

Customized Litigation: The Case for Making Civil Procedure Negotiable

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Abstract

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

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Introduction

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

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

This Article argues for a fundamentally different conception of the rules governing litigation. I argue that the current set of procedural rules should be treated as default rules, rather than as nonnegotiable parameters. My thesis is not that our rules of civil procedure do not work. The current system of litigation may work well for some disputants, but the system is not ideally designed for *every* disputant in *every* context. And the market indicators available to us—for example, the rates at which disputants opt to pursue traditional litigation through to completion—bear this out.² If litigants mutually want to

¹ HENRY FORD, *MY LIFE AND WORK* 72 (Arno Press 1973) (1922).

² See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters*

change the shape of their litigation, as long as the modifications do not disrupt the fundamental procedural criteria described below, we ought to let them have their procedural way.

Consider modern litigants' experiences in the following three scenarios:

Scenario One. Two businesses enter into a complex agreement to launch a joint venture that will span dozens of states. They wisely anticipate the possibility that a dispute may arise at some point regarding the implementation of the joint venture, and they both would like to preidentify the venue in which any future disputes will be adjudicated. They also would prefer to specify ahead of time the set of substantive laws to be applied in adjudicating any future dispute, and they mutually would prefer for any such dispute to be heard by a judge, rather than by a jury. Can these parties enter an agreement that would provide the litigation experience they seek? Broadly speaking, yes.³

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

Scenario Three. Two former business partners are locked in a bitter dispute that already involves claims and counterclaims alleging breach of contract and fraud. Both litigants fear that the costs and the scope of the litigation will spiral out of control. They would like to enter a binding agreement that caps the scope of the litigation, so that neither can engage in any further joinder. They would like a guarantee that the court will enforce their mutually established boundaries

in *Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) (noting that the civil trial rate in federal courts dropped from 11.5% in 1962 to 1.8% in 2002).

³ As I describe more fully in Part III.A, *infra*, our current system enforces certain kinds of contractual, predispute customization agreements such as these.

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

on the scope of discovery. The litigants anticipate that some of the rules of evidence will unnecessarily prolong the trial, so they mutually would prefer to conduct the litigation under a more relaxed set of evidentiary standards. They also want finality and would like to limit, or even eliminate, the prospect of postjudgment appeal. Can *these* litigants enter agreements that create the litigation experience they seek? No.

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

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

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

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

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

I. Opportunities to Customize Litigation

Mechanisms by which disputants arrive at resolution have almost limitless variations. Even within the narrow category of dispute reso-

⁵ For more on the limits of legitimate customization, see *infra* Part IV.

lution mechanisms referred to as litigation, one sees tremendous potential variation on a range of different questions. Virtually every topic in an introductory civil procedure course describes some aspect of litigation that our system of justice handles one way, but which one could imagine being handled in some other way by some other court system. How is an action commenced? Who sets the scope of the dispute, and how? In what forum must the litigation take place? What evidence is considered, and how is it gathered? On what basis are decisions made? Who makes the decisions? What effect does a decision have on the litigants? What effect does a decision have on nonlitigants? And so on.⁶

Each of these questions has one or more answers in our court systems, but a civil procedure course must spend time exploring them precisely because the answers are not self-evident.⁷ We have subsystems for joinder, for discovery, for dispositive motions, for evidence, for appeals, and for dozens of other issues critical to the functioning of our litigation system. We have designed each of these subsystems in the best way we can currently think to design them. Each looks different now than it did in some previous version of our court system,⁸ and each looks different from the system in place in some other country's court system. No one would imagine that our current version of the rules of litigation have now, finally, reached a state of immutable perfection. Virtually every year, we make some revisions to the procedures in place in federal courts, and a similar pattern exists in the states.⁹ We will continue to amend the rules of adjudication as we learn more about what methods best address our shared interests in the judicial system.

⁶ For an overview of the relationship between the procedural components of litigation and other mechanisms of dispute resolution, see Jeffrey R. Seul, *Litigation as a Dispute Resolution Alternative*, in THE HANDBOOK OF DISPUTE RESOLUTION 336, 336–57 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

⁷ Virtually the entire body of literature falling under the umbrella label “comparative civil procedure” serves as an illustration of this point. In the global community, one sees variations on virtually every aspect of procedure. See generally MAURO CAPPELETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* (1989); MIRJAN DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986); ARTHUR TAYLOR VON MEHREN, *LAW IN THE UNITED STATES: A GENERAL AND COMPARATIVE VIEW* (1989); *LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN* (James A.R. Nafziger & Symeon C. Symeonides eds., 2002).

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

⁹ See Carl Tobias, *The Past and Future of the Federal Rules in State Courts*, 3 NEV. L.J. 400, 402–03 (2002).

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

A. Joinder

Certain litigants might reasonably prefer to have a different set of rules regarding the scope of their litigation. The Federal Rules of Civil Procedure and virtually every state procedural system present the opportunity for liberal joinder of both claims and parties.¹⁰ One can imagine circumstances in which the parties might mutually fear a joinder arms race—a piece of litigation that explodes into a mess of parties and claims. In some cases, permissive joinder resembles a prisoner's dilemma,¹¹ with the act of joining a claim or a party roughly resembling “defection” in the well-known game theoretic construct.¹² One way out of a prisoner's dilemma, of course, is to create a mechanism for public, mutual, binding commitments, so that neither side is able to defect nor fears defection from the other side. What if litigants wanted to preclude permissive joinder by “freezing” the scope of a piece of litigation at some very early point in time?

¹⁰ See FED. R. CIV. P. 18, 20.

¹¹ The prisoner's dilemma involves the following scenario:

Two prisoners, held incommunicado, are charged with the same crime. They can be convicted only if either confesses. Further, if only one confesses, he is set free for having turned state's evidence and is given a reward to boot. The prisoner who has held out is convicted on the strength of the other's testimony and is given a more severe sentence than if he had also confessed. It is in the interest of each to confess whatever the other does. But it is in their collective interest to hold out.

Orley Ashenfelter & David Bloom, *Lawyers as Agents of the Devil in a Prisoner's Dilemma Game* i (Princeton Univ. Indus. Relations Section, Working Paper No. 270, 1990) (citation omitted).

¹² For an interesting application of the prisoner's dilemma to basic civil litigation, see *id.* at 17–18 (concluding that the decision to hire a lawyer constitutes a “defection” in prisoner's dilemma terms because outcomes produced by two unrepresented parties are statistically indistinguishable from those in which both parties had lawyers, except for the attorneys' fees).

The current rules provide no reliable mechanism for parties to assure themselves early on that the scope of litigation has been (and will remain) contained. Indeed, in modern litigation, parties routinely change the scope of their claims or defenses. Federal Rule 15 routinely permits formal amendment even well after the commencement of the litigation, indicating that “leave [to amend] shall be freely given when justice so requires.”¹³ Under the “relation back” doctrine, added claims or defenses may even be treated as if they were part of the original pleadings, so that even the statute of limitations does not act as a complete bar.¹⁴ In fact, even at trial, the rules contemplate that issues that were never previously raised will *still* be treated as if they had been in issue all along, unless the opposing party objects.¹⁵ Even if an opposing party objects, however, the court will permit the new issue or evidence to be introduced, unless the objecting party can demonstrate “prejudice.”¹⁶

One can imagine why litigants might want courts to enforce a mutual agreement *not* to file amended pleadings or to bring about permissive joinder in any other way. One litigator I interviewed in connection with my research for this article indicated that if a reliable mechanism along these lines existed, he could envision “some cases when I would include a proposed, customized joinder limitation in my demand letter to the other side,” before the litigation even began.¹⁷

The strongest objection to the enforcement of such a customized procedural arrangement likely stems from the efficiency argument underlying modern procedure’s liberal joinder policy. One of the strongest motivators for requiring joinder along transactional lines is the (most likely correct) assumption that it is wasteful to permit litigants to bring multiple lawsuits over the same transaction or occurrence. The Federal Rules and most state procedural systems, therefore, provide for compulsory counterclaims and have *res judicata* doctrines that functionally require litigants to raise all claims related to a single transaction in one lawsuit.¹⁸ As to compulsory joinder, therefore, the efficiency rationale is compelling.

Customization limiting permissive joinder, however, raises a different set of issues. If the plaintiff has five completely unrelated

¹³ FED. R. CIV. P. 15(a).

¹⁴ See FED. R. CIV. P. 15(c).

¹⁵ See FED. R. CIV. P. 15(b).

¹⁶ See *id.*; FED. R. CIV. P. 15(c).

¹⁷ Interview with Robert Tsai, Assoc. Professor of Law, Univ. of Or. Sch. of Law, in Eugene, Or. (Jan. 2006).

¹⁸ See FED. R. CIV. P. 13(a).

claims against the same defendant, how much more efficient is it to permit all of the claims to be joined together in one lawsuit?¹⁹ The tendency of courts to hold separate trials in these cases suggests that the opportunities for efficiency are more limited than with compulsory joinder.²⁰ Furthermore, by their very nature, opportunities for permissive joinder are just that—permissive. We do not require litigants to bring unrelated claims together; we merely invite them to do so.²¹ To the extent that they have created a customized procedure in which they have agreed not to do so, why not enforce that agreement?

Some litigants might prefer the wholesale rejection of further joinder I describe in this section. Others might prefer simply to confine joinder in a more modest, predetermined manner. And it is easy to imagine that one or both of the parties in some circumstances might prefer the rules of joinder just as they are. That is the beauty of customization—it would permit litigants to tailor the rules in ways they consider to be mutually advantageous, when such an opportunity arises.

B. Discovery

Many discovery-related circumstances are already fully within the parties' control.²² Yet more room for customization exists, particularly regarding the circumstances in which a court will overturn litigants' private agreements regarding discovery. What if litigants wanted to limit the circumstances in which courts would intervene in the litigants' decisions about how discovery should unfold?

Federal Rule of Civil Procedure 29 provides an example of the kind of judicial intervention contemplated by modern discovery rules. It provides that litigants' agreements with respect to discovery timing are subject to "the approval of the court" if the customization would disrupt a previously adopted calendar or timetable.²³ In the modern era of "managerial" judges, the policy can be understood as an effort to curtail indefinite litigation. Once a modern judge establishes a deadline for dispositive motions, discovery closure, or trial, receiving an extension of time becomes quite difficult. If one envisions courts'

¹⁹ I suspect that one of the bases for suggesting that permissive joinder is more efficient has to do with the likelihood of settlement. In other words, perhaps it is more efficient to *settle* five cases all at once, rather than separately.

²⁰ See FED. R. CIV. P. 42(b).

²¹ See FED. R. CIV. P. 18(a).

²² For a description of the circumstances in which litigants already customize some aspects of discovery practice, see *infra* Part III.B.3.

²³ FED. R. CIV. P. 29(2).

dockets as being cluttered with perpetually neglected cases, then the opposition to extensions is sensible.

In at least some circumstances, however, cases linger on the docket because of haste, rather than the opposite. One litigator I interviewed called this trend toward judicial rejection of joint motions to extend discovery deadlines “the worst, most inefficient, single most annoying thing judges do these days.”²⁴ Many of the procedural hurdles over which litigants must leap are aimed at preparation for adjudication, rather than at facilitating settlement.²⁵ Sometimes, the way to get a case off the docket (if that is the concern driving the tight deadlines) is to give the disputants more time to find nonadjudicative resolutions. In such circumstances, why not permit litigants to customize the calendar? If they both agree that more time would help, why not let them have it? Nothing in the statutory or constitutional structures underlying the courts demands discovery of a particular shape or timing. Mutually acceptable extensions would not create any meaningful burden on nonlitigants, nor would they affect the symbolic or functional public interests associated with the judiciary. If the real concern is the integrity of the court’s docket, perhaps we could allow them to post a “bond” of sorts, so that if the extra time does not produce settlement, some other trigger (financial or time-related) kicks in. In all events, more room exists for litigants to explore mutual customization of discovery devices and deadlines.

A second example of potential customization stems from the prospect that some litigants will have precisely the *opposite* interests of those described above. Some litigants do not want extensions of time. They do not want the court to grant extra interrogatories or extra depositions. Instead, they want true security that discovery will not run amok. If both sides prefer a tight discovery schedule, of course, they are free to craft one under Rule 26(f) and have the judge enter their mutual request as an order pursuant to Rule 16.²⁶ For

²⁴ Interview with Jeffrey Krivis, Mediator & Litigator, in L.A., Cal. (Feb. 2006). I acknowledge the possibility that judges engage in managerial decisions that are simultaneously important *and* unpopular with the targeted litigants. Courts’ dockets cannot be held hostage by litigants who protract litigation through mutual neglect, sloth, or inattention. That some litigants believe judges erred in their exercise of discretion on timing is not evidence that the judges in fact erred. It is evidence, however, that some litigants hold the *perception* that they would be better served by a different treatment of litigation calendars.

²⁵ See Michael Moffitt, *Pleadings in the Age of Settlement*, 80 *IND. L.J.* 727, 757 (2005) (arguing that the timing and structure of modern pleading rules complicate, rather than facilitate, efficient settlement discussions).

²⁶ See *FED. R. CIV. P.* 26(f) (requiring the parties to develop a proposed discovery plan, which includes the proposed scope and timing of discovery); *FED. R. CIV. P.* 16(b) (requiring the

many litigants, this may be sufficient assurance that the discovery will be as quick and as streamlined as they initially negotiated. The problem, however, lies in the prospect that the trial court may (as many do) subsequently grant a motion *by one litigant* to permit discovery beyond that which was mutually negotiated at the outset. “For good cause,” a court may alter the provisions of a scheduling order, and the nonmoving party faces almost impossible odds in having the trial court’s decision to extend or expand discovery reversed on appeal.²⁷

What if the litigants mutually wanted a more binding commitment at the outset of discovery? In Homer’s *Odyssey*, Odysseus so feared that he would be lured by the seductive and disastrous call of the sirens that he instructed his sailors to lash him to the masts (so that he could not turn the boat) and to fill their own ears with wax (so that they would not heed his subsequent requests to take the boat in that direction).²⁸ What if litigants wanted to enter an Odyssean commitment regarding discovery at the outset of litigation?²⁹ Could litigants lash themselves to the mast of a particular set of discovery rules and fill judges’ ears with wax?

Discovery represents such a significant component of modern litigation expenses that one can easily imagine why litigants might want a reliable mechanism for limiting its use.³⁰ A firm and durable ceiling on the availability of discovery would be troublesome if it were *imposed* on litigants, but most of those concerns evaporate if both parties are sophisticated and knowingly entered the agreement at the outset of the litigation.

district judge, after receiving the Rule 26(f) report from the parties, to enter a scheduling order that limits the time to complete discovery).

²⁷ See *Barwick v. Celotex Corp.*, 736 F.2d 946, 954 (4th Cir. 1984) (scheduling orders “are not set in stone, but may be relaxed for good cause, extraordinary circumstances, or in the interest of justice”); see also *O’Connell v. Hyatt Hotels of Puerto Rico*, 357 F.3d 152, 155 (1st Cir. 2004) (contrasting the “good cause” standard of discovery schedule revisions with the “freely given” standard of pleading amendments).

²⁸ HOMER, *THE ODYSSEY* 175 (Edward McCrorie trans., The Johns Hopkins Univ. Press 2004).

²⁹ The idea that one might reasonably seek to preclude certain options that would otherwise be available is well established. See, e.g., JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 168 (2000); JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 36–37 (rev. ed. 1984).

³⁰ For more on discovery costs, see THOMAS E. WILLGING ET AL., *FED. JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES* 14–19 (1997); John D. Shugrue, *Identifying and Combating Discovery Abuse*, 23 *LITIG.*, Winter 1997, at 10, 10; Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 *B.C. L. REV.* 525, 531, 547–53, 575, 584 (1998).

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

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

C. Evidence

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

What if litigants mutually wanted to present evidence in a manner that deviated from the norms established by the Federal Rules of Evidence? One attorney I interviewed in connection with this article described a case in which he and opposing counsel discussed the

question of evidentiary rules in advance of the litigation.³¹ The case involved a contest over the valuation of a particular piece of property in an eminent domain case. Both sides planned to put an expert on the stand to testify as to certain aspects of the property's value, but each expert's testimony would have considerable components that would be nothing more than hearsay. The lawyer and his counterpart agreed *ex ante* that neither would object on the basis of hearsay when either expert was on the stand. The two mutually approached the bench and informed the judge of their private arrangement, and the judge did nothing to stand in the way of the arrangement. In the words of one, "What would have otherwise taken days took no more than a couple of hours of trial time."³² Litigants may have reason to want to customize the rules of evidence.

One trend supporting the view that litigants might mutually disfavor the rules of evidence can be seen in modern arbitration. Arbitrators may (or may not) apply the rules of evidence in adversarial arbitration hearings, depending on the contractual terms negotiated by the disputants themselves.³³ This feature of arbitration is commonly cited as a comparative advantage.³⁴ One attorney I interviewed explained his preference for arbitration's customized evidentiary standards by saying, "The rules of evidence don't actually keep anything from getting in; they just make it take longer to get it in."³⁵

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

³¹ Interview with Maurice Holland, Professor of Law, Univ. of Or. Sch. of Law, in Eugene, Or. (Oct. 2005).

³² *Id.*

³³ 4 AM. JUR. 2D *Alternative Dispute Resolution* § 190 (1995).

³⁴ See, e.g., Alan W. Kowalchuk, *Resolving Intellectual Property Disputes Outside of Court: Using ADR to Take Control of Your Case*, DISP. RESOL. J., May–June 2006, at 28, 30.

³⁵ Telephone Interview with M.J. Tedesco, Attorney at Law, in Cambridge, Mass. (June 2004). In at least one respect, this may overstate the case because one might expect a legally trained arbitrator to handle hearsay (or some other unreliable form of evidence) differently than a lay jury. We might have greater confidence in an "open-season" approach to evidence in arbitration (or in a bench trial) than in a civil jury trial.

Mutually crafted adaptations of the rules of evidence would not change the courts or their functions in any intolerable way. Courts have not engaged in unconstitutional behavior if they permit objectionable, but unobjected-to, evidence to go before a jury. Nothing in a revised set of evidentiary rules would prevent a court from serving the important functions of resolving disputes or articulating the laws relevant to that dispute.³⁶ Efficiency concerns do not stand in the way of customization, because—if anything—adjudicative proceedings with customized evidentiary standards would likely proceed more quickly. Furthermore, customized evidentiary standards hold no prospect of harming nonlitigants.³⁷

Perhaps the best argument against permitting customized evidentiary standards stems from the public's symbolic interest in the functioning of the courts. In short, might it sully the public's good image of the courts if the public somehow found out that the court was permitting hearsay to go before a jury in a given case? I think not, for two reasons. First, I seriously doubt that most casual observers of the court system would be capable of discerning hearsay from permissible testimony.³⁸ Second, it is not clear to me why it would make the *court* look bad, because it was based on the affirmative agreement of the litigants. The public may have a diminished view of one of the litigants—the one ultimately harmed by the agreement to depart from the current evidentiary standards—but that does not argue against permitting the customization.

As with the other aspects of litigation I have described in this section, it is easy to imagine litigants crafting a great number of possible variations on the rules of evidence. Some might dispense with them broadly, and some might carve out only narrow deviations from the current rules.³⁹ And surely some would prefer to proceed through

³⁶ A court's interpretation of substantive laws relevant to a case would not be affected. The only aspect of law articulation that would be curtailed would be the laws of evidence, because those would not be the focus of the litigation.

³⁷ Even the common law preclusion doctrines are structured in a way that would largely accommodate customized litigation. The Restatement (Second) of Judgments, for example, provides that collateral estoppel does not attach in cases in which "[a] new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts." RESTATEMENT (SECOND) OF JUDGMENTS § 28(c)(3) (1980).

³⁸ In fact, if we were confident that jurors were consistently able to sort reliable forms of evidence from unreliable forms of evidence, were unaffected by prejudicial materials, etc., then we would have little need for the Rules of Evidence at all. The Rules' function—keeping certain forms of evidence from being submitted to a jury—presumes that jurors cannot be trusted to do that sorting on their own.

³⁹ For example, I can imagine a scenario in which litigants each wanted to present medical

litigation applying the existing rules. If evidentiary standards were treated as default rules, each of these litigants could have his or her way.

D. Appeals

Appeals present a fourth illustrative example of an area of litigation in which litigants might conceivably seek to customize their experience. For evidence that litigants might place value on the ability to limit, *ex ante*, their subsequent opportunities for appeal, one need look no further than modern trends in arbitration. Though arbitration proponents proclaim its virtues on many different levels,⁴⁰ most of the distinctions between arbitration and litigation are lost on the average (or even the sophisticated) arbitration consumer. The one thing proponents are quick to point to, however, is the *finality* arbitration offers because of the extraordinarily limited opportunities for judicial review of arbitral awards.⁴¹ What if litigants wanted similar assurances about the finality of a judgment entered by a trial court?

Our court system makes appellate review available to litigants for a number of reasons. We have an interest in assuring that the litigated outcome was “correct,” according to the relevant legal standards.⁴² We have an interest in making litigants believe that justice has been done. We want trial courts to operate within the rules of the law, and we assume that the prospect of subsequent appellate review encourages trial court judges to behave appropriately. And we value appel-

testimony from an expert witness solely in the form of competing affidavits. Customizable evidentiary standards would permit them to proceed according to their preference.

⁴⁰ Among the frequently claimed advantages are speed, informality, expertise of the decision maker, and cost effectiveness, although the evidence is mixed regarding at least some of these claims. *See, e.g.*, H.R. REP. NO. 97-542, at 13 (1982) (“The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices . . .”), *cited in* *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (reciting arbitration’s simplicity, informality, and expedition); Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C. L. REV. 123, 164–66 (2005) (naming “expertise of the arbitrators” as a primary advantage over litigation, but suggesting that in the securities arbitration context, such expertise may be overstated).

⁴¹ *See* Federal Arbitration Act, 9 U.S.C. § 10 (2000) (describing limited circumstances under which judicial review of arbitral awards is possible).

⁴² Our system assumes that an appellate court, with its ability to focus more narrowly on each legal decision by the trial court, will render a more accurate decision than the previous decision. At some level, of course, Justice Jackson’s observation that “[w]e [the Supreme Court] are not final because we are infallible, but we are infallible only because we are final” holds true. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

late courts' ability to make pronouncements of law that will be both publicly educative and binding on a broader set of courts.

Despite these societal interests, however, we leave the matter of appeals entirely in the hands of individual litigants. We do not *require* appellate courts to review every lower court decision. Indeed, appellate courts are essentially passive bodies, sitting idly until a litigant with appropriate standing invites them into a dispute. The typical litigant's decision to seek review by an appellate court is made after the conclusion of the trial court's work. We permit litigants to bargain over whether they will exercise this right. Indeed, we sometimes *encourage* them not to pursue appeals, through things like appellate mediation programs.⁴³ There is nothing remarkable about the idea that a losing litigant might not raise an appeal.

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

Appellate customization would not run afoul of the constitutional or statutory foundations of the courts. Civil litigants have no constitutional right to appeal,⁴⁴ though virtually all court systems provide at least one opportunity for appeal as of right. Nevertheless, we routinely let litigants waive or bargain away this right. Binding litigation, without the prospect for appeal, would not cause trial courts to exceed their constitutional or statutory authority. The trial court would merely oversee the litigation as usual. I can imagine that litigants might agree not to disclose the no-appeals customization to the trial court, so that the trial court would continue to operate *as if* appellate review were an option. In function, however, customization of litigation would not disrupt the operation of the trial courts in any objectionable manner. One might object that such agreements would strip *appellate* courts of their jurisdiction,⁴⁵ but again, appellate courts' ju-

⁴³ See Gilbert J. Ginsburg, Essay, *The Case for a Mediation Program in the Federal Circuit*, 50 AM. U. L. REV. 1379, 1382–90 (2001) (surveying existing federal appellate court mediation programs).

⁴⁴ See *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (“[A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all.”).

⁴⁵ In some ways, such an argument would parallel some of the arguments made in opposition to enforcing arbitration agreements in earlier times. Arbitration was said to strip courts of their jurisdiction impermissibly. See, e.g., *Allied-Bruce*, 513 U.S. at 270–71 (tracing the historical development of judicial resistance to arbitration to the English courts' hostile treatment of arbitration on the grounds of jurisdictional interference); *Dean Witter Reynolds Inc. v. Byrd*, 470

risdiction relies on parties bringing a case before them. A private customization agreement would not divest courts of their jurisdiction. Instead, it would act as a waiver of the right to appear before that court.

The most potentially troublesome aspect of the prospect of customization of appeals may stem from its effects on the public's interest in hearing appellate courts' pronouncements on the law. Might a limit on appeals result in an inadequate flow of appellate decisions, and thus contribute to an underdeveloped body of law? At some level, this is an empirical question to which no ready answer is available. Taken to an absurd extreme, of course, the public would surely object if the river of Supreme Court petitions for certiorari dried up because of upstream customization. On the other hand, no recent visitor to a law school library's stacks could credibly assert that we are suffering from a dearth of appellate opinions.⁴⁶

Permitting customization of appeals, like all forms of customization, would be no more than a mutual choice by the litigants in a particular dispute. From the Rawlsian position, behind the "veil of ignorance," before the litigation begins, neither party necessarily has reason to believe that *its side* will be the one to suffer from some judicial malfeasance.⁴⁷ Imagine that the plaintiff and defendant each gaze into their respective crystal balls and that each determines that it is equally likely to benefit or to suffer from some appealable trial court error. In that case, at that moment in time, the prospect of an appeal appears to be nothing more than a transaction cost, because the appellate decision would do nothing more than redistribute (at a cost) the endowments the trial court bestowed on the parties. We would not blink an eye at the prospect of litigants settling a case *following* the entry of judgment, before an appeal occurs. Indeed, we spend some

U.S. 213, 220 n.6 (1985) (citing reference in the legislative history of the Federal Arbitration Act to some courts' historical refusal to enforce arbitration agreements on the ground that they "ousted" courts of jurisdiction).

⁴⁶ Cf. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2644 (1995) (suggesting that continued increases in litigation rates and opinion generation risks creating a "Tower of Babel," leaving "no one judge capable of comprehending the entire corpus of federal law").

⁴⁷ See JOHN RAWLS, *A THEORY OF JUSTICE* 118–23 (rev. ed. 1999). "Rawls's thought experiment introduces uncertainty by allowing the decisionmaker to know the distributive consequences of a decision on future citizens—call them *A* and *B*—but denying the decisionmaker the knowledge of whether she herself will occupy *A*'s position or *B*'s position." Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 399 (2001).

public resources trying to encourage them to do precisely that.⁴⁸ Why not allow these parties to agree before litigation that the trial court's decisions will be final? Subject to the constraints articulated in Part IV, we should permit such customization.

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

My purpose in this Part is not to suggest a particular structure for customizing appeals or any other procedural process. What would customized litigation look like? In short, it would look however the litigants wanted it to look.⁴⁹

II. *The Case for Permitting Broad Customization*

Increasing litigants' opportunities for customization would improve the civil justice system in at least three ways. First, customized litigation holds the promise of outcomes that are more just—and more recognized as just—than the current system. Second, treating modern procedural rules as defaults from which parties can mutually negotiate deviations holds the promise of more efficient expenditures of both private and public resources. The third part of my argument for changing the litigation structure stems from the rapid decline in the frequency in which disputants use jury trials to resolve disputes. Although I do not subscribe to the overly romanticized vision some paint of the jury trial system,⁵⁰ I believe that juries play a critical function in

⁴⁸ See *supra* note 43 and accompanying text (describing the availability of appellate court mediation programs).

⁴⁹ In Part IV, *infra*, I describe the parameters of customization. Litigants' options are not as boundless as this phrase might suggest.

⁵⁰ I first encountered the term "litigation romanticism" in the writings of Professor Carrie Menkel-Meadow. See Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 22 (2004); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 20 (2000); Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 605 n.58 (1994); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2669 (1995) [hereinafter Menkel-Meadow, *Whose Dispute Is It?*]; see also Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689, 690 (2004).

our democratic system of justice.⁵¹ Customized litigation would help to preserve and promote those aspects of the modern jury system that are most important. The time has come for litigants to have more choices about how their litigation unfolds.

A. Customization Supports Procedural Justice

A substantial body of research, spanning several decades, demonstrates that disputants care not only about the outcomes they receive, but also about the process(es) that lead to the outcomes of their disputes.⁵² This literature, which falls under the broad umbrella of “procedural justice,” suggests that disputants commonly prefer certain alternatives to litigation, even if those alternatives do not produce more favorable substantive outcomes than litigation.⁵³ In fact, important causal effects seem to run in the opposite direction. “Disputants’ perceptions of the justice provided by a procedure affect their judgments of the distributive justice provided by the outcome”⁵⁴

The lessons of procedural justice research have important implications for the prospect of customized litigation. Evidence suggests that disputants consistently value certain features in a dispute resolution mechanism. For example, they want “voice,” i.e., an opportunity to tell their stories.⁵⁵ Disputants also want fair decision makers and a process that treats each disputant with dignity and respect.⁵⁶ These factors each speak to a feature of a particular process. Another aspect of procedural justice, i.e., another variable in assessing whether disputants view an outcome as fair, is the degree to which the disputants have control over the process itself.⁵⁷ Providing disputants with pro-

⁵¹ See *infra* text accompanying notes 83–85.

⁵² For a survey of this literature, see E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 2 (1988) (“[D]issatisfaction [in the face of a favorable outcome in a social situation] is difficult to understand if it is assumed that people are concerned only about outcomes but is often easily explained if it is assumed that people are concerned about process.”).

⁵³ See, e.g., Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 881–83 (1997) (describing research in which fathers in child custody disputes preferred mediation over litigation, even though they received no better substantive outcomes in mediation).

⁵⁴ Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 817 (2001).

⁵⁵ See *id.*

⁵⁶ See *id.*; see also LIND & TYLER, *supra* note 52, at 214.

⁵⁷ See LIND & TYLER, *supra* note 52, at 94 (“One of the central themes of the Thibaut and Walker research is that procedures that provide high process control for disputants tend to enhance procedural fairness. More recent research has confirmed this general finding.”). Interestingly, some research supports the prospect of an additional benefit to providing disputants with

cess control increases their perception of justice. Customized litigation is a form of process control, suggesting the prospect of increasing procedural justice.

We cannot reasonably expect all forms of customization to equally affect procedural justice and perceptions of fairness. At least two factors could serve to dampen the potential benefits of customization. First, in the litigation context, most of a disputant's activity is conducted through an attorney. The distinction between an agent and a principle almost certainly matters for purposes of gauging potential benefits from procedural justice. There is a limit on how much procedural justice "trickles down" to those who occupy a less prominent role. A procedure that gives a litigant's attorney "voice" surely provides more procedural justice than one that fails to do so. One might expect, however, that the fact that the procedural benefit is focused on the attorney, rather than on the litigant, would dampen the potential benefits.⁵⁸ Therefore, if customization occurs merely as the product of behind-the-scenes negotiations between opposing counsel, the procedural justice argument is weakened. The process control aspects of procedural justice are strongest when the principal is the party exercising control over the process.

A second limit on the capacity of litigation customization to deliver procedural justice depends on the timing of the customization. Modern forms of so-called mandatory arbitration provide the cautionary tale that illustrates this point.⁵⁹ The original picture of arbitra-

the opportunity to exercise control over the process. As Keith Allred explains, "the procedural justice research suggests that when we face a dispute with someone, we will tend to garner that person's trust and cooperation if we ask him or her to recommend a process for dealing with the dispute." Keith Allred, *Relationship Dynamics in Disputes: Replacing Contention with Cooperation*, in THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 6, at 83, 98 n.18.

⁵⁸ See, e.g., Welsh, *supra* note 54, at 838 (arguing that excluding disputants from mediation, as a cost-saving mechanism, decreases perceptions of procedural justice); Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211, 240 (2004) ("[Participants] preferred a process that granted disputants direct control over the presentation of evidence (rather than allowing a representative to do so).").

⁵⁹ See, e.g., Jay Folberg, *Arbitration Ethics—Is California the Future?*, 18 OHIO ST. J. ON DISP. RESOL. 343, 359 (2003) ("[Mandatory arbitration] clauses effectively restrict access to courts and attempt to limit class actions on behalf of claimants, who are unlikely in great numbers to pursue individual arbitration proceedings or obtain lawyers to challenge arbitration clauses."); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 6 (1997) ("[A]lthough theoretically the arbitration is not mandatory, effectively the consumer/employee has no choice but to sacrifice her right to a fair day in court if she wants the job, service or product in question.").

tion—two disputants mutually agreeing to submit an existing dispute to an arbitrator of their choice, applying a mutually negotiated set of arbitral procedures—raises few significant concerns. In the past two decades, however, the tide has shifted dramatically toward enforcing predispute arbitration agreements. Today, it is difficult to purchase a consumer good, accept employment, or receive health care treatment without having been deemed to have consented to a form of arbitration, thereby waiving any right to a trial.⁶⁰ Whatever procedural justice claim arbitration might have had is undermined both by the adhesive manner in which it is commonly imposed on one party, and by the temporal distance between the agreement and its implementation. Broad, anticipatory customization is not what I envision.⁶¹

Perceptions of justice stand to improve, however, if litigation customization provides a role for the actual disputants and is conducted in the context of a specific piece of litigation. Perceptions of justice are important. We ask our courts to play a range of different functions, including clarifying and publicizing laws, resolving disputes, and articulating collective norms.⁶² Courts' ability effectively to perform these functions depends, in large measure, on their ability to occupy a place of legitimacy in the public mind. If courts are, in fact, acting in a legitimate manner, then it is in the interest of democratic governance that the public perceive the courts to be legitimate. Disputants' assessments of procedural justice influence "their compliance with [the] outcome, and their faith in the legitimacy of the institution that offered the procedure."⁶³ Assuring the presence of procedural justice is critical to the judiciary's basic functions, and permitting litigants to have a say in the design of the litigation system holds promise for improving perceptions of procedural justice.

B. Customization Promotes Efficiency

In recent years, many have proposed to change the civil litigation system, citing the need to improve its efficiency. Calls for reform have been broad and loud. For example, in 2005, Robert J. Grey, then-

⁶⁰ See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 637 (1996) ("Large companies such as banks, hospitals, brokerage houses and even pest exterminators are increasingly including mandatory binding arbitration clauses in the fine print contracts they require all customers, employees, franchisees and other little guys to sign.").

⁶¹ For more on the relationship between arbitration and customized litigation, see *infra* Part IV.D.3.

⁶² See *infra* Part IV.B.1.

⁶³ Welsh, *supra* note 54, at 817.

President of the American Bar Association (“ABA”), wrote, “The opportunity to modernize, streamline and provide a more efficient process for resolving disputes can only produce positive results for society and the profession. There are no losers, only winners, in this effort.”⁶⁴ One proposal calls for greater use of timed trials, with each side’s allocated time ticking down every time that side stands to speak or present a witness.⁶⁵ Other proposals are aimed at limiting discovery expenses, at streamlining the jury selection process, or at improving juror comprehension.⁶⁶ Many of these ideas have merit and probably would improve the overall efficiency of the litigation system. They all, however, still assume a single, immutable set of procedures for all disputes.

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

The first two conditions clearly exist in the current system. Most courts see a great variety of disputes and disputants. The same federal district court, for instance, will hear a discrimination claim, a complaint about a hazardous waste cleanup, a patent infringement action, a breach of contract claim between multinational corporations, and a voter rights complaint. The same federal district court will hear cases brought by pro se litigants, by sole practitioners representing litigants

⁶⁴ Robert J. Grey, Jr., *Striving for a Just Solution: Our Work to Improve the Dispute Resolution System Benefits Society and the Profession*, A.B.A. J., July 2005, at 6, 6.

⁶⁵ For a discussion of the legal and practical implications of timed trials, see Martha K. Gooding & Ryan E. Lindsey, *Tempus Fugit: Practical Considerations for Trying a Case Against the Clock*, FED. LAW., Jan. 2006, at 42, 43–45.

⁶⁶ See AMERICAN JURY PROJECT, AM. BAR ASS’N, PRINCIPLES FOR JURIES AND JURY TRIALS 10–20 (2005), <http://www.abanet.org/juryprojectstandards/principles.pdf>; SECTION OF LITIGATION, AM. BAR ASS’N, CIVIL DISCOVERY STANDARDS 1 (rev. 2004), <http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf>.

of modest means, and by corporate counsel for multinational corporations. And under the current system, it will apply identical procedures to each lawsuit.⁶⁷

As I described in Part I, we also have reason to believe that some disputants might sometimes mutually prefer a set of procedural rules that deviates from the current rules—often for reasons related to efficiency.⁶⁸ For example, some litigants might mutually want to dispense entirely with the possibility of any appeals because of the cost and delay they entail. Others might prefer to remove choice from some later stage in the litigation process by entering an Odysseus-like commitment up front.⁶⁹ Parties might prefer to have a hard cap on discovery, a limit on joinder, or even a restriction against raising certain evidentiary objections—all in the name of efficiency. Whatever degree of admiration is due to the drafters of the civil procedure rules—and I personally think we owe them very considerable admiration—even they would not claim that the current procedures are ideal for all disputes. Instead, the current rules represent our best guess at the procedures that will produce the best justice, the best way, for the most cases. We can expect no more of a single set of procedural rules. It stands to reason that litigants might sometimes mutually prefer some other variation on the rules.

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

⁶⁷ In specialized courts, one might credibly argue that these procedures have been tailored to meet the particular dynamics and incentives of that kind of dispute. Perhaps traffic courts have perfectly efficient procedures for processing traffic tickets. Perhaps domestic relations courts have procedures that waste no resources in the adjudication of parental rights claims. Most courts, however, hear a broad array of different cases.

⁶⁸ Not all examples of customization would be driven by parties' mutual interest in an efficient process. At least sometimes—and probably most of the time—opposing litigants would agree on procedural customization because they each see strategic advantage in the proposal. Professor Kirgis described such a possible scenario:

One party might have very high costs involved in producing an important witness, and so want to dodge the hearsay rule. The other party might want more than anything to avoid appeals. They could make trades based on those different interests. The potential for those sorts of trades . . . demonstrate[s] that your proposal is not pie-in-the-sky—that hard-baked trial lawyers would actually agree on post-dispute customization.

E-mail from Paul Kirgis, Professor of Law, St. John's Univ. Sch. of Law, to Michael Moffitt, Assoc. Professor of Law and Assoc. Director, Appropriate Dispute Resolution Center, Univ. of Or. Sch. of Law (May 22, 2006) (on file with author).

⁶⁹ See *supra* notes 28–29 and accompanying text.

If all of the relevant costs were borne exclusively by the litigants themselves,⁷⁰ the equation would be simple, involving only three variables:

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

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

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

In mathematical terms, customization would produce attractive efficiencies for the litigants if $C > C' + N$.⁷¹

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

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

⁷⁰ In Part IV.D, *infra*, I address the concern that customization might cause less efficient expenditures by the courts. In the current section, I focus exclusively on the question of whether the *disputants* would realize any efficiency gains from customized procedures.

⁷¹ For a more detailed treatment of the potential economic efficiencies available to parties considering alternative procedures, see Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 496–501 (2003) (demonstrating algebraically that opposing parties might mutually prefer an alternative set of discovery rules).

Second, one can easily imagine that with experience, one or more procedural variants would gain popularity, decreasing the marginal cost of customization. The investment required to draft a procedural customization from whole cloth is vastly higher than the cost of simply adopting an existing variation by reference. The experience of arbitration agreements is informative in this regard. In theory, every party wishing to include an arbitration agreement may negotiate the precise terms of every aspect of the ensuing arbitration. What most parties do, instead, is incorporate by reference an existing set of publicly available arbitration rules, with perhaps a few modifications or details relevant to their particular dispute. A party's choice to customize a litigation procedure would, with experience, present only marginal transaction costs because of the availability of information about what previous litigants have chosen to customize.⁷²

In at least some circumstances, therefore, litigants would likely discover and codify opportunities for procedural variations that create mutual benefit.⁷³

C. *Saving the Civil Trial (by Changing It?)*

In 2004, Marc Galanter published his long-awaited final report on the "Vanishing Trial,"⁷⁴ and much of the legal community has reacted with alarm. The Vanishing Trial Project was the largest project ever undertaken by the ABA Section on Litigation,⁷⁵ and it has spawned numerous conferences, symposia, and follow-up efforts.⁷⁶ Galanter's data-intensive survey of the landscape of modern litigation, the foun-

⁷² In many respects, this has been the experience of the "public good" represented by corporate law. Much of corporate law is essentially a default rule, from which investors and corporations are free to negotiate deviations, if they are so inclined. Most do not, but the option exists and some standardized variations have developed. See Daniel J.H. Greenwood, *Markets and Democracy: The Illegitimacy of Corporate Law*, 74 UMKC L. REV. 41, 62 (2005) ("Standard corporate law . . . is open to all sorts of unusual arrangements: virtually all of its key requirements are merely default rules, waivable at the option of the individual firm or its participants."). Perhaps the experience will parallel the development of the Uniform Commercial Code, whose provisions have been guided in large part by developments in private commercial practices.

⁷³ A customized procedure is value creating, of course, only if it creates benefits for the litigants *without* merely externalizing costs on others. It would not suffice, for example, for litigants to create rules they favor which intolerably disfavor nondisputants or the public at large. For more on the limits of customization, see *infra* Part IV.

⁷⁴ See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

⁷⁵ Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, LITIG., Winter 2004, at 1, 1.

⁷⁶ See John Lande, *Replace "The Vanishing Trial" with More Helpful Myths*, 23 ALTERNATIVES TO THE HIGH COST OF LITIGATION, INT'L INST. FOR CONFLICT PREVENTION & RESOL. 161, 161 (2005).

dation of the project's report, traced trial rates in federal courts over four decades.⁷⁷ The statistic most cited from these studies shows that the civil trial rate in federal courts dropped from 11.5% in 1962 to 1.8% in 2002.⁷⁸ During the same years, courts witnessed a five-fold increase in cases initiated,⁷⁹ and a dramatic increase in the number of judges⁸⁰ and lawyers.⁸¹ Many have suggested, therefore, that the data shows a more complex picture than that initially suggested by the theme of a "vanishing trial."⁸² Nevertheless, empirical evidence suggests that the judiciary and the litigation process have recently undergone fundamental changes.

Many observers of the legal system view the decline of jury trial rates as unfortunate, with some even treating it as catastrophic. To some observers, the decline in rates of civil trials is most troubling because it means a decrease in the frequency with which juries operate. Building on Alexis de Tocqueville's observation that juries are "political institutions" rather than merely components of the judicial bureaucracy, some fear a decline in the "republican" function of juries—bodies designed to "plac[e] the real direction of society in the hands of the governed."⁸³ Proponents of the jury system also point to the unique capacity of juries to play a socializing role through deliberation and pronouncements of important shared values.⁸⁴ The random composition of juries makes them distinct from any other actors within the political system. They are more diverse than judges, lawmakers, and even private factfinders such as arbitrators. In short, juries may serve a critical democratic function as "the whole community's spokesman,"⁸⁵ and a decline in civil trial rates means fewer opportunities to perform that function.

Others see the decline in civil trial rates as troubling because it signals a move away from the norm-establishing function of trials. Trials are set up as clashes between right and wrong. In most instances,

⁷⁷ See Galanter, *supra* note 74, at 459, 461.

⁷⁸ *Id.* at 459, 462–63.

⁷⁹ *Id.* at 461, 462–63.

⁸⁰ *Id.* at 500–01.

⁸¹ *Id.* at 521.

⁸² See Friedman, *supra* note 50, at 689–91; Lande, *supra* note 76, at 161, 169.

⁸³ Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. EMPIRICAL LEGAL STUD. 973, 974 (2004) (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 282 (Phillips Bradley ed. & trans., Alfred A. Knopf 1945) (1848)); see also Patricia Lee Refo, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. v, vi (2004) ("The cost of losing that citizen participation in government [provided by jury service] is impossible to calculate.").

⁸⁴ See, e.g., ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 52–65 (2001).

⁸⁵ Landsman, *supra* note 83, at 974.

trials produce a clearly identifiable winner and loser. Some see this as one of the biggest weaknesses of trials, particularly in a complex, postmodern world.⁸⁶ Others, however, see the move away from these bold pronouncements of truth and right as an unacceptable slide toward moral relativism.⁸⁷ Trials demand line drawing, an outcome superior to compromise or silence in many contexts.⁸⁸

Still others mourn the apparent decline of the role of the civil trial because of the decline's impact on the legal profession. In the wake of declining opportunities to try a case to its conclusion, "firms [now] routinely elect new litigation partners who have never even second-chaired a trial."⁸⁹ As fewer attorneys have experience litigating cases through to trial, a self-perpetuating phenomenon might arise. The less experience a lawyer has with trial, the more hesitant that lawyer will be to take a case all the way to trial. As a result, still fewer attorneys receive trial experience, creating a causal loop of inexperience and hesitation.⁹⁰ Furthermore, the distribution of fully litigated cases is not evenly spread among all attorneys. It is not that every lawyer has an equally reduced chance of going to trial. Instead, an increasingly small percentage of attorneys are handling virtually all of the trial litigation.⁹¹ With one commentator describing this move toward a smaller, more insular bar as the "ghettoization of trials,"⁹² some believe that the trend points toward the decline of this aspect of the profession.

Why are trials vanishing? No consensus has emerged that trials are, in fact, vanishing, but the data unmistakably reflect a change in the patterns of litigation. In the federal courts, at least, far fewer dis-

⁸⁶ See, e.g., Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 6 (1996) ("[S]ome matters—mostly civil, but occasionally even criminal, cases—are not susceptible to a binary (i.e., right/wrong, win/lose) conclusion or solution.").

⁸⁷ See Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEGAL STUD. 627, 627 (2004) ("The rejection of trials may also evidence a new and troubling cultural preference for compromise over standing on principles."); Refo, *supra* note 75, at 1, 58 ("Settlement and compromise can be viewed as just another step toward moral relativism . . .").

⁸⁸ The contrast between settlement-as-compromise and litigation-as-no-compromise is not nearly as stark in practice. See, e.g., Jeff Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881, 896–900 (2004) (pointing out that many litigated cases produce results involving negotiation and compromise, with judges rather than litigants doing the compromising); Menkel-Meadow, *Whose Dispute Is It?*, *supra* note 50, at 2669–70.

⁸⁹ Refo, *supra* note 75, at 58.

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² Landsman, *supra* note 83, at 981.

putes result in trials.⁹³ If, in fact, the civil trial is in need of rescue, it is important to understand why. The cause(s) of these complex phenomena, of course, elude simple identification.⁹⁴

Some have suggested that the meteoric rise in the use of alternative dispute resolution (“ADR”) procedures is the reason that fewer cases survive in the litigation system long enough to conclude in a jury trial.⁹⁵ Arbitration clauses are now nearly ubiquitous in consumer products, employment agreements, and health care contracts. Their routine enforcement has meant that certain categories of disputes rarely remain in a trial court.⁹⁶ Private mediation has proliferated, with virtually every area of the law now seeing routine use of mediators to resolve disputes in a nonadjudicatory setting.⁹⁷ In some jurisdictions, litigants are now required to engage in mediation or another ADR mechanism before proceeding through various stages of litigation.⁹⁸

The decline in civil trial rates might also be explained by pointing to procedural changes in the litigation process—changes that have made jury trials less attractive to litigants.⁹⁹ The increasing expense of

⁹³ Galanter, *supra* note 74, at 459, 462–63.

⁹⁴ For a well-articulated cautionary note regarding our limited ability to reliably draw causal inferences from the data currently available, see Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 571, 571–87 (2004).

⁹⁵ See, e.g., Refo, *supra* note 75, at 58 (“Alternative dispute resolution, in all of its permutations, also contributes to the declining trial rates.”); cf. John Lande, “The Vanishing Trial” Report: An Alternative View of the Data, DISP. RESOL. MAG., Summer 2004, at 19, 19–21 (arguing that the common perception that the decrease in trial rates is attributable to an increase in ADR proceedings is not necessarily accurate and that more research is necessary to determine if there is a causal connection). Despite the widely held perspective that increased ADR proceedings have resulted in a decrease in jury trials, the empirical data have thus far delivered a more complex picture of the interactions between ADR and litigation. For a survey of that literature, see Thomas J. Stipanowich, *ADR and “The Vanishing Trial”: What We Know—And What We Don’t*, DISP. RESOL. MAG., Summer 2004, at 7, 7–9; see also Lande, *supra* note 76, at 20–21.

⁹⁶ See Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 17 (2003).

⁹⁷ See SARAH R. COLE, NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY & PRACTICE* § 2:1 (2d ed. 2005).

⁹⁸ *Id.* § 7:1–2. For a survey of the institutionalization of dispute resolution mechanisms, see Nancy Welsh, *Institutionalization and Professionalization*, in *THE HANDBOOK OF DISPUTE RESOLUTION*, *supra* note 6, at 488–93.

⁹⁹ Not all procedural changes should have necessarily resulted in a decline in trial rates. Relaxing the pleadings standards, for example, allows more litigants into the system. These additional litigants would be less likely to survive subsequent dispositive motions than their counterparts. Therefore, one part of the explanation for a decline in trial rates would also properly point to the increase in cases entering the judicial system. Stephen C. Yeazell, *Getting What We Asked for, Getting What We Paid for, and Not Liking What We Got: The Vanishing Civil Trial*, 1

discovery practice, for example, often makes the prospect of full-blown litigation unjustifiable from a cost-benefit perspective.¹⁰⁰ Furthermore, the privatization of discovery embodied in the Federal Rules of Civil Procedure decreases litigants' incentives to use trial as a device for uncovering information relevant to the resolution of the dispute.¹⁰¹ As Professor Yeazell put it: "[B]efore 1938, trial was often the only real way to do discovery So, all other things being equal, extensive discovery will lower the trial rates because it produces information."¹⁰²

Some also place responsibility on the bench for the decline in civil trial rates. Judges have undeniably taken on a far more "managerial" posture when overseeing cases. Multiple aspects of Federal Rule of Civil Procedure 16 make this role clear: under Rule 16, judges must manage—among other things—discovery schedules, dispositive motion timetables, witness lists, and information exchanges.¹⁰³ Judges also now more commonly engage personally in settlement conferences and other efforts at resolving the dispute before trial.¹⁰⁴ Furthermore, judges are now far more likely to grant summary judgment motions, making trial considerably more infrequent.¹⁰⁵ Finally, a fundamental change in judicial temperament might explain the decline in civil trials. Specifically, one hears of an increasing number of trial court judges who have lost faith in trials as an appropriate dispute resolu-

J. EMPIRICAL LEGAL STUD. 943, 948 (2004); *see also* Galanter, *supra* note 74, at 478 (suggesting that the "decline in the number of trials involves the squeezing out of smaller cases," as evidenced by the increasing average length of trials).

¹⁰⁰ *See* Refo, *supra* note 75, at 58.

¹⁰¹ Yeazell, *supra* note 99, at 950 ("By privatizing the uncovering of historical facts we have placed the power in the hands of the parties—power they regularly employ to settle their cases without adjudication on the merits.")

¹⁰² *Id.* at 951 (footnote omitted).

¹⁰³ FED. R. CIV. P. 16.

¹⁰⁴ *See, e.g.,* E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 13 (1989) ("Pretrial conferences are used for both case settlement and trial preparation, but in recent years they have increasingly become a forum for judicial intervention in search of settlement."); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 498–506 (1985) (discussing the role of judges in settlement conferences).

¹⁰⁵ *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 613 (2004) (citing one study that found the percent of summary judgments granted rising from 3.7% in 1975 to 7.7% in 2000).

tion mechanism.¹⁰⁶ Some judges have even come to view trials as a “failure,” that is, something to be avoided if at all possible.¹⁰⁷

One more potential contributor to the decline in trial rates stems from the relative unattractiveness of full-blown litigation in today’s courts.¹⁰⁸ In the past two years, the ABA has devoted enormous resources to a project reexamining the rules governing jury trials. In 2005, the ABA adopted the “Principles for Juries & Jury Trials,” which aimed to modernize the jury trial, bring added efficiency, and promote justice.¹⁰⁹ Many other reforms are under consideration or are being adopted in isolated jurisdictions.¹¹⁰ The procedural barge, however, is slow to turn.¹¹¹

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

The opportunity for specific disputants mutually to customize their litigation experience, however, changes that calculation. Sophisticated business transactions routinely include arbitration agreements in part because of the flexible procedure such agreements offer.¹¹² To

¹⁰⁶ See Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 529–36 (1986).

¹⁰⁷ See Butler, *supra* note 87, at 627–28; Landsman, *supra* note 83, at 984 (“The rhetoric describing trials as a systematic failure or pathology must be challenged, especially among sitting judges.”).

¹⁰⁸ Among the reasons disputants might find modern litigation comparatively unattractive are the delays and scheduling difficulties created by backlogs and heavy criminal dockets in many court systems.

¹⁰⁹ See AMERICAN JURY PROJECT, AM. BAR ASS’N, *supra* note 66, at 17–24.

¹¹⁰ See, e.g., Grey, Jr., *supra* note 64, at 6 (“Innovative, creative approaches include limitations on discovery, setting reasonable time limits for civil trials, reducing the number of expert witnesses, and more discipline by judges and lawyers in managing the costs and time associated with litigation.”).

¹¹¹ Procedural changes have occurred more rapidly at the state court level. The initial vision of interstate uniformity in state court procedures has been all but abandoned, with an increase in “localism.” One observer suggests that this trend might signal a new federalism in state civil procedure. See Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1173–76 (2005).

¹¹² Arbitration agreements appearing in transactions between sophisticated business parties do not run the same set of risks one sees associated with the arbitration clauses that appear

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

III. Current Experiences with Customization

Some descriptions of litigation hold it up as a well-defined, predictable sequence of predetermined steps, applied equally to all disputants appearing in court. This vision of litigation is, in some ways, the fantasy of first-year civil procedure students, who typically are eager to grasp solid answers about how the litigation process unfolds.¹¹³ At a broad level of abstraction, it is certainly true that every piece of litigation includes predictable, rule-driven components. Disputants define the scope of the dispute, courts make determinations about the scope of their authority, disputants engage in information exchange, the factfinder makes determinations of the facts which are then compared to the relevant substantive legal standards, and so on. In the details, however, one finds considerable variation, even within the same court system with cases that share outward similarities. The fact that litigants already make choices that shape their litigation experience is important to note because it suggests—accurately—that we have already begun the customization experiment. Though perhaps not explicitly, we are already exploring the appropriate boundaries of customization.

with increasing frequency in consumer and employment contexts. Arbitration clauses appearing in adhesion contracts may represent nothing more than a crass calculation by the more powerful party (the business) that the weaker party will be bound by arbitration's less advantageous terms (for example, limited remedies). Between sophisticated parties, however, I have less concern that one side is simply pulling the wool over the other side's eyes. Instead, I suspect that the attraction is based, in part, on arbitration's opportunities for customization.

¹¹³ I have no empirical data to support my assertion that this is among the things about which my first-year students fantasize. I make this inference based on their questions and comments. This vision of trial as a singular phenomenon, however, is not limited to first-year law students. For example, in offering a contrary perspective to those who view current trial rates as demonstrating that the civil trial is vanishing, John Lande writes, "The vanishing trial myth has three elements: (1) The, (2) Vanishing, and (3) Trial. 'The' implies, inaccurately, that there is a single uniform phenomenon of trial." Lande, *supra* note 76, at 161; *see also* John Lande, *Shifting the Focus from the Myth of "The Vanishing Trial" to Complex Conflict Management Systems, Or I Learned Almost Everything I Need to Know About Conflict Resolution from Marc Galanter*, 6 *CARDOZO J. CONFLICT RESOL.* 191, 191 (2005).

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

A. *Prelitigation Customization*

Contracts containing choice-of-forum clauses provide one example of private, predispute customization by prospective litigants. With increasing frequency, parties drafting a contract anticipate the possibility of a dispute arising out of the contract. As its name suggests, a choice-of-forum clause specifies the forum in which the contracting parties agree to bring any complaints within the scope of the contractual term.¹¹⁴ Courts generally enforce choice-of-forum clauses, holding the litigants to their previous agreement about the location of the litigation.¹¹⁵ The result is customization, in the sense that the disputants are experiencing litigation as they envisioned it should proceed. Litigants who agreed to a choice-of-forum clause may have an experi-

¹¹⁴ An expansive choice-of-forum clause might read, "Any and all disputes arising out of or related to the creation, performance, or breach of any terms of this contract shall be litigated exclusively in a court in the state of X." This is an example of a so-called mandatory choice-of-forum clause because it provides that the *exclusive* forum for litigation is in the state of X. 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3803.1 (3d ed. Supp. 2006). Other choice-of-forum clauses are merely "permissive," and courts routinely interpret permissive choice-of-forum clauses as an indication of the litigants' consent to litigation in the specified forum, but they are not viewed as barring litigation in other jurisdictions. *Id.*

¹¹⁵ At one point, courts were reluctant to give the clauses effect. *See Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9–10 (1972) ("Forum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court."). Over the past several decades, however, courts have viewed choice-of-forum clauses with considerably more favor. Chief Justice Warren Burger wrote in *Bremen* that a "forum clause should control absent a strong showing that it should be set aside." *Id.* at 15. The question of whether a choice of forum is sufficiently "reasonable" to be enforced is one for which "there are no hard-and-fast rules, no precise formulae." *D'Antuono v. CCH Computax Sys., Inc.*, 570 F. Supp. 708, 712 (D.R.I. 1983) (listing at least nine factors included in the determination of a choice-of-forum clause's reasonableness).

ence quite different than the one they would have had in the absence of the clause. Their litigation may take place in an entirely different court than it would have in the absence of the predispute contractual provision. In short, this is the litigants' fight, and the enforced choice-of-forum clause allows that fight to take place where the litigants decided they wanted to fight.¹¹⁶

Additionally, parties entering a contractual relationship sometimes agree upon the substantive rules that are to govern any subsequent disputes. Using "choice-of-law" provisions, parties can control with reasonable certainty the substantive legal standards against which their subsequent behaviors will be assessed. Many perceive states' baseline conflict-of-laws rules to be uncertain, vague, or even litigation-inducing.¹¹⁷ Parties understandably seek mechanisms like choice-of-law provisions to reduce the uncertainty associated with multijurisdictional transactions. They "want to know at the time of entering into a contract which state's law will be applied, rather than waiting for the judge to tell them when deciding a contract dispute."¹¹⁸ The modern trend is for courts to enforce most choice-of-law provisions in contracts.¹¹⁹

Choice-of-law provisions, therefore, represent an important opportunity for litigants to customize their litigation experience. In some cases, a choice-of-law provision may simply name the jurisdiction whose laws the court would have applied in the absence of any choice-of-law provision. In those cases, the provisions merely provide security or certainty to parties who may fear an unpredicted result from a court's choice-of-law analysis. In most cases, however, the function of a choice-of-law provision is to specify a set of substantive laws that are at least somewhat different from the laws the forum state's default conflict-of-law rules would have otherwise specified. The provisions thus customize the disputants' litigation experience.

¹¹⁶ For more on the enforcement of choice-of-forum clauses, see Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51 (1992).

¹¹⁷ See Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 366 (2003) (stating that choice-of-law provisions help "reduce the uncertainty of vague conflict-of-laws default rules").

¹¹⁸ *Id.* at 403.

¹¹⁹ *Id.* at 317. For a historical analysis of the enforcement of choice-of-law provisions in the United States, see David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 58–65 (2003); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1165–68 (2000); Ribstein, *supra* note 117, at 370–71.

Litigants can also choose to waive, by agreement, the right to a jury in civil cases, providing another illustration of an existing opportunity for customization.¹²⁰ For example, a contractual jury-waiver clause might read, “The [parties] each hereby irrevocably waive any right it may have to trial by jury in any action, suit, counterclaim or proceeding arising out of or relating to this agreement”¹²¹ If upheld, a prelitigation¹²² contractual jury waiver customizes the litigation experience of the disputants. As a general matter, federal courts will enforce contractual waivers of jury rights, though they will construe the contracts narrowly.¹²³ Prelitigation contracts containing explicit jury waivers provide a third illustration of the opportunities litigants have to shape their experiences in court before a lawsuit even commences. If either of the litigants prefers to have a jury decide the facts, the litigation will proceed in that direction. If, however, the litigants mutually prefer to have a judicial factfinder, contractual jury waivers permit them to have their way, thus customizing their litigation experience.

To this discussion of existing, prelitigation customization opportunities, I should add one clarifying note about arbitration. Although arbitration clauses may represent the most conspicuous example of a jury-waiving contractual arrangement, they do not customize the litigation experience of the disputants *within* the court system. Although

¹²⁰ RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002) (“Although the right of trial by jury in civil actions is protected by the Seventh Amendment to the Constitution, that right, like other constitutional rights, may be waived by prior written agreement of the parties.”). In state courts, however, contractual waivers of jury rights may violate state constitutional provisions. See, e.g., Bank South v. Howard, 444 S.E.2d 799, 800 (Ga. 1994) (“[P]re-litigation contractual waivers of jury trial are not provided for by our Constitution or Code and are not to be enforced in cases tried under the laws of Georgia.”). Even in those states, waivers may be permitted through stipulation or by open, oral declaration in court. See *id.* For a thought-provoking, cautionary treatment of the prospect of broadly enforced jury waivers, see Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. (forthcoming) (on file with author).

¹²¹ Paracor Fin., Inc. v. Gen. Elec. Capital Corp., 96 F.3d 1151, 1166 (9th Cir. 1996) (quoting jury waiver section of a disputed contract).

¹²² In addition to the predispute customization described in this section, jury waivers also can occur during litigation. Litigants can declare a waiver explicitly to a judge, and a litigant is deemed to have waived any right to a jury by failing to make an appropriate jury demand. See FED. R. CIV. P. 38(d).

¹²³ See *Powell*, 191 F. Supp. 2d at 813 (noting that jury waivers are enforceable, but the “waiver must be made knowingly and voluntarily, and courts will indulge every reasonable presumption against a waiver of that right”); Debra T. Landis, Annotation, *Contractual Jury Trial Waivers in Federal Civil Cases*, 92 A.L.R. FED. 688, 692 (1989) (“The general rule that since the right to a jury trial is highly favored, waivers thereof will be strictly construed and will not be lightly inferred or extended has been recognized as applicable to an express contractual waiver of a jury trial.”).

parties agreeing to bring a dispute before an arbitrator are certainly waiving their right to a jury,¹²⁴ they are also wresting the dispute out of the court and placing it in the hands of an arbitrator, who acts as judge and factfinder.¹²⁵ Arbitral decisions return to the court system only if questions of enforcement or appeal arise, and the latter only in a narrow set of circumstances.¹²⁶ Arbitrations are more appropriately conceived of as *alternatives to* litigation, and because they occur outside of the litigation system, for purposes of this article, I do not consider them to be examples of customized litigation.¹²⁷

Choice-of-forum clauses, choice-of-law provisions, and jury-waiver provisions are three examples of prominent prelitigation customization tools that are currently available to litigants who choose to settle their future disputes in a traditional judicial forum. Once litigation actually begins, litigants also have several customization options available to them.

B. Customization During Litigation

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

¹²⁴ See, e.g., *Pierson v. Dean Witter Reynolds Inc.*, 742 F.2d 334, 339 (7th Cir. 1984) (“[The] loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.”).

¹²⁵ See generally Kristen M. Blankley, *Arbitration*, in *THE HANDBOOK OF DISPUTE RESOLUTION*, *supra* note 6, at 318.

¹²⁶ See Federal Arbitration Act, 9 U.S.C. §§ 9–10 (2000).

¹²⁷ I return to the question of arbitration and its relationship to customized litigation below. See *infra* Part IV.D.3.

1. High-Low Agreements

A high-low agreement is a form of a contingent settlement, with the eventual obligations of the parties being dictated by the result of a jury trial.¹²⁸ Litigants typically enter a high-low agreement during the course of a trial, or even while the jury is deliberating, having negotiated boundaries on the award the plaintiff will eventually recover.¹²⁹ The “high” number represents a ceiling, the most the plaintiff can recover. If the jury returns an award in excess of the high number, the plaintiff recovers only the previously agreed upon high number.¹³⁰ The “low” number is the minimum payment from the defendant to the plaintiff. The plaintiff recovers that minimum amount even if the jury awards less—or even if the jury finds for the defendant entirely.¹³¹ If the jury returns a verdict in between the high and the low numbers, most high-low agreements provide that the jury’s verdict is the actual award.¹³²

Disputants’ motivation to enter high-low agreements stems primarily from nervousness that the jury’s verdict might fall outside of the range both sides consider most likely.¹³³ In a sense, the defendant is “buying” the right to be free from the worry of an adverse jackpot jury verdict against him or her. The plaintiff is selling its lottery ticket in exchange for the certainty that it will recover no less than the low amount. One can easily imagine circumstances in which neither side can tolerate the risk of an award falling at one extreme or the other.¹³⁴ Both sides in a high-low agreement abandon the fantasy of a home-run verdict, in exchange for eliminating the prospect of a nightmare verdict.

¹²⁸ Molly McDonough, *High-Lows’ Ups and Downs*, A.B.A. J., Aug. 2005, at 12, 12. For more on contingent agreements, see Michael Moffitt, *Contingent Agreements: Agreeing to Disagree About the Future*, 87 MARO. L. REV. 691, 691–96 (2004).

¹²⁹ McDonough, *supra* note 128, at 12.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 13.

¹³³ *See id.*

¹³⁴ The nature of high-low agreements makes it difficult to know with precision how frequently they are used. One estimate suggests that disputants discuss the possibility in at least twenty percent of litigated cases, with one in ten cases actually using them. *Id.* at 12. In addition to high-low agreements, parties routinely use a variety of other mechanisms for similar purposes. *See* Stephen C. Yeazell, *Re-financing Civil Litigation*, 51 DEPAUL L. REV. 183, 196 (2001) (“When settlements occur, they are, as compared with our reference point in 1925, as likely to look like a corporate merger than a cash sale at a supermarket. Just the set of names should convince most of us of this proposition: Mary Carter agreements, Sliding Scale agreements, High-Low agreements, structured settlements, and cede-back agreements. Each of these is a staple not of bet-the-industry class actions but of run-of-the-mill tort litigation.”).

As a general matter, courts have enforced high-low agreements.¹³⁵ Like any contract, high-low agreements can present ambiguity or conflicting interpretations. What happens if the jury is hung or if a mistrial is declared?¹³⁶ What happens if the jury comes back with an award in one amount, but then also finds the plaintiff to have been contributorily negligent at a level that would substantially reduce the total?¹³⁷ Cases of contested high-low agreements are rare, and one experienced lawyer described their enforcement as more of “a gentleman’s agreement” than a matter of precise contractual construction.¹³⁸ Nevertheless, all indications are that such agreements are routinely enforced by courts, making them an option for extrajudicial customization of the litigation experience.

2. Referrals to Magistrates

Magistrate judges play an increasingly important role in civil litigation within the federal courts.¹³⁹ Federal district court judges have the discretionary power to assign a wide range of judicial activities to magistrate judges.¹⁴⁰ Civil litigants in federal court routinely find themselves appearing before a magistrate judge on, for example, evidentiary matters.¹⁴¹ Indeed, with the exception of certain dispositive motions, motions to certify a class, and requests for injunctive relief, federal district court judges are empowered to refer “any pretrial mat-

¹³⁵ McDonough, *supra* note 128, at 12.

¹³⁶ See, e.g., *Camarda v. Borman’s, Inc.*, No. 191715, 1997 WL 33344418, at *1–2 (Mich. Ct. App. July 18, 1997) (ordering defendant to pay costs associated with a mistrial declared during the first trial, notwithstanding the high-low agreement the parties entered into during the subsequent trial).

¹³⁷ See, e.g., *Batista v. Elite Ambulette Serv., Inc.*, 721 N.Y.S.2d 355, 356 (App. Div. 2001) (awarding the plaintiff \$150,000 in damages, the “low” amount of the high-low agreement, despite the fact that the jury found a total of \$225,000 in damages, because the jury found the plaintiff to be contributorily negligent and the high-low agreement was silent with respect to contributory negligence).

¹³⁸ McDonough, *supra* note 128, at 12.

¹³⁹ See Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661, 661 (2005); Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503, 1526 (1995); Brendan Linehan Shannon, Note, *The Federal Magistrates Act: A New Article III Analysis for a New Breed of Judicial Officer*, 33 WM. & MARY L. REV. 253, 253 (1991).

¹⁴⁰ See 28 U.S.C. § 636(b) (2000).

¹⁴¹ See Baker, *supra* note 139, at 661 (“Lawyers and parties who have watched their cases progress through the federal courts no doubt can attest to the fact that more commonly it is the magistrate judges, rather than the district judges, who assume active, pretrial roles in case management and settlement—the mainstay of modern federal court civil practice.”); see also 28 U.S.C. § 636(b)(1)(B) (empowering designated magistrate judges to conduct evidentiary hearings).

ter pending before the court” to a magistrate judge.¹⁴² In some cases, therefore, litigants have no control over the introduction of these non-Article III judges into the litigation process.

The judicial code, however, also provides opportunities for litigants to make customized choices with respect to the roles of magistrate judges. Under 28 U.S.C. § 636(c), litigants may consent to having “any or all proceedings in a jury or nonjury civil matter” determined by a magistrate judge, rather than a district court judge.¹⁴³ The process of referring a case to a magistrate judge varies by jurisdiction, with some districts doing more “encouraging” than others.¹⁴⁴ In all districts, however, § 636(c) invites litigants to make the fundamental choice about the person who will oversee their trial. Referrals to magistrate judges are, therefore, an example of customization taking place within the existing rules.

In most important regards, magistrate judges and district court judges operate in identical ways. Magistrate judges apply the same legal standards and the same procedures as federal district court judges.¹⁴⁵ If parties consent to have a magistrate judge preside over the trial, appeals go directly to federal appellate courts, exactly as if judgment had been entered by a district court.¹⁴⁶ In several crucial respects, therefore, magistrate judges mirror the functioning of district court judges.

Why, then, might parties decide to consent to have a magistrate judge preside over a trial, instead of an Article III district court judge? The answer stems primarily from differences between the dockets of district court judges and those of magistrate judges. Magistrate judges’ calendars are more controlled, providing litigants with greater predictability and security with respect to trial dates.¹⁴⁷ For litigants

¹⁴² 28 U.S.C. § 636(b)(1)(A)–(B).

¹⁴³ *Id.* § 636(c)(1).

¹⁴⁴ See Pro & Hnatowski, *supra* note 139, at 1528 (noting that “[s]everal district courts have . . . employed innovative techniques to encourage section 636(c) consents in civil cases,” including opt-out provisions, waiver approaches, or random default assignment to magistrate judges).

¹⁴⁵ See 28 U.S.C. § 636(d).

¹⁴⁶ *Id.* § 636(c)(3).

¹⁴⁷ See Pro & Hnatowski, *supra* note 139, at 1535 (“The evolving magistrate judges system represents one important example of how the federal judiciary meets its responsibility of providing an accessible forum in which litigants in federal court can receive a fair, inexpensive, and expeditious resolution of their disputes.”). Caseload relief also serves as a primary explanation for district court judges’ openness to (and even enthusiasm for) referrals to magistrate judges. See Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2610 (1998) (“Given that federal judges . . . plead for

who mutually value the speed and certainty of magistrate judges' trial calendars more than they value whatever protections or benefits derive from having an Article III judge preside over their trial, § 636(c) provides an opportunity for beneficial customization.¹⁴⁸

3. *Discovery*

One of the most important characteristics of modern civil procedure is the extent to which it relies on individual parties' efforts in discovery to aid in the factfinding process.¹⁴⁹ The rules contemplate that virtually all discovery will take place extrajudicially, with the courts intervening only when invited by the parties, and even then, only reluctantly. The modern reality is that most judges hate to deal with discovery disputes,¹⁵⁰ and the rules make it relatively easy for them to stay out of most discovery fights.¹⁵¹ In short, discovery is essentially a party-driven process.

To facilitate the parties' efforts in managing their own discovery processes, procedural rules include three different categories of provisions related to discovery. The first (and probably most familiar) category of provisions defines the structure of the discovery process, including the different discovery devices available,¹⁵² limitations on

assistance in their caseload without radical expansion of their ranks, it is not surprising that federal judges . . . sanction the delegation of some of their work to an array of non life-tenured 'judges.'").

¹⁴⁸ In some state courts, litigants enjoy even greater opportunity for customization affecting the decision maker. So-called rent-a-judge provisions in state rules of procedure, for example, allow litigants to stipulate to the appointment of retired or senior judges to oversee the adjudication of the dispute in question. *See, e.g.*, CAL. CT. R. 243.31; OHIO REV. CODE ANN. § 2701.10 (LexisNexis 2000); TEX. CIV. PRAC. & REM. CODE ANN. § 151 (Vernon 2005). Many of the same considerations that prompt referrals to magistrate judges likely lead litigants to opt for the appointment of these "retired" or "temporary" judges.

¹⁴⁹ At an early point in time, pleadings were used to develop facts, instead of discovery. *See* Moffitt, *supra* note 25, at 757 (cataloguing the historical functions of pleadings within the litigation system).

¹⁵⁰ Judges' distaste for discovery disputes is widespread and well known. *See* Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189, 198 (1992) ("[J]udges tend to view discovery disputes with distaste and avoid dealing with them as long as possible."); Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709, 723 (1998) ("[J]udges are supposed to enforce the [discovery] rules, but they do not, partially because (as all the lawyers and the judges agree) they dislike discovery disputes, treating them as quarrels between bickering children . . .").

¹⁵¹ *See, e.g.*, FED. R. CIV. P. 26(c) (providing court protection from a discovery request only as a last resort, after the parties have attempted in good faith to work out their difference outside of court).

¹⁵² *See* FED. R. CIV. P. 26(a)(5).

their use, and procedures for complaining about misbehavior by others.¹⁵³ For example, the rules specify that one may take a deposition upon written questions of *any* person,¹⁵⁴ but one can send interrogatories only to *opposing* parties.¹⁵⁵ Furthermore, the rules inform litigants of the circumstances under which they may seek to have a party undergo a mental examination,¹⁵⁶ and they identify penalties for failure to comply with the various requirements.¹⁵⁷ This first category of rules is important, of course, because it defines the parameters of the discovery mechanisms available to parties.

The second category of provisions in the discovery rules is the set of rules that *require* the parties to engage in a certain degree of customization. For example, Rule 26(f) provides that prior to their scheduling conference, litigants “must . . . develop a proposed discovery plan,” including any proposed adjustments to the default timeline, form, or content of discovery efforts.¹⁵⁸ In this sense, the procedural rules essentially force customization, or at least force an effort at customization. (If the parties cannot agree to a discovery plan, the rules contemplate judicial intervention.¹⁵⁹) Recognizing the widely divergent set of cases that must operate under the same basic discovery rules, customized discovery plans enable courts and litigants to agree to treat, for example, a complex antitrust case differently from a relatively simple breach of contract case.

The third category of provisions in the discovery rules contemplates opening the doors to even greater customization, though the rules do not require it. Rule 29 provides: “Unless otherwise directed by the court, the parties may by written stipulation . . . modify other procedures governing or limitations placed upon discovery,” with the exception of certain changes that would affect the overall calendar or timeline of the litigation.¹⁶⁰ Rule 29 does not, however, require cus-

¹⁵³ See FED. R. CIV. P. 37.

¹⁵⁴ FED. R. CIV. P. 31(a)(1).

¹⁵⁵ FED. R. CIV. P. 33(a).

¹⁵⁶ See FED. R. CIV. P. 35.

¹⁵⁷ See FED. R. CIV. P. 37.

¹⁵⁸ FED. R. CIV. P. 26(f).

¹⁵⁹ See JAY E. GRENIG & JEFFREY S. KINSLER, HANDBOOK OF FEDERAL CIVIL DISCOVERY AND DISCLOSURE § 1.6 (2d ed. 2002); 6A WRIGHT, MILLER & COOPER, *supra* note 114, at § 1522.1.

¹⁶⁰ FED. R. CIV. P. 29. Similar provisions appear in some state civil procedure codes as well. See, e.g., TEX. R. CIV. P. 191.1 (allowing the “procedures and limitations set forth in the rules pertaining to discovery” to be “modified in any suit by the agreement of the parties or by court order for good cause”).

tomization.¹⁶¹ It treats the rest of the discovery rules as default rules, creating a baseline from which the parties may negotiate deviations. The idea of customization, therefore, is already well established within discovery.

4. *Jury Instructions*

The crafting of jury instructions presents a final example of the ways in which current procedural rules give litigants an opportunity to shape their litigation experience. In a simple case, litigants might opt for the straightforward and appeals-tested pattern jury instructions for the jurisdiction in which the litigation is taking place.¹⁶² And in many cases, to be certain, the process of crafting jury instructions is a purely adversarial undertaking, with each side hoping to frame the issues and legal standards in ways most favorable to its case. Nevertheless, litigants sometimes present a mutually crafted set of jury instructions to the judge. These customized jury instructions represent a deviation from the “standard” instructions, and the parties’ stipulations indicate that each party views the instructions as superior in the context of their particular litigation.

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

Second, and even more significant, when civil litigants jointly present jury instructions to a judge, they are functionally waiving any right to appeal based on the inadequacy or inaccuracy of those instructions. A criminal defendant might be able to sustain an appeal if his or her counsel stipulated to an erroneous and damaging jury instruction, even if his or her counsel did not raise an objection to the instruction at trial.¹⁶³ In a civil context, however, clients will be bound by the decisions of their counsel. Even if the act of submitting the

¹⁶¹ See Jay E. Grenig, *Stipulations Regarding Discovery Procedure*, 21 AM. J. TRIAL ADVOC. 547, 549 (1998) (“In 1993, Rule 29 was amended to give greater opportunity for litigants to agree upon modifications to discovery procedures or to limit discovery.”).

¹⁶² Many treatises and practitioner guides provide pattern jury instructions. See, e.g., 75A AM. JUR. 2D *Trial* § 1168 (1991).

¹⁶³ See *United States v. Bustillo*, 789 F.2d 1364, 1367 (9th Cir. 1986) (permitting review of a jury instruction under a plain error standard, even though the defendant’s counsel failed to object to it at trial). *But see* *United States v. Ward*, 914 F.2d 1340, 1344 n.4 (9th Cir. 1990) (noting that if a defendant and the government submit joint jury instructions, the defendant would be

stipulated jury instructions did not constitute an express waiver of objection, the party submitting the instruction surely would not immediately raise an objection to those instructions. Absent an objection at the trial court level, no appeal would survive.¹⁶⁴

Judges are under no obligation to adopt the jury instructions proposed by the litigants—even if all litigants stipulate to the instructions.¹⁶⁵ As a practical matter, however, it is quite unlikely that a judge would stand in the way of a set of instructions both sides had crafted and accepted. Jury instructions, therefore, represent an opportunity for litigants to customize, by mutual agreement, their litigation experience.

Modern litigation permits customization in a number of different ways during the course of litigation. Stipulated jury instructions, customized discovery agreements, the use of magistrate judges, and contingent settlement agreements represent four distinct options. But legitimate customization has its limits. In the next Part, I articulate three fundamental principles to which any effort at customization must adhere, thus providing boundaries around the prospect of customization.

IV. Limits on Customization

Legitimate opportunities to customize litigation are not infinite. Despite Henry Ford's quotation at the beginning of this article,¹⁶⁶ Ford automobiles are now available in dozens of different colors, along with thousands of different combinations of other options. There is a limit, of course, to the amount of customization you can do to a car made by Ford and have it remain a Ford. If you paint it some color other than black, no one would seriously suggest that the car is anything but a Ford. But if you change the motor and the chassis to something other than Ford, at least some automotive enthusiasts would say that the car has ceased to be a Ford. Similarly, at some

“precluded from arguing on appeal” that the jury instructions were flawed because the defendant would have “invited any error that may be present in the instructions”).

¹⁶⁴ See, e.g., *Gherman v. Colburn*, 140 Cal. Rptr. 330, 345 (Ct. App. 1977) (“A party may not complain of the giving of instructions which he has requested.”).

¹⁶⁵ Stipulations about jury instructions are ordinarily treated like any other stipulation. See, e.g., *Ferrell v. State ex rel. Dep't of Highways*, 387 P.2d 129, 132–33 (Okla. 1963) (holding that the defendants were bound by their jury-instruction stipulation). Courts are not typically obligated to respect all stipulations made by the parties. See, e.g., *Peiter v. Degenring*, 71 A.2d 87, 90 (Conn. 1949) (“[A stipulation] is not . . . necessarily binding upon the court, and under the circumstances of a particular case the court may be justified in disregarding it.”).

¹⁶⁶ See *supra* note 1 and accompanying text.

point, with enough tinkering, litigation would cease to be litigation and would begin to be something else. There are—and should be—limits on the kinds of customization litigants should expect to have available.

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

A. *Constitutional and Statutory Limits*

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

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

These court-establishing laws provide one nonnegotiable limit on the ability of disputants to customize their litigation experience. It is axiomatic that the parties cannot create subject matter jurisdiction by consent.¹⁶⁷ Parties similarly cannot waive defects in subject matter jurisdiction.¹⁶⁸ No contractual provision can create subject matter jurisdiction where none exists statutorily. Neighbors involved in a minor dispute over a property line cannot effectively agree to appear in federal district court. Family members in a fight over a will cannot bring their dispute before a traffic court judge, even if everyone in the family consents to doing so. A family court cannot oversee litigation initiated over the validity of a patent, even if all of the disputants prefer that forum over the federal courts. Courts are created with certain limited powers, and those powers are not a function of the desires of the disputants.¹⁶⁹

Certain aspects of the court system are fixed for all litigants, whether by rule, statute, or constitutional constraint. Distinguishing between these three types of constraints is important because they are not equally difficult to change. The current rules of civil procedure

¹⁶⁷ See *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1237 (2006) (“[C]ourts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.”); *United States v. Cotton*, 535 U.S. 625, 630 (2002); (“[S]ubject-matter jurisdiction . . . involves a court’s power to hear a case [and] can never be forfeited or waived.”); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986) (“[T]he parties by consent cannot confer on federal courts subject-matter jurisdiction”); *United States v. Griffin*, 303 U.S. 226, 229 (1938) (“[L]ack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties”); *Beers v. N. Am. Van Lines, Inc.*, 836 F.2d 910, 912 (5th Cir. 1988) (“The parties cannot create federal subject matter jurisdiction either by agreement or consent.”).

¹⁶⁸ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 26 (1989) (Stevens, J., concurring) (“[T]he cases are legion holding that a party may not waive a defect in subject-matter jurisdiction or invoke federal jurisdiction simply by consent.”), *overruled by Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); see also *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 389 (1998) (“No party can waive the defect or consent to jurisdiction.”).

¹⁶⁹ One could imagine a different set of statutes and rules establishing the court systems within which litigation takes place. For example, there is no *constitutional* reason why federal subject matter jurisdiction could not be at least partially customizable. Federal courts are currently statutorily empowered to hear diversity cases in which there is complete diversity and in which the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332 (2000). These are not constitutional parameters, however. Congress has the power to provide federal subject matter jurisdiction in cases involving only “minimal” diversity, and it can clearly change the amount in controversy. Similarly, for example, Congress could provide that federal district courts would have subject matter jurisdiction in diversity cases in which (a) the amount in controversy exceeds \$100,000, or (b) the amount in controversy exceeds \$50,000 and both litigants consent to appearing in federal court. There are practical and policy reasons why such an approach might not be wise, of course, but such an arrangement would present no *constitutional* problems. Only the fact that Congress has not provided a statutory basis for it bars such customization.

and the current system of statutes governing the judiciary are more easily amended than the constitutional constraints within which litigation occurs. Nevertheless, the laws creating the courts and their procedures serve as an outer limit on the customization options for litigants.

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

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

1. *Functional Interests*

Courts perform a number of functions in society, at least two of which are directly relevant to the question of customization. First, courts are important as a mechanism for resolving disputes. Second, courts play a critical role in articulating rules and establishing meaningful precedents.¹⁷⁰ Customization that undercuts either of these functional interests would be troublesome.

Courts' roles in the resolution of disputes are undeniable in many cases. Courts resolve some disputes directly—either by ruling on a dispositive motion or by entering judgment following a trial. In the vast majority of these cases, the court's resolution is indeed a “resolution.”¹⁷¹ The case ends, one way or the other. Furthermore, although the vast majority of disputes are resolved without trial,¹⁷² efforts at

¹⁷⁰ See Luban, *supra* note 46, at 2622 (“[O]ur court system not only resolves disputes, but also produces rules and precedents.”).

¹⁷¹ An exception to this assertion appears in the realm of institutional reform litigation, in which the court's continued involvement is a critical component of the management of the resolution. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1082 (1984) (criticizing “[t]he dispute-resolution story” for “trivializ[ing] the remedial dimensions” of lawsuits involving significant cases such as institutional reform litigation. In such cases, “judgment is not the end of a lawsuit but only the beginning. The involvement of the court may continue almost indefinitely.”).

¹⁷² See Galanter, *supra* note 2, at 459–60; Marc Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 (1994); see also

settlement routinely occur “in the shadow” of the prospect of litigation.¹⁷³ The most conspicuous examples of this occur on the proverbial courthouse steps. Even in settlement discussions that take place well before any prospect of litigation, each side’s calculations include assessments of the risks and opportunities presented by litigation. To the extent that society is better off for having one less unresolved dispute, the court system typically earns the credit.

Given this dispute-resolution function, we would understandably resist most efforts at customization that would result in something other than the *resolution* of disputes. We would not want to provide a blank ticket for disputants to reengage periodically in their arguments ad infinitum, for example. Of course, in some circumstances, the current rules provide for something short of a final, complete resolution. In institutional reform litigation (e.g., school desegregation, prison system reform, etc.), for example, it is common for the disputants to enter a consent decree that anticipates continued judicial involvement over a period of years.¹⁷⁴ Such cases are the exception, however. Our clear preference is for our court system to provide final, binding resolution to disputes as quickly as practicable, given the other relevant constraints. Society would reasonably frown on customization efforts that caused the courts to abandon this function.

Similarly, in our common law system, courts serve an important function in articulating the boundaries of current rules and providing guidance to the public at large about the state of the law. An oversimplification of the dispute-resolution function of courts would label it a wholly “private good”—something solely benefiting those who engage in the litigation. In the late 1970s, William Landes and Richard Posner argued that litigation should be viewed not only as a private good, but also as a “public good”—a product whose benefits are necessarily enjoyed by all, or at least by most.¹⁷⁵ Underlying the view that courts are more than mere resolvers of disputes, David Luban observed that

Ross E. Cheit & Jacob E. Gersen, *When Businesses Sue Each Other: An Empirical Study of State Court Litigation*, 25 LAW & SOC. INQUIRY 789, 812 (2000).

¹⁷³ See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979) (describing how divorce law does not “impos[e] order from above, but rather . . . provid[es] a framework within which divorcing couples can themselves determine their postdissolution rights and responsibilities”).

¹⁷⁴ See Fiss, *supra* note 171, at 1083.

¹⁷⁵ William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 236 (1979). Owen Fiss echoes these concerns about preserving the norm-articulation function of courts in his article, *Against Settlement*, perhaps the most-cited critique of ADR. See Fiss, *supra* note 171, at 1085–86.

“our court system not only resolves disputes, but also produces rules and precedents. Though private judges may well be efficient purveyors of dispute resolution, they are terribly inefficient producers of rules.”¹⁷⁶ In short, part of the bargain for society, part of the reason it agrees to pay so much for its court system, is that, in return for its investment, it receives the benefit of more clearly articulated laws and rules.¹⁷⁷

Society does not always demand final resolution from its courts, nor does it always demand public articulation from its courts. The default operating assumption for courts is that they will make their proceedings, their decisions, and the reasoning behind their decisions available to the public. In limited circumstances, courts seal some aspects of their proceedings. Similarly, courts sometimes do not articulate their decisions fully—for example, by not publishing an opinion or by placing some aspect of the decision under a protective order.¹⁷⁸ As a norm, however, a trial court’s open proceedings, its written records, and appellate courts’ assessment of those records provide the public with access to courts throughout the life of a dispute and beyond.

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

¹⁷⁶ Luban, *supra* note 46, at 2622.

¹⁷⁷ It is not clear that society is in need of more judicial opinions. *Cf. id.* at 2644 (“It is not hard to see where expanding the judicial system takes us: more trial courts generate more law, along with more inconsistent decisions, more appeals, more efforts by higher courts to reconcile inconsistencies, and—in short—a buzzing, blooming confusion of legal information. What began as the Tree of Life ends as the Tower of Babel.”). For a thoughtful and more complex view of the functions of courts, see Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 32–37 (1986).

¹⁷⁸ For an overview of the issues related to the publication of judicial opinions, see *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. (2002), available at <http://judiciary.house.gov/legacy/80454.pdf>.

2. Efficiency Interests

The public has an interest in how much money is spent on the court system. Courts are expensive to operate. The modest filing fees charged to litigants cover nowhere near the full costs of maintaining the judicial system. The crucial societal functions performed by courts justify this level of expenditure, but the judicial branch is not immune to the budgetary challenges facing all other aspects of government.¹⁷⁹ Not surprisingly, some of the arguments in favor of publicly subsidized ADR programs boil down to efficiency, cost-cutting, and docket management.¹⁸⁰ Given the important functions courts play, we have accepted the idea of providing public funds to create and sustain the litigation infrastructure for private litigants.

That society has approved of the expenditure of public money on court systems does not mean that it would subsidize them regardless of their structure or their cost. The public would almost certainly resist procedural changes that permitted private litigants to restructure the cadence of litigation in ways that caused a wasteful increase in public expense. We would not want a customization agreement that fundamentally changed the expenditures required for the court to oversee the litigation. So, for example, private litigants could not mutually agree to a process that triples the number of days spent in trial. Similarly, even if both litigants preferred to have a jury of 100 jurors, the public would reasonably balk at the added expenditures such a customized procedure would impose. Although the public has seen it fit to provide certain judicial resources to private litigants at an extraordinary discount, the public's subsidies are generally capped and are not a function of private litigants' decisions.

The concern over efficiency can be overstated, of course. Litigants routinely make decisions that cause increased expenditures of public resources. Refusing to refer a case to a magistrate causes the

¹⁷⁹ See David L. Hudson, Jr., *Cutting Costs . . . and Courts*, A.B.A. J., Apr. 2003, at 16, 16; see also John Roberts, *2005 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH, Jan. 2006, at 1, 2 ("Escalating rents combined with across-the-board cuts imposed during fiscal years 2004 and 2005 resulted in a reduction of approximately 1,500 judicial branch employees as of mid-December when compared to October 2003."); William Rehnquist, *2004 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH, Jan. 2005, at 1, 1 ("The continuing uncertainties and delays in the funding process, along with rising fixed costs that outpace any increased funding from Congress, have required many courts to impose hiring freezes, furloughs, and reductions in force.").

¹⁸⁰ See Carrie Menkel-Meadow, *Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution*, in THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 6, at 13, 19.

public to spend more money.¹⁸¹ Taking a case to trial, rather than settling it, costs the public money. We allow lawyers to file objections, to request extra time, and to raise appeals, even though each of these things results in the public spending some additional resources. It is not that *any* decision resulting in the expenditure of money is impermissible. Each of these expenses, however, is expressly contemplated in the current structure of the judicial system.¹⁸² What the public would resist are private customization efforts that cause significant expenditures beyond those already contemplated.¹⁸³

3. *Symbolic Interests*

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

Customization cannot be allowed to undermine the public's sense of the legitimacy of the courts. Allowing private disputants to convert the courtroom into a circus in one case would undermine the ability of the court to perform its important functions not only in that particular case, but in other cases as well. Even with the consent of the litigants, a trial court judge cannot be made to preside over a pie-eating contest as the standard for victory, for example. It is not that society would necessarily refuse to enforce the results of a private dispute resolution mechanism that based its decision on the outcome of a pie-eating con-

¹⁸¹ Though cost savings are often cited among the reasons for using magistrate judges, I know of no empirical studies comparing the actual costs of using magistrate judges to the costs of using district court judges. Even if everything else were constant, however, the salary differential between the two suggests the prospect of at least some savings.

¹⁸² Some mutual decisions by litigants might cause added expenditures of public resources. For example, if courts upheld private parties' contractual provisions seeking to provide judicial review of arbitral awards beyond that contemplated in the Federal Arbitration Act, the courts would be shouldering additional expense. *Cf.* Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171, 171, 174 (2003) (arguing that the limits that the Act places on judicial review of arbitral awards should be loosened to allow broader judicial review of awards, in certain circumstances, if the parties agree in advance to allow it).

¹⁸³ Perhaps we should contemplate a system that *would* permit even private litigants to increase the cost of the judicial function, as long as they underwrite the expenses involved. Even if litigants genuinely and mutually believed that it was important to have a jury of fifty members, we would normally refuse such customization on the grounds that the expenses it would create would be too large. What if the litigants agreed to reimburse the system for the added expenses involved? Why not permit litigants to buy a "premium" process, if the result were cost-neutral (or better) for the public?

test (or any otherwise legal mechanisms),¹⁸⁴ it is that we would not tolerate dragging judicial officials into the fray, out of fear that their involvement would decrease the legitimacy with which their subsequent actions might be perceived.

These concerns would prevent, for example, customization that decreased the levels of candor required of litigants. Why not permit litigants to agree that everyone should be allowed to lie to the judge and to each other? Why not permit them to contract around Federal Rule of Civil Procedure 11 (veracity in pleadings) or Model Rule of Professional Conduct 3.3 (candor toward the tribunal)? The answer is not that we refuse to tolerate *any* dispute resolution mechanism in which knowingly false documents or testimony may be presented.¹⁸⁵ Instead, it is that we refuse to drag the good name of our *courts* into a process so expressly divorced from the fundamental images of truth-seeking and justice-promotion on which our courts rest. Put simply, some things “just wouldn’t be proper.”¹⁸⁶

However, concern over preserving legitimacy does not mean that the public would, or should, resist every change to courts or to their procedures. Legitimacy is not necessarily derived from ancestry. Litigants no longer resolve disputes by battle, by compurgation, or by ordeal, even though these were once the procedures by which justice was believed to have been done.¹⁸⁷ Indeed, any court that did those things now would be seen as *illegitimate*, because of society’s shifting assessment of the appropriate way for courts to conduct themselves.

¹⁸⁴ The private sector provides any number of examples of nontraditional mechanisms for resolving disputes. For instance, in spring of 2005, two of the world’s premier auction houses, Sotheby’s and Christie’s, engaged in a game of rock-paper-scissors to decide which of the two houses would receive the right to sell a Japanese company’s art collection, valued at more than \$20 million. Christie’s won, having chosen scissors. See Carol Vogel, *Rock, Paper, Payoff: Child’s Play Wins Auction House an Art Sale*, N.Y. TIMES, Apr. 29, 2005, at A1.

¹⁸⁵ For example, within mediation, only the common law of fraud binds parties’ behavior. For a discussion of the prospect of requiring “good-faith” participation in mediation, see Roger L. Carter, *Oh Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. DISP. RESOL. 367; John Lande, *Why a Good-Faith Requirement Is a Bad Idea for Mediation*, 23 ALTERNATIVES TO THE HIGH COST OF LITIGATION, INT’L INST. FOR CONFLICT PREVENTION & RESOL. 1, 8–9 (2005).

¹⁸⁶ Some, like Lon Fuller, might suggest that customization risks robbing litigation of its “moral integrity.” See LON L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER* 92–124 (Kenneth I. Winston ed., 1981). Fuller’s notion of litigation’s moral integrity is that each individual process possesses certain fundamental attributes, without which they cease to hold together legitimately. *Id.* Trial looks quite different today than when Fuller articulated litigation’s moral integrity. It is not clear to me, therefore, that customization is the biggest challenge to Fuller’s vision.

¹⁸⁷ See R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 63–67 (2d ed. 1988) (describing the development of various methods of trial).

That we should preserve the courts' legitimacy does not mean that we should reject all customization any more than we should resist updating procedural rules. We simply must be cautious not to undercut the courts' important standing in society.¹⁸⁸

C. Limits Aimed at Preventing Harm to Nonlitigants

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

For example, it would be inappropriate for litigants to restructure procedural rules in ways that would prohibit nonlitigants from intervening in litigation in which their interests are at stake. Under certain circumstances, federal and state procedural rules allow a nonlitigant to parachute into the middle of a fight, even if both of the initial litigants would prefer to keep the intervenor out.¹⁸⁹ In some circumstances, an absentee may be affected by practical harms stemming from the outcome of the litigation. In others, the risk of stare decisis may constitute a sufficient prospective harm to demand the compulsory joinder of an intervenor, even if it is against the will of the existing parties.¹⁹⁰ Courts would appropriately resist any effort at customization that would risk prejudicing those nonlitigants who

¹⁸⁸ In the mid-1960s, New Jersey trial court judges used to sit with litigants and counsel in an informal setting, often at a conference room table, to work out various aspects of litigation planning. After some years of experimentation, the judges were asked to return to wearing robes and to sit behind the bench for those same conversations. Apparently, litigants and counsel found it disconcerting to have judges appearing in such an informal manner. Interview with Dom Vetri, Professor of Law, Univ. of Or. Sch. of Law, in Eugene, Or. (Feb. 2006).

¹⁸⁹ See FED. R. CIV. P. 24(a); CAL. CIV. PROC. CODE § 387 (West Supp. 2006). Many states have incorporated the provisions of Federal Rule of Civil Procedure 24 directly into their procedural codes or have adopted substantially similar provisions. For a review of the history of intervention, see James Moore & Edward Levi, *Federal Intervention: I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565 (1936).

¹⁹⁰ For a colorful illustration of this principle, see *Atlantis Dev. Corp. v. United States*, 379 F.2d 818 (5th Cir. 1967). In *Atlantis*, the United States brought suit against several companies that were conducting dredging operations on a reef off the coast of Florida. *Id.* at 820–21. A competitor, who also claimed title to the reef, sought to intervene. *Id.* at 821–22. The court permitted compulsory joinder under Federal Rule of Civil Procedure 19(a) because the absent party was “without a friend in this litigation” and would have been prejudiced with any outcome if not permitted to join. *Id.* at 825.

would enjoy protections under the current intervention rules. Litigants cannot lock the courthouse doors once they are inside, barring those who rightfully belong from entering.

Similarly, customization cannot eliminate the formal roles of those assigned to protect the rights of interested parties who are not otherwise represented. For example, in many actions involving juvenile and domestic relations, state court systems appoint a guardian ad litem to provide independent advice to the court and to promote the interests of the child or children potentially affected by the legal action.¹⁹¹ The state's interest in protecting these nonlitigants is strong, and the guardian ad litem system exists precisely because of the risk that the existing litigants (the parents) will make decisions that do not adequately promote the interests of the nonlitigants (the children). Therefore, no private arrangement between the existing litigants can disturb the role of such a court-appointed actor.

Judges' active roles in refereeing settlements in class actions provide a third example of customization limits aimed at protecting nonlitigants. In a typical non-class-action dispute, in which each person with a legally cognizable claim or interest appears as a party to the dispute, the disputants are essentially free to settle on whatever terms they prefer. The plaintiff(s) can agree to accept payment from the defendant(s) in exchange for dismissing the lawsuit. When the underlying litigation has been certified as a class action, however, it is not merely the rights of the named parties that are at stake in a settlement. Instead, all members of the certified class who do not affirmatively opt out of the settlement terms will have their rights extinguished in exchange for the settlement terms negotiated by the class representative and the class counsel.¹⁹²

The fact that the settlement may affect unnamed parties raises the prospect of inappropriate settlement terms in ways that disfavor absent class members. For example, a defendant could offer the rep-

¹⁹¹ See, e.g., Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(ix) (2000) (requiring states, as a condition to receiving grant money, to provide guardians ad litem to children who are subject to abuse or neglect proceedings).

¹⁹² See FED. R. CIV. P. 23(e). The results of a properly certified and maintained class action are binding on all class members, even those who did not participate in the litigation or its settlement. See *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation."); *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940) ("It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present . . .").

representative of the plaintiff class a “sweetheart deal”—one that provides a disproportionately attractive benefit to the representative when compared with the benefit going to unnamed class members.¹⁹³ We reasonably fear that a defendant may “buy out” the named plaintiff, prejudicing the interests of the numerous unnamed plaintiffs. As a result, Federal Rule of Civil Procedure 23(e) provides that litigants involved in a class action are not free to settle privately on whatever terms they prefer.¹⁹⁴ Once a case is certified as a class action, the court overseeing the litigation has an obligation to review the terms of a proposed settlement agreement and to assess its fairness.¹⁹⁵ Determining a proposed deal’s fairness is, of course, a highly fact-specific, subjective determination, but it is a critical procedural requirement for assuring that the rights of class members are adequately protected. It would, therefore, not be appropriate policy and likely be inconsistent with due process to permit class representatives to customize litigation rules in a way that retains the case’s status as a class action but removes it from the purview of Rule 23(e) or its state equivalents.

Customized litigation processes do not necessarily need to protect nonlitigants more than the current system does. The current system does not always protect the interests of all of those who may be affected by the outcome of a particular piece of litigation because the parties to a suit continue to control the scope and the direction of litigation.¹⁹⁶ Customization, however, cannot be an avenue for reducing the protections nonlitigants currently enjoy. Due process demands greater protection. The interests of those who are not currently parties to the lawsuit, therefore, represent a third category of constraints on appropriate customization.

D. Concerns About Customized Litigation

Increasing litigants’ opportunities to customize their litigation experience is no panacea. Like any policy change, it presents a combina-

¹⁹³ See, e.g., Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CAL. L. REV. 685, 729 (2005) (calling collusive settlements “one of the greatest challenges facing class action courts”); David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19, 37–40 (describing the risks of both “sweetheart” and “kickback” deals).

¹⁹⁴ FED. R. CIV. P. 23(e).

¹⁹⁵ *Id.*

¹⁹⁶ Just as a plaintiff is the “master” of its complaint for purposes of choosing theories of recovery, for purposes of the well-pleaded complaint rule, a plaintiff is the “master” of deciding which defendant(s) to name in the lawsuit. *Cf. Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (introducing the “master of the complaint” doctrine).

tion of tradeoffs, and observers may disagree about whether the benefits outweigh the costs. Furthermore, because it represents a significant deviation from prior practices, some of the effects of customized litigation would necessarily remain unknown until implemented and observed. In this final section, I articulate the three primary concerns I anticipate from those who would oppose expanding opportunities for customized litigation. Each objection highlights an important aspect of litigation. Correctly understood, however, none of them should stand in the way of permitting customized litigation.

1. *The Complexity and Cost of Customization*

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

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

As an initial matter, I am skeptical of concerns suggesting that trial court judges may not be able to efficiently manage the complications presented by customized procedures. We routinely require judges to interpret a shifting patchwork of procedural rules, both because of the ascendancy of intersystem litigation and because we frequently amend procedural rules. Judges are, in many ways, ideally positioned to interpret agreements such as those represented by customized procedures.¹⁹⁷ The few areas in which significant customization already exists suggest that customized procedural rules neither clog nor confuse the judiciary. For example, we have not seen a flood of litigation over the contours of Rule 29 agreements.¹⁹⁸ Those discov-

¹⁹⁷ Anecdotally, those who have voiced this concern over my idea with me directly have uniformly been academics. The admittedly small and nonrandom selection of sitting judges with whom I have spoken on the topic have not expressed this as a concern.

¹⁹⁸ I know of no easy way to document the *infrequency* with which a rule is at the center of a legal dispute. As a rough measure, I did a basic search in Westlaw and LexisNexis, seeking *any* reported cases that cited Federal Rule of Civil Procedure 29 at all, for *any* proposition. Despite the nearly eighty year history of the rule, the search yielded fewer than 150 cases. And on careful review, more than one-third of those cases were actually criminal cases in which the court

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

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

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

The suggestion that customized procedures may confuse, overwhelm, or burden the court system holds intuitive logic. But the empirical data currently available¹⁹⁹ suggest that this concern is overstated. And even if additional expense were involved, we have no reason to think that the costs would be so overwhelming that they would outweigh the potential benefits of customization.

intended to refer to Federal Rule of *Criminal* Procedure 29, but *erroneously* cited Federal Rule of Civil Procedure 29 instead. A review of the leading Civil Procedure treatises suggests the same conclusion: Rule 29 has not spawned much litigation.

¹⁹⁹ See *supra* note 198.

2. Fixed Procedures as Prophylaxis

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

Some formal aspects of modern civil procedure, of course, are designed to protect parties who may not be in a position to protect themselves effectively. Courts, for example, appoint guardians ad litem to protect the interests of children.²⁰⁰ Courts also review proposed class action settlements to assess their fairness toward class members who are not named representatives.²⁰¹ As I make clear above, these aspects of litigation procedure are not among those ripe for customization.²⁰² These rules exist precisely because we cannot trust the litigants themselves to protect the interests of these absent parties.

This objection, however, focuses not on absent parties, but rather on those parties who are titular participants in the litigation. Does customization risk stripping away formal procedures designed to protect unsophisticated litigants? The very bedrock idea of the rule of law is that the same laws should apply to all people. Under the rule of law, the rich do not operate under a different set of laws from the poor. Under the rule of law, justice is done by neutral application of predetermined rules to the particular facts of a case.²⁰³ If we permit litigants to bargain over procedures, do we risk undermining the vision that every litigant receives equal treatment? Are formal litigation procedures not the last bastion of equality, the last aspect of modern life where all are treated equally?

As an initial matter, I might quibble with the characterization of formal trial procedures as necessarily protecting the weak and unsophisticated. Pro se litigants, for example, fare extraordinarily poorly in modern litigation, even when courts relax some of the rules in order to accommodate their status.²⁰⁴ Formal litigation procedures create

²⁰⁰ See *supra* text accompanying note 191.

²⁰¹ See *supra* text accompanying note 192.

²⁰² See *supra* Part IV.C.

²⁰³ Some view the prospect of any deviations from established norms as threatening to the concept of justice. See, e.g., 1 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 7a n.2 (Peter Tillers ed., 1983) (“[W]e have 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 whether almost any agreement concerning evidentiary matters entered into before any dispute has arisen is likely to be substantively fair.”).

²⁰⁴ See Jessica Case, *Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law an Excuse?*, 90 KY. L.J. 701, 720 n.116 (2001–2002) (exploring the extent to which courts

considerable barriers to entering the justice system, and disparities in resources commonly affect how the litigation unfolds. No responsible observer of modern litigation would suggest that wealth is irrelevant.²⁰⁵

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

This concern is most pronounced in contexts in which the litigant is operating without legal representation. If pro se litigants are the genuine focus of this concern, perhaps the answer is to limit customization agreements to contexts in which parties are represented by counsel. Such an approach might present some challenges in implementation, and it shows more paternalism than I might generally prefer. Still, I can imagine a reason to address the nightmare of a pro se litigant being duped on the courthouse steps by a sophisticated opposing counsel.

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

should provide specific, modified instructions for pro se litigants to address “pro se litigants’ lack of success on the federal trial court level”).

²⁰⁵ See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974) (arguing that the structure of the legal system tends to favor those with greater financial resources).

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

3. *The Arbitration Alternative*

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

Arbitration offers disputants almost unlimited opportunity to customize their adjudicative dispute resolution experience. Litigants could receive virtually any procedural variation described above by electing to go to arbitration.²⁰⁶ Arbitration parties can limit joinder, curtail discovery, dispense with the rules of evidence, and virtually eliminate the prospect of appeals. In fact, arbitration can involve customization unthinkable in litigation. For example, arbitration parties can reform pleading requirements, set their own calendar, and choose their own arbitrator. In short, arbitration offers prospective litigants many of the benefits of customization.²⁰⁷

For at least three reasons, however, the availability of arbitration as a private alternative to litigation does not negate the need to make litigation customizable. First, arbitration is not as accessible as the courthouse. Litigants seeking to enter the judicial system pay only a modest filing fee.²⁰⁸ Disputants proceeding through arbitration pay filing fees, administration fees, and arbitrators' fees, amounting to

²⁰⁶ *See supra* Part I.

²⁰⁷ One of the benefits of litigation that is not available to arbitration parties is the depth and breadth of procedural rules. Arbitration providers have extensive procedures, covering the most common adjudication issues, but arbitration procedures are nowhere near as comprehensive as the Federal Rules of Civil Procedure and other legal structures supporting litigation. Litigation, therefore, can offer a degree of certainty unavailable in arbitration.

²⁰⁸ PUB. CITIZEN, *THE COSTS OF ARBITRATION 5* (2002), available at <http://www.citizen.org/documents/ACF110A.pdf>.

considerably more than court fees.²⁰⁹ If arbitration were available as a private alternative on the same terms as litigation, then I might be less concerned. I am not convinced, however, that the private market model and mindset (“If people think arbitration is better, let them buy their way into arbitration.”) is the full solution to providing appropriate dispute resolution mechanisms. We should be troubled by the prospect that our courts could be reduced to the poor man’s last resort.

Second, this objection assumes that dispute resolution is the only purpose or benefit relevant to the choice of process. If that were true, then the public and the litigants should be indifferent to the method used to resolve it. In fact, if it were only about resolving disputes, then the public might see great benefit in sending more litigants to arbitration, because it would ease the demand for—and presumably, the expense of—judicial services. But, of course, more is at stake. Courts perform important functions in society beyond dispute resolution. Courts articulate community norms.²¹⁰ Juries are part of our system of democratic governance.²¹¹ Courts are the visible symbol of the rule of law in society. Making courts unattractive to disputants comes at a real cost.

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

Conclusion

The idea that disputants ought to enjoy multiple options when it comes to the resolution of their disputes is not new. In 1976, Chief Justice Warren Burger convened a collection of judges, practitioners, and scholars for the Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice.²¹² At that conference, Professor Frank Sander delivered a seminal speech entitled *Varieties*

²⁰⁹ *Id.*

²¹⁰ *See supra* Parts II.C, IV.B.3.

²¹¹ *See supra* Part II.C.

²¹² *See* Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking*:

of *Dispute Processing*.²¹³ Professor Sander's idea, which later assumed the label "multi-door courthouse," was that disputants and disputes ought to be sorted as they enter the courthouse.²¹⁴ Some would proceed to litigation, but others would go to mediation, factfinding, arbitration, a screening panel, or some other designated dispute resolution process offered at the courthouse.²¹⁵ Many credit Professor Sander's speech with "launching" the modern, institutionalized ADR movement as we now know it.²¹⁶ It is certainly rare for a modern litigant not to encounter opportunities to pursue alternative dispute resolution mechanisms. Indeed, many modern litigants are required to do so.²¹⁷ The idea that one might choose from among different nonlitigation processes is well entrenched. Process pluralism,²¹⁸ as some have called it, is the rule of the day.

My suggestion builds on the idea of process pluralism, but suggests that we ought to embrace and encourage pluralism *within* a particular dispute resolution mechanism—litigation. Frank Sander's idea of the multi-door courthouse (like virtually all of its modern ADR progeny) would transform litigants into something else. In Professor Sander's world, litigants would become parties to a mediation, or to an arbitration, or to a fact finding. They would become participants in something other than litigation. For a while, at least, they would cease

Lessons from the Institutionalization of Court-Connected Mediation, 5 NEV. L.J. 399, 401 (2004–2005).

²¹³ Frank E.A. Sander, *Varieties of Dispute Processing*, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), in 70 F.R.D. 111.

²¹⁴ *Id.* at 130–31. The phrase "multi-door courthouse" does not appear in the text of Sander's speech. The phrase is said to have made its first appearance in a magazine article describing Sander's speech shortly after the Pound Conference. Interview with Frank E.A. Sander in Cambridge, Mass. (June 2005).

²¹⁵ Sander, *supra* note 213, at 131.

²¹⁶ See McAdoo & Welsh, *supra* note 212, at 402 ("Sander is now a part of the historical lore of the ADR movement. Among other ideas offered to address the problems of court overload, Professor Sander introduced the multi-door courthouse."); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 1 (2000) ("When we think of the 'founding' of the ADR movement . . . [m]any of us think of Frank Sander and the 'multi-door courthouse' suggested by his famous paper, delivered at the Pound Conference . . ."); Michael Moffitt, *Before the Big Bang: The Making of an ADR Pioneer*, 22 NEGOTIATIONS J. 437, 437 (2006) (characterizing the Pound Conference as ADR's "big bang" moment).

²¹⁷ See *supra* Part II.C.

²¹⁸ See FULLER, *supra* note 186, at 87–88, 92, 147–48 (describing the need for different processes to address different disputes); Marc Galanter & John Lande, *Private Courts and Public Authority*, 12 STUD. IN L., POL., & SOC'Y 393, 394–95, 398–407 (1992) (describing "process pluralism"); Menkel-Meadow, *supra* note 50, at 10 (defining process pluralism and exploring its relationship to the justice-seeking functions of courts).

to be litigants. My suggestion is different. I suggest that we look for ways to *keep* disputants as litigants, *but still offer them more choices*.

The idea of customized litigation is not quite as heretical as it may appear at first blush. Some may imagine that customization would do injury to our image of blind justice, administering the laws equally to all who come into a court of law. Admittedly, in the abstract, litigants today enjoy the benefits of the uniform application of the rule of law. But the reality on the ground is that, even today, no two trials look exactly alike, not only because the particular facts of the dispute are different, but also because some degree of customization already happens. Customization already occurs. We should be clearer in naming it as such, and we should clearly articulate limits on the scope of permissible customization.

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

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