauses," State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737 (2004).

73. 134 Cal. App. 4th 886, 890 (Cal. Ct. App. 2005)

74. *Id.*

75. *Id* at 890-98. *See also* Discover Bank v. Super. Ct., 30 Cal. Rptr. 3d 76, 95-96 (Cal. 2005) (holding the clause unconscionable under California law, reversing the earlier court of appeals decision in the case, and remanding to determine the impact of the choice of law clause). *But see* America Online, Inc. v. Superior Court, 108 Cal. Rptr. 2d 699, 708-13 (Cal. 2001) (voiding a choice of forum clause that would have sent the case to Virginia, which in turn would have prohibited class treatment and thus violated the public policy of California as expressed in the Consumers Legal Remedies Act).

76. To the extent that certain classes are certified to protect absent class members, the waiver agreement might have third-party effects that a court would find problematic. This could be true, for example, of 'limited fund' class actions under Federal Rule 23(b)(1) and its state law counterparts. The kind of consumer and employment cases considered here are unlikely to involve this type of class.

surely as by failing to demand a jury she waives a jury trial. Proceeding as an individual claimant is certainly one of the options available in the court system. Thus, the reasoning that a party may do by contract what she could do later by failing to assert procedural rights, would support a contractual class action waiver.

3. Efficiency

The courts might also view class waiver as efficient. Certainly within any one case, it would be faster and easier to litigate the named parties' dispute without having to undertake class discovery, hold a class certification hearing, choose class counsel, send notice to the class, and generally manage the class action. On the other hand, viewed systemically, it could be more costly to litigate numerous individual claims than a single class action.[77] Even in cases seeking class certification, however, the courts have been mostly unsympathetic to arguments that nationwide class actions based on state law are efficient. The trend began with Judge Posner's opinion in *Rhone-Poulenc*,[78] and the aversion to treating mass claims as class actions has been followed in a number of circuits and state courts.[79] Widespread concern about the manageability of class actions may provide further support to those courts who would like to see the class action waivers enforced in the interests of the defendants who contracted for them.[80]

B. Confidentiality

A dispute filed in court will never be as hidden from public view as a dispute resolved in a completely private forum.[81] Nevertheless, a great deal of confidenti-

77. In a situation where individual plaintiffs claims are quite small, however, the alternative to a class action might be no action at all, and that would also reduce the courts' caseload. For an argument regarding the economic efficiency of small claims class actions see William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C.L. REV.— (forthcoming), *available at* http://ssrn.com/abstract=890303 (2006) (last visited May 12, 2006).

78. *In re* Rhone-Poulenc Rorer, 51 F.3d 1293, 1295-1303 (7th Cir. 1995).

79. *See, e.g.*, Compaq Computer Corp. v. Lapray, 135 S.W.3d 657, 658 (Tex. 2004); *Ex parte* Green Tree Fin. Corp., 723 So.2d 6, 11 (Ala. 1998); Castano v. Amer. Tobacco Co., 84 F.3d 734, 756-62 (5th Cir. 1996); Georgine v. Amchem Products, Inc., 83 F.3d 610, 635 (3d Cir. 1996); *In re* Am. Med. Sys., 75 F.3d 1069, 1079-90 (6th Cir. 1996); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234-35 (9th Cir. 1996). *See generally* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 429-30 (2005); Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1519-20 (2005).

80. The recent Class Action Fairness Act, 28 U.S.C. § 1332(d)(2), was intended to make it easier to remove state-filed actions to federal court, where many believe that class actions are less likely to be certified. *See, e.g.*, Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1715 (2000) ("The prevailing sense among some practitioners is that in many venues in the Gulf States—most notoriously Louisiana, Texas, and, until recently, Alabama—judges are more than willing to certify almost anything that walks through the courtroom doors."). The Texas Supreme Court has since decided cases that make class certification much more difficult. *See, e.g.*, Compaq Computer Corp. v. Lapray, 135 S.W.3d 657 (Tex. 2004).

81. Even arbitration clauses cannot guarantee complete privacy, since if a party chooses to litigate the enforceability of the clause, that case will be open to the public and may attract publicity or result in a reported opinion. Nor does the arbitration clause itself prevent a person with a complaint from approaching the media, although the chosen arbitration rules may prevent it.

ality can be contracted for, even in the court setting. Certain aspects of the dispute can be sealed completely by agreement, and those agreements are often blessed by the court since they are opposed by no one.

1. Post-Dispute Confidentiality Agreements

a. Docket Sheets and Court Records

The existence of a lawsuit is likely to be public. The First Amendment and common law support a qualified right of access to docket sheets and other court records.[82] "By inspecting materials like docket sheets, the public can discern the prevalence of certain types of cases, the nature of the parties to particular kinds of actions, information about the settlement rates in different areas of law, and the types of materials that are likely to be sealed."[83] The presumption of openness can be rebutted only if the party seeking secrecy shows that suppression "is essential to preserve higher values and is narrowly tailored to serve that interest."[84]

Despite this official right of access, cases do get completely sealed. In Connecticut, for example, "what appeared to be thousands of cases" were sealed so that court personnel were prohibited from allowing the public access to the files or, in some cases, from acknowledging the existence of the cases at all.[85] In 1988, the Washington Post reported that the federal district court for the District of Columbia had in its index of cases twelve lawsuits in which the parties were listed as "Sealed v. Sealed," at least some of which were sealed when they were filed.[86] In a law review article, the Chief Judge for the District of South Carolina described what would happen if a visitor asked to see the record in Civil Action No. 3:00-3768.[87] Rather than being given the documents in the case, they would see an order that reads:

> The entire record in this case, except for this order, including pleadings, exhibits, hearings, transcripts and prior opinions, memoranda and orders of this court will be sealed, and access to it by other persons other than the parties to this case shall be had only upon further order of this court.

82. Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 93-94 (2d Cir. 2004). *See also* FED. R. CIV. P. 77(b).

83. *Hartford Courant Co.*, 380 F.3d at 95-96.

84. Grove Fresh Distribs. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994).

85. *Hartford Courant Co.*, 380 F.3d at 86 (quoting Eric Rich & Dave Altimari, *Elite Enjoy "Secret File" Lawsuits*, THE HARTFORD COURANT, Feb. 9, 2003, at A1 ("Judges have selectively sealed divorce, paternity and other cases involving fellow judges, celebrities and wealthy CEOs that, for most people, would play out in full view of the public . . .")).

86. Elsa Walsh, *Public Courts, Private Justice: Hundreds of Cases Shrouded in Secrecy*, WASH. POST, Oct. 24, 1988, at A1.

87. Joseph F. Anderson Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 712 (2004). Judge Anderson also quotes an order from a case in Aiken County, S.C., which was the only public information in the case: "If anyone involved in this case, the attorneys, the parties, or their representatives should disclose the terms and conditions of the resolution of this case, they will be in contempt of this court." *Id.*

> At least in some cases, then, there is no meaningful public access even to the existence of the dispute. It seems likely that the sealing was often done pursuant to agreement of the parties.[88]

b. Unfiled Discovery Materials

Discovery materials, since they are not generally filed with the court, are even easier to hide.[89] The Supreme Court, in *Seattle Times Co. v. Rhinehart*, held that the First Amendment does not limit the power of courts to enter protective orders to limit dissemination of discovery materials.[90] The Supreme Court stressed that discovery is not historically open and it is not part of a civil trial. That ruling paved the way for continued contractual secrecy in the discovery phase of litigation. Parties, generally at the beginning of discovery, ask for and receive "umbrella" orders that permit producing parties to designate materials as confidential without advance examination of the materials by the court.[91] The Manual for Complex Litigation (Second) recommends such agreements and orders, asserting that they "greatly expedite the flow of discovery material while affording protection against unwarranted disclosures."[92] By making such an agreement, the parties can keep discovery materials out of the public eye.[93] Only if the discovery materials need to be filed with the court for use in a merits-based motion do the parties risk having to reveal the information.[94] Even then, if they are genuinely protected by a privilege or some other right of privacy, a showing of good cause will allow them to be filed under seal.[95]

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88. *See also* Tresa Baldas, *Divorces Sealed as Business Priority Company Data, Privacy Drive Trend*, NAT'L L. J., Nov. 14, 2005 (noting that courts are now sealing records "for companies, treating trade secrets, assets, stock values and executive salaries as valuable, sensitive information that needs special protection").

89. FED. R. CIV. P. 5(d).

90. 467 U.S. 20, 37 (1984).

91. For example, one such agreement provided that should defendant designate documents as confidential,

> [c]ounsel for any party other than the defendant shall use all product and information produced and disclosed by the defendant solely for the purposes of preparing for trial of this action. Under no circumstances shall material covered by this Protective Order be disclosed to anyone other than counsel in this action and experts retained by them. At the conclusion of the proceedings in this action, all documents and information subject to this Order, including any copies or extracts or summaries thereof, or documents containing information taken therefrom, shall be returned to counsel for the defendant.

Littlejohn v. BIC Corp., 851 F.2d 673, 676 (3d Cir. 1988).

92. MANUAL FOR COMPLEX LITIGATION (SECOND) § 21.431 (1985). For academic arguments supporting secrecy for discovery materials under most circumstances, see Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 504-05; Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 501-02 (1991). For arguments to the contrary, see Anderson, *supra* note 86; David S. Sanson, *The Pervasive Problem of Court-Sanctioned Secrecy and the Exigency of National Reform*, 53 DUKE L.J. 807 (2003); Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. FOR THE STUDY OF LEGAL ETHICS 115 (1999); Laurie Kratky Dore, *Secrecy By Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999).

93. *But see* TEX. REV. CIV. STAT. § 76a (making unfiled discovery materials public when they relate to public health or safety or government wrongdoing). Texas practitioners, however, have informed me that sealing orders are nevertheless routinely granted.

94. *See, e.g.*, Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110 (2d Cir. 2006).

95. *See, e.g.*, FED. R. CIV. P. 26(c).

c. Trials and Trial Evidence

If there is an actual (unvanished) trial of the case, that trial probably needs to be open to the public. Both common law and the First Amendment provide a presumptive right of access to civil proceedings, including the live trial, exhibits admitted into evidence, and transcripts of the trial.[96] This right of access can be rebutted, but only on a showing of "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[97] Even documents protected by an umbrella discovery order become open to the public if they are introduced into evidence at trial[98] or filed in support of a successful motion for summary judgment.[99]

d. Settlements and Sealing Orders

When settlement enters the picture, sealing of the record becomes a distinct possibility. The parties can shield the settlement itself from the public simply by failing to file it with the court. In addition, settlement may be used to leverage considerably greater confidentiality. Although the court should make particularized findings to justify sealing the record, Judge Anderson describes the dynamics that frequently occur in these cases. Attorneys for all of the parties in a trial expected to be lengthy advise the judge that they have settled the case, but that the settlement is conditioned on a protective order that

> provides for:
> - Total confidentiality on the terms of settlement, to be enforced by the court's contempt power;
> - A return by the plaintiff of all documents produced during discovery;[100]
> - A prohibition on plaintiff's counsel and plaintiff discussing the case; and
> - The vacating of substantive orders entered in the case, thereby removing this precedent from the record."[101]

As Judge Anderson points out, if the judge signs this order, all of the parties will be happy. "The plaintiff recovers a handsome sum, both lawyers get paid, the defendant gets its court-ordered secrecy, the judge has one less case to try, and

96. *In re* Cendant Corp., 260 F.3d 183, 192 (3d Cir. 2001). *See also* FED. R. CIV. P. 43 (taking of testimony to be in open court).

97. Publicker Indus., v. Cohen, 733 F.2d 1059, 1073 (3d Cir. 1984).

98. *Littlejohn*, 851 F.2d at 680.

99. Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653 (3d Cir. 1991); Rushford v. New Yorker Magazine, 846 F.2d 249 (4th Cir. 1988); Joy v. North, 692 F.2d 880 (2d Cir. 1982).

100. When exhibits are returned to the parties in a settled case, at some point they cease to be "court records" and the public loses access to them. *See Littlejohn*, 851 F.2d at 683 ("We . . . hold that, absent allegations of fraud or other extraordinary circumstances, trial exhibits that were restored to their owner after a case has been completely terminated and which were properly subject to destruction by the clerk of court are no longer judicial records within the 'supervisory power' of the district court.").

101. Anderson, *supra* note 87, at 728.

there is no one around to object to the secrecy order."[102] Therefore there is significant pressure to agree to enter the requested sealing order.[103] Once the order has been entered, it can only be changed on a showing of "some extraordinary circumstance or compelling need," especially if the order was granted in the context of a settlement.[104]

2. *Pre-Litigation Contracts*

Once a dispute has arisen, contractual agreements permit parties to secure significant, but not complete, privacy. Doctrinally, the public court system comes with a presumption of public access. Functionally, however, private agreements are often enforced absent media interest in the case forcing the courts to apply the First Amendment and common law rules of openness. It is quite easy for the parties to provide for the secrecy of unfiled discovery materials. Would the courts also enforce pre-litigation contracts for secrecy?

a. Contract Theory and the Arbitration Analogy

A philosophy of deferring to the parties' contract could lead the courts to enforce pre-litigation contracts for privacy. They are no less bargained-for than jury waiver clauses, and courts have allowed the contracting away of constitutional rights. In the context of sealing orders, though, the parties attempt to contract around the rights of non-parties. This may not be an insurmountable problem, because there is precedent for enforcing contracts with public effects by focusing instead on its significance to the parties. Jury waivers, for example, allow the parties to bargain away the *public's* right to participate in self-government through serving on juries, just as secrecy agreements allow the parties to bargain away the public's right to knowledge about the court system. Further, secrecy agreements have been incorporated into court orders in pending litigation with only occasional qualms. While certain secrecy provisions, as applied, might violate public policy, it seems likely that many would be enforced.[105]

Analogies to arbitration cases would also support the contractual confidentiality clauses. One of the dominant reasons that parties contract for arbitration rather than litigation is to avoid publicity. Although commentators sometimes bemoan the resulting loss of information about disputes, secrecy in arbitration is well es-

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102. *Id.* at 729.

103. *See* Marcus, *supra* note 92, at 502-05 (describing the forces that encourage such settlements and arguing that, although there will be occasional public policy problems, such orders are generally appropriate).

104. Geller v. Branic Int'l Realty Corp., 212 F.3d 734, 738 (2d Cir. 2000). *See also* Miller, *supra* note 92, at 486-87 ("absent special circumstances, a court should honor confidentialities that are bargained-for elements of settlement agreements"); U.S. v. Glens Falls Newspapers, Inc., 160 F.3d 853, 858 (2d Cir. 1998).

105. Discovery confidentiality orders are on safer ground, while settlements that seal the record will sometimes be more problematic. "In extreme instances, a settlement agreement might be void as against public policy if it is intended to suppress evidence. Such instances will be exceedingly rare, however; if the agreement provided that all materials turned over through discovery be returned and that all copies of these materials be destroyed the court might suspect such concerns are implicated." Marcus, *supra* note 92, at 504.

tablished. The arbitration analogy might work again: if you can get complete secrecy by agreeing to arbitrate, why not encourage parties to stay in the court system by allowing secrecy there as well? Given the constitutional and common law limits on court secrecy, this might provide the public with more information about disputes than the arbitration alternative.

b. Choosing Existing Processes

Protective orders and sealing orders are available in conventional litigation. When no one objects, they are even more available than black letter law would lead one to believe. A pre-dispute contract that mandates secrecy is arguably changing only the timing of the agreement. Unlike jury waivers and class action status, however, protective orders do not arise simply from party default. While parties can effectively waive a jury trial and decline to represent a class on their own, parts of the quest for confidentiality require the cooperation of the judge, and in theory require a showing of at least good cause even in the post-dispute setting. While judges can enforce clauses waiving juries by inaction (not summoning a jury), a sealing order requires affirmative conduct from the judge. While some judges are quite content to go along with the parties in the interest of facilitating settlement, others sometimes balk at sealing the record. The need for court cooperation to invoke this device during litigation can pose challenges to the enforceability of pre-dispute contracts. As with the other devices, though, confidentiality provisions are available on the existing menu of court processes.

c. Efficiency

The efficiency argument for secret agreements is two-fold, and depends on the stage of litigation to be kept secret. Umbrella confidentiality orders during the discovery process can be efficient as they eliminate the need for time-consuming discovery disputes and orders, saving time both for the parties and the court. The agreements eliminate the need to file particularized motions for protective orders (and accompanying briefs) for each document that a party believes is protected as a trade secret or is otherwise confidential. They therefore eliminate the need for the court to rule on such disputes until a document needs to be used for some merits-based motion or introduced at trial. This may mean the judge never needs to rule on the document's status at all. If the agreed order extends to producing privileged documents, subject to a "claw back" for inadvertent production, the document production process can move at an even faster pace as documents do not have to be screened for privilege before they are produced. At the same time, parties get to see their opponents' documents, because they are produced subject to the confidentiality order. This may hasten the settlement process, making settlements more closely "match" the merits of a case.

The other efficiency argument relates to sealing orders that are agreed to as a term of an overall settlement. Proponents argue that many cases would not settle absent sealing and that settlement is more efficient than trial.

Settlement not only reduces the need for further governmental involvement, it also reduces the cost of dispute resolution to the litigants and helps conserve valuable judicial resources. This promotes the more efficient operation of the court

system. "Our civil justice system could not bear the increased burden that would accompany reducing the frequency of settlement or delaying the stage in the litigation at which settlement is achieved."[106]

These efficiency claims may be somewhat overstated. For discovery, an umbrella order can delay the day of reckoning, but disputes with regard to documents that are central to the litigation will happen eventually, unless the case settles before that becomes necessary. For settlement, secrecy is not important to settlement in all, or even most, cases. Would a party unable to obtain a sealing of the entire file prefer a public trial to a quiet private settlement? The District of South Carolina, for example, experienced no decrease in settlements (or in filings) after it adopted a stringent anti-secrecy local rule.[107] In addition, where the sealing order prohibits sharing information with other litigants with similar cases, it could become inefficient in that it requires duplicative discovery and, in all likelihood, duplicative discovery disputes.[108]

C. Miscellaneous Additional Clauses

Rather than belabor the analysis, this section will list briefly other contract terms that an institutional defendant might consider adding to its wish list. All are provisions that can be chosen during the litigation process either by default or by contract, and all have an arguable efficiency benefit to the court system.

1. No Appeal

Part of the attraction of arbitration is its trial-stage finality. Arbitral awards can be reviewed only under the most limited circumstances, hastening the final disposition of the dispute. [109] In addition to speed, lack of appeal limits the potential for unfavorable precedent that would apply to cases more generally. By contracting to arbitrate, parties are essentially contracting out of the right to appeal. Could an explicit provision waiving the right to appeal be made part of a predispute contract?[110]

Lack of appeal is certainly available by post-dispute default. Just as a jury can be waived if a party fails to make a timely request, an appeal can be waived

106. Miller, *supra* note 92, at 486.

107. Anderson, *supra* note 87, at 726.

108. *See* Paul Carrington, *Recent Efforts to Change Discovery Rules: Advice for Draftsmen of Rules for State Courts*, 9 KAN. J.L. & PUB. POL'Y 456, 468 (2000) (noting that "the diseconomies of redundant discovery ought to be avoided if possible"). *See also* Marcus, *supra* note 92, at 496.

109. 9 U.S.C. § 10 (2000); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 932 (10th Cir. 2001) (explaining standards for vacating an award).

110. Whether an institutional party would want to bargain for such a provision is another question. Although prohibiting a losing plaintiff from appealing would help the institution, it might want to be able to launch its own appeal. Recent research by Professors Eisenberg, Schwab, and Clermont indicates that defendants in federal court have a significant advantage on appeal. *See* Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547 (2003); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ From Negotiable Instruments*, 2002 U. ILL. L. REV. 947 [hereinafter Clermont & Eisenberg, *Plaintiphobia*]. It would also present an interesting issue if the trial court refused to enforce parts of the parties' contractual design. Could the unhappy drafter appeal or otherwise review *that* decision?

by failure to comply with appellate deadlines.[111] Appeal is not generally the norm. For litigated cases (disposed of through trial or dispositive motion), the appeal rate is far less than half.[112] Appeal can also be foregone by agreement. Lack of appeal is a central feature of most settlements. Even defendants in criminal cases may agree to appeal waivers as part of the plea bargaining process.[113] In Europe, parties can agree to "exclusion agreements" that effectively eliminate the right to appeal.[114]

An efficiency argument can also be made for eliminating appeals. The courts of appeal themselves have a heavy case load and perceive their time as limited. In addition, a reversal on appeal might lead to a remand for new trial, thus adding to the work load of the trial courts. In certain types of disputes, the courts themselves have advocated limiting the availability of appeal in the name of efficiency.[115]

2. *Limited Discovery*

The cost of discovery is often cited by institutional defendants as a problem with the court system and a reason for choosing arbitration. Discovery could be limited by default. Discovery is, after all, party-initiated and parties can choose to limit their discovery.[116] Discovery limits can also be chosen by contract. During litigation, Rule 29 allows the parties by written stipulation to "modify . . . procedures governing or limitations placed upon discovery."[117] Further, Rule 26 requires a discovery planning conference, and notes that the conference should include consideration of whether discovery should be limited to particular issues, whether changes should be made in the limitations on discovery, and whether other limitations should be imposed.[118]

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111. *See, e.g.*, FED. R. APP. P. 4.

112. Clermont & Eisenberg, *Plaintiphobia*, *supra* note 110, at 951, 967.

113. Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 U.C.L.A. L. REV. 113, 115, 147-48 (1999).

114. *See* Kenneth M. Curtin, *An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards*, 15 OHIO ST. J. ON DISP. RESOL. 337, 360-61 (2000) (arguing that parties may contractually modify their appeal rights in arbitration to decrease but not to increase the scope of review). The federal courts of appeal are split on the issue, with some favoring the contractual provisions based on party autonomy and some rejecting contracts that expand appellate rights as threatening the integrity of the arbitral process. *Id.* at 356-60.

115. Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 605-06 (1985). They have also been cutting back on judicial time spent on existing appeals and limiting precedent through nonpublication of opinions. *See* Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002); William M. Richman & William L. Reynolds, *Elitism, Expediency and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996).

116. Empirical research has consistently found that in most cases the amount of discovery done is quite modest. *See* James S. Kakalik, *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 621-22 (1998); Thomas E. Willging, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 540 (1998).

117. FED. R. CIV. P. 29.

118. FED. R. CIV. P. 26(f). *See also* FED. R. CIV. P. 16(c)(6) (suggesting pretrial order regarding the control and scheduling of discovery).

Limits on discovery are an increasingly common feature of litigation. Many systems' rules of procedure place numerical limits or time limits on discovery.[119] Limiting the quantity of discovery and the duration of discovery could also be characterized as more efficient in the sense that it saves time within particular lawsuits.

3. Modification of the Rules of Evidence

Many of the rules of evidence are designed for jury trials, and their intent is to keep information from the jury that jurors might misinterpret or give too much weight. Bench trials, on the other hand, relax the rules of evidence. A judge serving as trier of fact can admit improper evidence and, as long as she does not specifically rely on that evidence, will be presumed to have disregarded it. Since this article assumes that the contract drafter will have provided for waiver of a jury, the relaxation of evidentiary rules might also be something desired for efficiency's sake. There might even be particular rules that a party would want to override.

At trial, a party can easily waive the impact of most rules of evidence simply by failing to object. In fact, the timing of evidentiary objections (and hence the timing of waiver) has been moved forward in many jurisdictions by pretrial rules that require advance exchange of exhibits and objections.[120] A contractual clause regarding evidence rules, either generally stating that the strict rules of evidence will not apply, or modifying particular rules, would simply move the timing up even further.[121]

Wigmore's treatise on evidence bemoans the fact that "courts have not directly confronted the tension between the values of party autonomy and factfinding reliability,"[122] and what case law exists is evenly split.[123] While Wigmore "was prepared, within broad limits, to accept agreements that might undermine the accuracy of the fact-finding process merely because the parties had agreed to a certain regimen of proof," Professor Tillers, the 1985 reviser, welcomed limits on party autonomy based on "an old-fashioned belief that the forms of justice should not be bartered and sold and since, in addition, we have grave doubts as to

119. *See, e.g.*, FED. R. CIV. P. 30(a)(2)(A); 30(d)(2) (limiting number and duration of depositions); 33 (limiting number of interrogatories); TEX. R. CIV. P. 190.1-5 (creating discovery levels that limit use of devices and time for discovery).

120. *See, e.g.*, FED. R. CIV. P. 26(a)(3).

121. Such modification is apparently possible. *See* David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Influence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1086 n.5 (2002) (citing JOHN KOBAYASHI, *Too Little, Too Late: Use and Abuse of Innocuous Yet Dangerous Evidentiary Doctrines*, in 2 ALI-ABA COURSE OF STUDY: TRIAL EVIDENCE, CIVIL PRACTICE, AND EFFECTIVE LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 1127, 1141-45 (1991)); Note, *Contracts to Alter the Rules of Evidence*, 46 HARV. L. REV. 138 (1932) (stating that "application of the 'arbitrary' rules of evidence to litigation involving modern business has provoked widespread criticism"). To the extent that certain rules of evidence are designed to protect the witnesses rather than the parties, modification of those rules might be beyond the power of the contracting future litigants.

122. JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 563 n.2 (Peter Tillers rev. 1985).

123. *See generally id.* § 7a.

whether almost any agreement concerning evidentiary matters entered into before any dispute has arisen is likely to be substantively fair."[124]

4. Time Limits on the Presentation of Evidence

The amount of time that a party will take to present his case is largely under the party's control. A time limit, therefore, can be accomplished through default. In an actual trial, for example, a party gives up the right to present evidence for *two* weeks by presenting it for only *one* week and resting its case. In arbitration, the governing rules often place time limits on the presentation of evidence,[125] and so by contracting to arbitrate, parties have contracted for time limits. Time limits are also an existing part of the courts' current options. Judges are encouraged in these managerial times to enter an order "establishing a reasonable limit on the time allowed for presenting evidence."[126] Such a degree of control, which also includes the power to order a party to present evidence early in the trial on a potentially dispositive issue, is intended to increase trial efficiency. The designer trial would change only the timing of the decision, and put it in the hands of the parties rather than the presiding judge.[127]

D. Where Are We Headed?

A number of forces have changed and are changing the face of dispute resolution in the United States: the cost of formal proceedings,[128] distrust of the jury, dislike for discovery, respect for party autonomy, appreciation of alternative devices, and, for some, an antipathy for government regulation of any kind.[129] So far, most of the changes have moved disputes out of courts and into other venues: mediation, arbitration, dispute centers, and administrative agencies.[130] Some changes, however, have already begun to affect court behavior. The Vanishing Trial data show that a larger percentage of cases are being decided on pre-trial

124. *Id.* at 562-63.

125. For example, under the rules of procedure of the National Arbitration Forum, even disputes exceeding $30,000 are limited to 180 minutes unless additional fees are paid. Smaller cases get even less time, with the smallest scheduled for only an hour altogether. National Arbitration Forum, *Code of Procedure*, Rule 34(B), *available at* http://www.arb-forum.com/programs/code_new/part5.asp (last visited Mar. 5, 2006).

126. FED. R. CIV. P. 16(c)(15).

127. *See also* Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 ARIZ. L. REV. 663 (1993).

128. *See* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 U.C.L.A. L. REV. 1, 62-63 (1996).

129. *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 517-20 (2004); Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1 (2004); John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1 (1998); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted, or "The Law of ADR,"* 19 FLA. ST. L. REV. 1 (1991); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Friedman, *supra* note 8, at 703.

130. *See* Resnik, *Morphing*, *supra* note 49.

motions.[131] Judges have been encouraged to emphasize speed and cost control, and to view their job as disposing of cases rather than as applying the law. By putting a premium on efficiency and autonomy, many judges decry a trial as a failure and strive above all to move the parties toward settlement.[132] "Courts have embraced the privatization of public processes, the diminution of transparency, and the decline of regulation."[133]

These same forces have motivated some of the recent changes in procedural rules. For example, the Alternative Dispute Resolution Act's requirement that federal district courts facilitate alternative dispute resolution,[134] the Private Securities Litigation Reform Act's limits on pleadings and discovery,[135] the 1993 amendments to Rule 16 directing judges to promote alternative dispute resolution,[136] the 2000 amendments to the discovery rules that cut back on automatic initial disclosure and limited the scope of relevance,[137] the 2003 amendments to the class action rule,[138] and the Class Action Fairness Act[139] have all attempted to reduce litigation costs and modify some of the aspects of procedure most disliked by the business community.[140] For a while, the Advisory Committee explored the possibility of "Simplified Rules" of procedure for trials seeking monetary damages of less than $50,000.[141] Attempts to limit the scope of the Federal Arbitration Act, meanwhile, went nowhere, and companies continue to write contracts requiring binding arbitration.[142]

The next step could be a combination of arbitration's ability to customize procedure and the courts' growing receptiveness to limits on process. This article has mentioned only a few of the most obvious ways in which litigants might want to design their own processes. Other designs could be drafted as well, and they could be better tailored by a repeat player who can accurately predict what its future disputes will look like.[143] If enforceable, such agreements could also be designed on a post-dispute basis by litigants with more equal bargaining power.[144]

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131. Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004).

132. Patrick Higginbotham, *So Why Do We Still Call Them Trial Courts?*, 55 SMU L. REV. 1405 (2002) (examining the declining use of trials); Resnik, *Morphing*, *supra* note 49, at 811.

133. Resnik, *Morphing*, *supra* note 49, at 824.

134. *See* 28 U.S.C. §§ 471-482 (2000).

135. 15 U.S.C. § 77z-1 (2000).

136. FED. R. CIV. P. 16(c)(9).

137. FED. R. CIV. P. 26(a) & (b).

138. FED. R. CIV. P. 23.

139. Pub. L. No. 109-2, 119 Stat. 4 (codified in 28 U.S.C.).

140. Judge Weinstein argues that the trend toward privatization of dispute resolution "must be put in the context of a variety of recent procedural and substantive modifications designed to limit plaintiffs' access to the courts." Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 257 (1996).

141. Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1797 (2002).

142. Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 HARV. J. ON LEGIS. 281, 292-98 (2002) (discussing unsuccessful legislative efforts to limit the use of arbitration clauses in adhesion contracts).

143. For example, much of the law regarding pre-dispute agreements to alter the rules of evidence arises out of insurance contracts which stipulate that certain types of proof were required to establish the insured's right to recover. Courts were split on whether to enforce such agreements based on

This article has looked at the contractual modifications one at a time, and concluded that a number of them might be enforced based on the reasoning of the arbitration and jury waiver cases. However, the hypothetical contract with which the article began combined them, allowing the parties to make for themselves, in advance, a number of decisions that taken together privatize the public system in significant ways.[145] Will the courts be as receptive to a package of contractual decisions made for them by the parties?

III. THE LIMITS OF DESIGN

The implications of the Designer Trial are complex, because the public court system serves both private and public functions. As Professor Landes and Professor Posner demonstrated years ago, courts have dual roles.[146] One role is to provide a private service—dispute resolution. In serving this function, the courts react to litigants who have requested their help by processing the claims and defenses, assisting in settling the controversy, and making available a mechanism to resolve the dispute and enforce the result if agreement is not forthcoming.[147] Under this view, courts are serving the needs of private parties. As a result, they should honor the autonomy of those parties in making decisions about the most efficient, private method of reaching a quality solution. Settlements are also favored because they end disputes and "reestablish order more quickly and less disruptively than adjudication."[148]

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concepts of party autonomy, or to reject them based on public policy concerns. *See* WIGMORE, *supra* note 121, §7a.

144. One could even imagine situations in which pre-dispute agreements could be made in the context of criminal law. In India, for example, there is a system of "anticipatory bail" in which a person who believes he or she will be arrested can go in advance to court and apply in advance for bail. *See Know Your Law: Anticipatory Bail, available at* http://www.ourkarnataka.com/Articles/law/anticipatory-bail.htm (last visited Mar. 8, 2006).

145. When I first began working on this article, I worried that I was being unduly paranoid about the possibility of contract jurisprudence spilling over from arbitration to litigation. Just as this article was going to print, however, a number of new pieces advocating contractual procedure modifications appeared on the Social Science Research Network. *See* Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV.—(2007) (forthcoming), *available at* http://ssrn.com/abstract=888221 (arguing for post-dispute bargaining) (last visited May 12, 2006); Henry S. Noyes, *If You (Re)Build It They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image* (Feb. 2006), *available at* http://ssrn.com/abstract=891301 (arguing in favor of enforcing all contractual modifications not prohibited by Congress) (last visisted May 12, 2006); Robert E. Scott & George G. Triantis, *Principles of Contract Design*, 115 YALE L.J. 814 (2006), *available at* http://ssrn.com/abstract=722263 (arguing for contractual modifications of burdens and standards of proof) (last visited May 12, 2006).

146. William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979).

147. This view of litigation's "primary mission" as dispute resolution is reflected in the writings of Professors Miller and Marcus on discovery secrecy. *See* Miller, *supra* note 92, at 431; Marcus, *supra* note 92, at 468. *See also* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (arguing that courts are best suited to resolve private disputes between private parties).

148. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2623 n.20 (1995).

The courts' second role is to produce public goods[149] and serve public functions.[150] For example, courts create precedents and legal rules. The public processes of courts provide an opportunity for public debate about and the development of social norms.[151] The resulting legal regulation "enables economic formation and transactions, deters health and safety hazards, compensates injuries, [and] protects basic civil rights."[152] For this lawmaking purpose, the government-created rules of procedure represent the rulemakers' assessment of the best way to achieve reliable application of law to fact without unnecessary expense or delay. In addition to legal rules, courts provide the public with information about court processes,[153] information about the nature of disputes and the facts underlying those disputes, and information about dispute outcomes.[154]

In addition to functional public benefits, courts serve as important cultural icons. "Trials are more than a forum for the objective adjudication of contested facts. . . . They are rituals—one of the few in our secular, heterogenous society, that are open to all."[155] This ritual legitimizes legal authority,[156] and "subsidizes a judicial authority that is available for future litigants."[157] It is important that our court system is (or at least aspires to be) visibly egalitarian, providing opportunities for parties to express themselves, and treating them with respect.[158] The government-created rules of procedure represent, in this symbolic sense, the system's best efforts to find a correct balance between fairness and efficiency, and to pro-

149. "Economists define a public good as a beneficial product that cannot be provided to one consumer without making it available to all (or at least many others). The textbook example is a lighthouse: if one shipper erects a lighthouse, she cannot prevent other ships navigating the same waters from using it for free." *Id.* at 2623.

150. Even the courts' private role has a public component. It is in society's interest that disputes be peacefully resolved according to predictable rules of behavior, and so courts are publicly created and funded.

151. Professor Fiss is probably the best known proponent of this public conception of the role of courts. *See* Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979) ("[C]ourts exist to give meaning to our public values, not to resolve disputes.").

152. 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. OF CONF. RES. (forthcoming 2006) (manuscript at 21, on file with authors). When the government is a litigant, the case outcome itself may well have a direct impact on members of the public. It is difficult to draw a clear line between disputes that are purely private and those that are public. For example, modern product liability suits "are 'private' actions for damages, but given the increasingly regulatory tinge of much modern tort law, they have implications for the public." Marcus, *supra* note 92, at 469.

153. *See* Resnik, *Procedure*, *supra* note 41, at 623-24. Public scrutiny of the court system is an important reason for the traditional presumption that court processes must be open. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

154. Luban, *supra* note 148, at 2625 ("[T]he discovery and publicizing of facts, which may subsequently be used by political actors, ordinary citizens, or other agents in the legal system (litigants as well as lawyers), is a public good created by adjudication"). This function of the court system is sometimes referred to as its educational role. *See, e.g.*, Friedman, *supra* note 8, at 689 ("[I]nsofar as the "trial" did exist, it served a function that the legal system no longer cares to fulfill, at least not in the traditional way. This function was a didactic or theatrical or educational function.").

155. Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEGAL STUD. 627, 629 (2004).

156. CHASE, *supra* note 9, at 119-22.

157. Luban, *supra* note 148, at 2625.

158. CHASE, *supra* note 9, at 52, 60, 119-22.

vide facially equal opportunities for all litigants. Professor Ackerman also suggests that the lack of public trials may decrease social capital and the communitarian values of America.[159]

The system's dual identities create conflicting norms for decisions about whether courts should enforce contracts for customized litigation. If one views the courts as merely resolving private disputes, there is a strong reason to allow private parties to tweak the process. Their contract, seen as a private matter, embodies the consent of every affected party. The primary issue for the court would be assuring meaningful assent to the contract's terms. If one views the courts as providing public goods, however, a contract between the litigants affects members of the community, and "the public" has not signed off on the contract either directly or by voting for its drafters.

It is not possible to decide enforcement by categorizing particular procedural components as "private" (easy to contract for) or "public" (requiring greater scrutiny), because most features of civil procedure exist for both reasons. Most procedural rules function both to resolve a particular dispute for the private litigants and to assure accurate enforcement of legal rules for public regulatory reasons. In doing so, courts try to strike an adversarial balance between the parties. For example, pleadings rules serve the parties by requiring fair notice of claims and defenses, and they serve the public by establishing the threshold for using the state's powers to assert a claim. Discovery rules serve the parties by providing information needed for trial and by governing party costs. They serve the public by making information available for more accurate outcomes and limiting the cost of the judicial system. Joinder rules serve the parties by allowing efficient use of the litigants' resources and serve the public by allowing efficient use of the courts' resources. Juries serve the parties by resolving contested issues of fact necessary to decide the dispute, and they serve the public by injecting democratic citizen participation into the formulation and application of the law. Appeals serve the parties by correcting errors in the particular case and the public by providing precedent to govern future behavior and future lawsuits. The transparency of all of these processes serves the educational and symbolic values discussed above.

Enforcement of a contract that makes a package of procedural choices would also work dramatic changes in the role of the trial judge. Under the Federal Rules of Civil Procedure and their state counterparts, judges have an enormous amount of discretion. "With their flexible, equity-based approach aimed at diminishing formalism, these rules put trial judges front and center and endowed them with a good deal of discretion to tailor processes to the circumstances of a particular case."[160] During the pre-trial phase, judges have considerable discretion in managing the lawsuit, in shaping the scope of claims and parties, in allowing amendments to the pleadings, in making decisions about discovery relevance and burden, in ordering ADR, and the like. Judges may also allow trial by jury even for a party who has waived that right by failing to demand one on time.[161] During the trial itself, the judge has discretion regarding the number of jurors, the order of trial (including possible bifurcation), the amount of time allocated for proof, and

159. *See* Robert M. Ackerman, *Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America's Social Capital*, 2006 J. DISP. RESOL. 165 .

160. Resnik, *Morphing*, *supra* note 49, at 805.

161. FED. R. CIV. P. 39(b).

the form of the jury charge.[162] The evidence rules also provide the judge with substantial discretion, including discretion to present evidence without the consent of the parties.[163]

Imagine instead a situation in which the judge was bound by the parties' contract. Enforcing jury waivers actually increases the judge's power; enforcing a whole menu of procedures limits it. The forum and applicable law were selected by the parties; joinder and class actions would be prohibited; the quantity of discovery and its time period would be set; confidentiality orders would be agreed to; the length of the trial would be set; the jury would be unavailable, etc. Although certain discretionary authority would inevitably remain, designer trial contracts could remove from judges the power to make important decisions regarding the management and determination of the case. Among other things, it would limit the judge's discretion to exercise discretion to protect weaker parties.[164]

Should courts, then, enforce contracts for process? The answer might be an easy "yes" if we could be sure that the provisions were genuinely bargained for and: 1) the parties had equal bargaining power; 2) the dispute was entirely between private parties; 3) the outcome of the dispute would affect only those parties; 4) the courts were not asked to adopt procedures that would take time and resources away from other court business; and 5) the process chosen was not an affront to the dignity of the court. In such a situation, the private role of the courts dominates and party autonomy could be given great weight without damage to other values.

Most situations will be much murkier and, as a result, contracts for process should not be automatically entitled to specific performance. As a creature of equity, specific performance is within the discretion of the court. As such, it should not be granted if the act that would be compelled is contrary to public policy.[165] Therefore, the trial court should scrutinize the provisions, severally and as a group, to determine their probable effect. In providing content to "public policy" in this context, the court should not be limited to the kind of extreme situations that render a contract "unconscionable." Instead, the question should be whether enforcement of the contract would jeopardize the courts' ability to safeguard the public interest. More specifically, the court should consider the following:

- whether the parties agreed to the terms knowingly, voluntarily, and intelligently;[166]

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162. *See* FED. R. CIV. P. 42 (trial); 43 (time allocation); 48 (jurors); 49 (jury charge).

163. *See, e.g.*, FED. R. EVID. 201(c) (court may take judicial notice); 614 (court may call and interrogate witnesses); 706 (court may appoint expert witnesses).

164. Weinstein, *supra* note 140, at 260.

165. *See* RESTATEMENT (SECOND) CONTRACTS §§ 357, 365 (1981).

166. In considering this issue, the courts should *not* employ a presumption in favor of validity like the presumption in favor of arbitration under the Federal Arbitration Act. That presumption stems from the Supreme Court's interpretation of the FAA itself, and does not apply to litigation. Therefore, courts should not rely on precedent under that Act finding assent merely because of the existence of legible contract language. They could, however, employ insight from empirical research regarding things like consumer understanding of contract terms in assuring themselves that assent to the terms was meaningful. *See* Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233 (2002) (reporting that a high percentage of literate adults are unable to extract relevant information from form contracts).

- whether the parties' actual dispute is the type they contemplated at the time of contracting;
- the importance of developing a body of public outcomes and case precedent in the particular area of the law[167] and the importance of the jury's participation in instantiating the values involved;[168]
- public interest in the subject matter of the dispute;[169]
- the impact of the contract's terms on the ability of the plaintiff to meet the burden of proof and the defendant to present a defense, including the ability to gather information and the opportunity to present it to the finder of fact;
- the comparative impact of the contract terms on the parties;
- the probable impact of the contract on the particular case's cost in terms of time and money;
- the impact on this court's docket and systemic judicial efficiency more generally; and
  - the extent to which the chosen process protects the litigants' dignity and ability to be heard.

Collectively, these factors seek to protect the parties' right of self-determination, the development of legal rules, the educational and symbolic functions of the courts, the accuracy of case outcomes, and the affordability of court processes.[170] Before a contract for a customized trial should be enforced, the party seeking enforcement must demonstrate that the factors above weigh strongly in favor of the contractual procedures. The normative and political values supporting public adjudication[171] cannot be bargained away without the involvement of anyone representing the public interest. The court, by carefully analyzing the contract's effect, provides that public check on the private deal.

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167. Professor Hadfield's discussion of the way the objectives for the operation of the legal system vary depending on the kind of case involved can be quite helpful here. *See* Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1276 (2005).

168. *See* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1274 (2005) ("There is no formula that will yield the right number or percentage of trials. But if we want a legal system in which judges and juries devise public standards and assess accountability, particularly that of powerful actors, we need enough trials to do that job.").

169. This would include factors such as whether the government is a party; whether the case involves issues of public health or safety; whether other suits regarding the same subject are pending or likely to be filed; and whether legitimate privacy interests would be threatened by public disclosure. In addition, no court record should be sealed unless the requirements for post-dispute sealing are met. *See* discussion *supra* Part II.B, Confidentiality.

170. Different combinations of factors will be relevant depending on the terms of the contract and the identity of the parties.

171. Professor Resnik summarizes these beliefs: "that the state is the appropriate central regulator of conduct, that norm enforcement through transparent decisionmaking by state-empowered judges is desirable, that public resources ought to be spent upon individual complaints of alleged failures to comply with legal obligations, that litigants ought to be provided with opportunities to present proofs and reasoned arguments, that the power of adjudicators can be controlled by obliging them to rely on facts adduced on the record and to perform some of their duties in public, and that legitimate judgments thus result." Resnik, *Procedure*, *supra* note 41, at 623-24.

IV. CONCLUSION

Dispute resolution, including the part of it represented by the public court system, is changing rapidly. Both public and private systems must respond to the needs of disputing parties and the public at large. As the government monopoly on dispute resolution weakens, it is tempting to change the court system to help retain its market share, as it is important for public adjudication to be the dominant player in creating and enforcing social norms. While the public system can and should be flexible, it should not give up its distinctive values in an effort to compete with private alternatives. Litigation may draw on lessons learned in alternative methods of dispute resolution; ADR, in turn, may draw on lessons learned from centuries of experience with traditional litigation. Decisions about procedure should not, however, be made irrevocably based on pre-dispute bargaining power, behind a veil of ignorance, by parties considering only themselves.