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The End of Law

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ARTICLES

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The political and judicial response to the so-called litigation "crisis" has had a profound and little-noticed effect on the traditional place that legal norms occupy in law. Litigation reforms have obscured and removed legal norms from the center of the legal process. Law itself has been privatized, obscured, and even erased, most often by its protectors and guardians: judges and the courts. Eager to "streamline" and "expedite" legal proceedings, various devices and procedures have changed the face of both civil and criminal litigation. As one example, the dramatic increase in settlement, plea bargaining, and alternative dispute resolution renders many disputes privately—rather than publicly—judged. Doctrines that emphasize discretionary review, standards of review, and doctrines such as harmless error serve to obscure and distort the application of legal norms. Other practices such as designating certain judicial decisions as "unpublished opinions" and thus limiting the circumstances under which such an opinion may be used as precedent also limit the public nature of law. These and similar devices and procedures limit both the public nature of law and the law itself, by reducing the number of cases fully litigated, by reducing the available case precedents, and by reducing appellate review and scrutiny. Law has become less public and less accessible; legal norms that should inform people of the acceptable limits on their behavior are lost or obscured. The anomalous nature of cases that are fully litigated and decided, even fewer of which are appealed and still fewer of which result in a published opinion, raises questions about their value as precedent and as embodying societal norms. The loss of substantive law from the public realm distorts the legal landscape, limits public testing and debate of legal norms, and devalues or destroys institutional competencies. Taken together, we refer to these developments as presaging "the end of law." This article explores and analyzes these developments, and concludes that the traditionally understood processes of law are fading from—or perhaps more accurately, are being hidden from—view, with negative consequences for both law itself and for society as a whole.

INTRODUCTION

For a quarter of a century, most popular accounts of the role of law in the United States have claimed to discover and decry the increasing legalization of our society. Cries of excessive litigiousness,[1] along with calls for a return to a

[1] Claims regarding the litigious nature of American society are asserted both generally and with respect to virtually every sort of specific type of lawsuit imaginable. *See, e.g.*, Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L.J. 183, 201 (2000) (suggesting that

less law-dominated society, have been regularly sounded, and these calls often are illustrated with the hyping of seemingly outrageous cases.[2] Although some

among the reasons for increased litigiousness is "an increase in crime and criminal prosecutions (especially drug-related offenses)"); Thomas Adcock, *Lawyers Without Clients: A Legal Education is Valuable Training for Many Other Careers*, LEGAL TIMES, June 9, 2003, at 43 (referring to the United States as "perhaps the most litigious society the world has ever known"); Christopher S. Burnside et al., *Mold Spores: Bad Science or Bad Dream?*, NAT'L L.J., Feb. 18, 2002, at B13 (asserting that "[m]old is the next litigation explosion"); John C. Coffee, Jr., *Sarbanes-Oxley Act Coming Litigation Crisis*, NAT'L L.J., Mar. 10, 2003, at B8 (warning that the Sarbanes-Oxley Act will result in a litigation crisis in federal courts due to increased securities litigation); Kimberly Edds, *On Deck, at Bat and, Increasingly, in Court: High School Coaches Face Lawsuits from Disappointed Parents*, WASH. POST, June 6, 2003, at A3 (examining sports lawsuits and referring to the United States as "[a]n increasingly litigious society"); Robert P. Hartwig, *Report on First-Quarter 2002 Results*, ANDREWS NURSING HOME LITIG. RPTR., Sept. 6, 2002, at 10 ("In several states, the medical malpractice market has essentially collapsed, in large part due to excessive litigiousness."); *Long-Term Care: Study on Healthcare Trends in America Released*, BIOTECH BUS. WEEK, Apr. 14, 2003, at 15 (claiming that seniors and taxpayers are "victims of a litigation explosion that siphons increasingly scarce federal dollars out of the nation's healthcare system, starkly threatens senior access to quality healthcare, and costs taxpayers billions"); Tom Mashberg & Robin Washington, *Church Bankruptcy Option OK'd*, BOSTON HERALD, Dec. 5, 2002, at 1 (calling the Catholic archdiocese's potential filing of Chapter 11 bankruptcy a "strategy . . . to speed an end to the litigation crisis that is consuming the nation's fourth-largest archdiocese"); Ameet Sachdev, *Asbestos Deal Faces Huge Hurdles*, CHI. TRIB., Apr. 23, 2003, at C3 (referring to the "asbestos litigation crisis"). *See generally* PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1996) (arguing that the United States has too many laws, too much bureaucracy, and too much government).

[2] *See* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1396 (1994) (arguing that "the massive discovery reform agenda . . . is based on . . . pervasive, media-perpetuated myths"). As Professor Galanter has observed about the hyping of seemingly outrageous cases:

> [A] substantial portion of the horror stories are stories of nutty claims that, if they are pursued at all, are quickly discarded by the courts. Second, the stories invariably tell of a claim by an individual against an institution, governmental body, or corporation. If grotesque or unfounded claims are brought against individuals by other individuals or by corporate entities, they do not ascend into the pantheon of horror stories, nor do accounts of grotesque or frivolous defenses. It is a universe in which corporations and governments are victims, and individuals (and their lawyers) are the aggressors. Third, these stories are neither experiential nor analytic accounts, but disembodied cartoon-like tales that pivot on a single bizarre feature . . . . They are abstracted from media accounts and re-circulated by entrepreneurial publicists through a succession of other media. In the course of this re-circulation, they are further simplified and decontextualized.

Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 731 (1998) (footnotes omitted) [hereinafter Galanter, *Oil Strike*]; *see* Stephan Landsman, *The History and Objectives of the Civil Jury System*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 22, 54 (Robert E. Litan ed., 1993) (quoting

of these descriptions of litigiousness are based in fact,[3] the remainder, which constitute the far greater portion, reflect efforts by specific interest groups to gain political and legal advantage.[4] Both the rhetoric and the debate about a

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Forsyth's admonition that "'[i]t would not be difficult for an opponent of the system to cite ludicrous examples of foolish verdicts, but they would be a very unfair sample of the average quality; and nothing can be more unsafe than to make exceptional cases the basis of legislation'"); *see also* Edith Greene, *A Love-Hate Relationship*, 18 JUST. SYS. J. 99, 100 (1995) ("The plural of anecdote is not *data*."); Fred Strasser, *Tort Tales: Old Stories Never Die*, NAT'L L.J., Feb. 16, 1987, at 39 (describing some exaggerated accounts of purported lawsuits, followed by the actual facts of those cases).

[3] Litigiousness does indeed exist, but litigiousness is most often found in business disputes, not individual or class tort actions. *See* Marcia Coyle & Claudia MacLachlan, *Probing the Backlog*, NAT'L L.J., Aug. 7, 1995, at C1 ("The legal problems of American business—not claims by avaricious personal injury victims or attention-seeking prisoners—engorge the belly of the beast that is the federal district courts' backlog."); *id.* ("In recent years, the most demanding civil cases have been predominantly business disputes—securities, patent, contract, fraud and civil RICO, or Racketeer Influenced and Corrupt Organizations Act, cases."); Milo Geyelin, *Suits by Firms Exceed Those by Individuals*, WALL ST. J., Dec. 3, 1993, at B1 ("[B]usinesses' contract disputes with each other constitute the largest single category of lawsuits filed in federal court.").

[4] As Joan B. Claybrook argued before Congress:

> For the last 16 years, lobbyists for America's biggest corporations have come to Congress with wild claims about out of control juries and junk statistics about a product liability litigation explosion. . . . [T]he proponents of federal product liability legislation continue to rely on myths and unrepresentative anecdotes about product liability litigation and its impact on U.S. competitiveness to support disrupting state authority and protecting corporate wrongdoers.

Product Liability Reform: Hearing Before the House Comm. on the Judiciary, 105th Cong. 54-56 (1997) (statements of Joan B. Claybrook); *see also* VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 70-74 (2000) (describing research studies indicating that public perception of out-of-control litigation is the result of media reporting of civil lawsuits and advertising campaigns by business and insurance interests); Debra Lyn Bassett, *"I Lost at Trial—In the Court of Appeals!": The Expanding Power of the Federal Appellate Courts to Reexamine Facts*, 38 HOUS. L. REV. 1129, 1179 n.315 (2001) ("Insurance companies and other proponents of tort reform publicize large jury verdicts as indicative of the irrationality and incompetence of lay juries."); Stephen Daniels & Joanne Martin, *"The Impact that It Has Had is Between People's Ears": Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453, 459 (2000) ("Tort reform is not simply a 'product' being marketed, it is also a set of political goals that involve changing the civil justice system to favor particular interests."); Bruce A. Finzen & Brooke B. Tassoni, *Regulation of Consumer Products: Myth, Reality and the Media*, 11 KAN. J.L. & PUB. POL'Y 523, 523 (2002).

> For the past fifteen years pro-business interests in America have sought, through legislative efforts on the state and federal level, to reform the judicial and governmental regulatory systems that govern consumer products in America. In doing so, they have sought to portray consumer product regulation as unfair and costly to both corporations and consumers alike. Lacking empirical data to support their contentions, reformers have frequently turned to anecdotal evidence based upon half-truths and sometimes

so-called—but nonexistent—litigation "crisis"[5] obscure a less well-publicized but potentially more far-reaching countertrend: the disappearance of actual "law" as it is commonly understood—in the form of legal norms—from a central place in the legal process. The veiling and disappearance of legal norms from the public centerpiece is what this article identifies provocatively as the "end of law."

The end of law takes many forms and is both a consequence and unintended side effect of the much better-hyped "litigation explosion."[6] The erosion of

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blatant fiction to support their claims for needed reform. Recognizing the old adage that the pen is more powerful than the sword, reformers over time have turned to influential media outlets to sound the drumbeat for the need of reform.

Id.

[5] *See* NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1996: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 26 (Brian J. Ostrom & Neal B. Kauder eds., 1997) (concluding, upon the review of a recent report based on 16,000 trial courts in all fifty states, that "the bottom line is that there is no evidence of a tort litigation 'explosion'"); *id.* at 8 ("Although Congress and many state legislatures continue to debate tort reform, there is no evidence that the number of tort cases is increasing."); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992) (setting forth a five-year review of empirical evidence of tort litigation and debunking the myth of a "litigation explosion"); *see also infra* note 6.

[6] Much has been written about the so-called "litigation explosion." *See, e.g.*, Galanter, *Oil Strike*, *supra* note 2, at 717; Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 5 (1986) [hereinafter Galanter, *Litigation Explosion*]; Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 36 UCLA L. REV. 4, 5 (1983) [hereinafter Galanter, *Reading the Landscape*]; Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implication for the Litigation Explosion Debate*, 26 L. & SOC'Y REV. 85, 85 (1992).

Studies have refuted the factual basis for claiming a litigation crisis, indicating instead that the increase in litigation might better be described as a suppressed hiccup rather than an "explosion." *See* Galanter, *Litigation Explosion*, *supra*, at 5-8 (finding that empirical data do not support the popular notion that there has been a litigation explosion); Galanter, *Reading the Landscape*, *supra*, at 5-11 (asserting that most allegations of litigiousness are unsupported); *see also* Steven Brill & James Lyons, *The Not-So-Simple Crisis*, AM. LAW., May 1986, at 1, 1 ("There is no litigation explosion. Repeat that 2,000 more times and you're on your way to being deprogrammed of all that's been blared in the media rush to cover the liability-insurance crisis."); *see also supra* note 5.

Despite these findings, the clamoring continues for changes both in litigation procedures and in the nature of litigation itself. Various devices and procedures have been developed to address this "explosion." *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 911-12 (1987).

> [T]he Federal Rules and adjudication of civil disputes are under attack. Among the key targets are discovery abuse, expense and delay, excessive judicial power and discretion, excess court rulemaking, unpredictability, litigiousness, an overly adversarial

law in the form of legal norms is only vaguely understood in most mainstream or popular debate, which tends instead to focus on coping with a purported rising tide of legal despoliation. This erosion in both the civil and criminal arenas, however, threatens to transform the definition and essence of law.

This article argues that the well-intentioned efforts to streamline and expedite litigation have resulted in procedures that, although serving their intended purposes, are in effect unintentionally serving to bring about the end of law. Law is a social construct[7] with at least two primary goals. One goal is to provide behavioral norms—to inform people of the acceptable behavioral boundaries within which they may function and beyond which they will suffer some penalty.[8] Another goal is to provide a public resolution of disputes.[9]

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atmosphere, unequal resources of the parties, lack of focus, and formal adjudication itself. Case management, efforts to encourage settlements, and a breathtaking array of alternative dispute resolution mechanisms represent the current major categories of response.

Id. (citations omitted). Although there have been murmurings regarding potential downsides to these devices and procedures, these murmurings have largely been ignored in the calls for more judges, streamlined and expedited procedures, alternative methods for resolving disputes, and reductions in the availability, and the nature, of judicial review.

[7] *See* Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 738 (1993) ("To a far greater degree than the natural sciences, law is socially constructed and its paradigm shifts can be controlled: there are no immutable facts like the speed of light or the position of the stars that require a paradigm shift."); *see also* LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 1 (1975) ("Almost everyone concedes that law is to some degree a social product . . . ."); MARIANA VALVERDE, LAW'S DREAM OF A COMMON KNOWLEDGE 6 (2003) ("As Wittgenstein famously demonstrated, meaning does not inhere in words: it comes into existence within the particular social context in which words are used. Similarly, legal facts and legal judgments are only meaningful and effective within a network . . . .").

[8] *See* David M. Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 1980 AM. B. FOUND. RES. J. 425, 453 (explaining that one of the functions of law is to influence behavior to accord with established norms of acceptable behavior); *see also* JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 355 (1994) ("Members of the public must know what the law is if they are to predict the probable outcomes for acting a certain way, and modify their behavior accordingly."); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1382 (1994) ("In addition to behavioral change based on rational calculation and fear of sanctions, law may change behavior by influencing estimations of the correctness or feasibility of various sorts of behavior. We learn what society condones from courts and law-related activities."). One commentator has approached the behavioral norm angle from a different perspective—as looking to norms to evaluate whether judges have performed their duty. *See* Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 417 (1987) ("I believe that the norms are generated in the course of the interaction among disputants and adjudicator, and among disputants, adjudicator, and the public. This is an interaction over time, during which the polity develops, learns about, and changes the norms that govern disputes.").

Most who take up the study of law, like most of the informed lay public, begin with understanding "law" as a set of norms that set down the fundamental rules for what is permitted, prohibited, or required in conducting one's day-to-day life. As Justice Harlan wrote:

> *Erie* [*R.R. Co. v. Tompkins*] recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs.... To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether "substantive" or "procedural," is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.

Hanna v. Plumer, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring). As one's legal studies progress, one comes to see this concept of law as a part of law, as "substantive" (versus procedural) law or "black letter" law. One also learns, however, that procedural rules can have as great an impact in determining who prevailed in a legal dispute as the underlying substantive or normative rules. For example, this was one of the lessons of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), in which the Supreme Court addressed the procedural impact of the Rules of Decision Act upon choice of law. As a result, judges and legislatures have learned that they can modify substantive rules and affect outcomes by tinkering with procedural rules. And it is a relatively jejune view of the law that suggests "law's empire" is circumscribed by Justice Harlan's notion of "basic principles" alone. *See* RONALD DWORKIN, LAW'S EMPIRE (1986).

> We live in and by the law. It makes us what we are: citizens and employees and doctors and spouses and people who own things. It is sword, shield, and menace: we insist on our wage, or refuse to pay our rent, or are forced to forfeit penalties, or are closed up in jail, all in the name of what our abstract and ethereal sovereign, the law, has decreed. And we *argue* about what it has decreed, even when the books that are supposed to record its commands and directions are silent; we act then as if law had muttered its doom, too low to be heard distinctly. We are subjects of law's empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do.

Id. at vii. A more recent example involves the undermining of the substantive protections initially accorded in *Miranda v. Arizona*, 384 U.S. 436 (1965), through a variety of procedural maneuverings intended to uphold convictions despite clear violations of the *Miranda* rule. *See, e.g.*, People v. Peevy, 953 P.2d 1212, 1226 (Cal. 1998) (upholding conviction despite "widespread" or "systematic" law enforcement policy or practice of conducting interrogations that intentionally violate *Miranda*).

[9] *See* Neary v. Regents of the Univ. of Cal., 834 P.2d 119, 124 (Cal. 1992) ("[T]he paramount purpose of litigation is to resolve disputes."); Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1275 (1995) ("[A]djudication is about articulating public norms as well as settling private disputes; the making of common law, after all, is a well-accepted function of courts."); Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 249 (1996).

> For law to serve its function as giving expression to enforceable behavioral norms, it must be made publicly for all to see.... "Principled decisions are reasoned and public. As such they become known, feed expectations, and breed a common understanding of

The efforts to bring litigation excesses under control, however, have led to a series of "reforms" to streamline and expedite litigation procedures, some dating back almost sixty years, that are drastically obscuring and reducing both the visibility and the application of legal norms. Thus, the attempt to bring the so-called "crisis" under control is negatively affecting the more basic understanding of law as a carrier and transmitter of social norms. With the vast majority of the applications of law hidden from public view, citizens do not know how laws are being interpreted and enforced. Moreover, there is a substantial likelihood that laws are being applied and enforced inconsistently in non-public forums. Accordingly, the changes in litigation devices and procedures are facilitating the destruction of the law itself.[10]

The processes that threaten "law" fall into three general categories: (1) privatization,[11] (2) obscuring,[12] and (3) eradication.[13] These trends and devices for managing increased legalization remove substantive law from the public realm and thus from honest debate and testing; they distort the norms as applied, turning law into a caricature of itself; they result in a loss of ambience; they result in the loss of the full landscape of law; and they result in the devaluation and destruction of institutional competencies. At the trial level, a very real tension has developed between case management and case processing versus decisionmaking that tests and applies legal norms. Indeed, so much law is now hidden that appellate courts are left to create law and correct errors without a real sense of what constitutes the applicable law.[14]

This article identifies the threat to the entire universe of normative law from a variety of sources that both intentionally and unintentionally threaten to bury, obscure, or eliminate the central role of legal norms in the processes of law.

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the legal culture of the country . . . ."

Id. (quoting JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 358 (1994)).

[10] This article, of course, cannot comprehensively review every pertinent litigation device and procedure, and instead will discuss only a small number of examples. *See* Stempel, *supra* note 7, at 661-62 ("Any narrative of litigation change tends to leave out, gloss over or minimize discordant data or inconclusive phenomena. But without such simplification, communicating the 'gist' of an area is virtually impossible in anything less than a semester-long course or, even, an academic career.").

[11] *See infra* notes 60-145 and accompanying text (examining the impact of settlement and arbitration on legal norms).

[12] *See infra* notes 146-182 and accompanying text (examining the impact of courts' discretionary powers, standards of review, and the notion of harmless error upon legal norms).

[13] *See infra* notes 258-287 and accompanying text (examining the impact of vacatur and depublication on legal norms).

[14] *See, e.g.*, Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 743 (2001) (questioning whether the Supreme Court adequately guides lower courts because it releases so few opinions each year).

Ironically, this "end of law" is being led by law's protectors, guardians, and disseminators, while simultaneously encouraged by a whole range of actors, both individual and institutional—some wishing law well, some wishing it ill.[15] The consequences of the end of law, however, will be far-reaching and ultimately destructive of the legal virtues that define law in the United States and elsewhere, and will undermine the essential character of the "rule of law" here and throughout the world.

Part I of this article analyzes the meaning of "law" as this article uses the term, including the purposes and goals underlying law and the legal system in the United States.[16] Part II explores the impact of devices and procedures permitting private—and judicially encouraged—settlements, as well as the effect of arbitration and private judging on legal norms.[17] Part III explores the impact of devices and procedures that, despite some notable benefits, nevertheless result in the avoiding and obscuring of law—including the practice of according wide-ranging discretion to trial courts; appellate court procedures such as standards of review, harmless error, and the publication (or non-publication) of appellate decisions; and devices and procedures permitting the Supreme Court to avoid contributions to the law, including certiorari, standing, and changes to habeas review.[18] Part IV examines practices that eliminate the availability of decided case law as precedent, including vacatur and depublication.[19] Finally, Part V analyzes the overall impact of these developments upon law.[20]

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[15] *See* Jonathan D. Glater, *Pressure Increases for Tighter Limits on Injury Lawsuits*, N.Y. TIMES, May 28, 2003, at A1 (reporting on bills pending in more than twenty states that "aim to limit awards for pain and suffering, reduce the amount of money that defendants must pay to appeal a decision and apportion liability for damages based on a defendant's share of any blame"); Adam Liptak, *Shot in the Arm for Tort Overhaul*, N.Y. TIMES, Nov. 17, 2002, § 3, at 1 ("When it's all over, the rules governing tort actions—the civil lawsuits, usually for money, claiming wrongful conduct by defendants, usually companies—may well change drastically.").

[16] *See infra* notes 21-59 and accompanying text (discussing purposes and goals of law and the legal system).

[17] *See infra* notes 60-145 and accompanying text (examining fast-track procedures, Rule 16 conferences, procedures intended to encourage settlement, negotiated settlements generally, and arbitration).

[18] *See infra* notes 146-257 and accompanying text (examining ad hoc decisionmaking; appellate standards of review, harmless error, and publishing opinions; and the Supreme Court's use of certiorari, standing, mootness, ripeness, and restrictions on habeas review as avoidance devices).

[19] *See infra* notes 258-287 and accompanying text (examining the eradication of appellate decisions through vacatur and depublication).

[20] *See infra* notes 288-290 and accompanying text (analyzing the impact of these devices and procedures on the development of law and precedent).

I. WHAT IS LAW?

What is law? According to *Black's Law Dictionary*—a source familiar to all U.S. lawyers and law students—law, "in its generic sense, is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force."[21] Major schools of jurisprudential thought diverge in their definitions of law, reflecting the difficulty in crafting an effective definition.[22] Despite the difficulty in defining law, and although what underlies law remains disputed, the artifact of law nevertheless retains a widely accepted core meaning.

A. *Conceptualizing "Law"*

Judge Benjamin Cardozo defined law as "a principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged."[23] Similarly, Justice Oliver Wendell Holmes stated that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[24] Max Weber added to this notion, suggesting that "[a]n order will be called law if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a staff of people holding themselves specially ready for that purpose."[25] Each of these attempts to define law, perhaps obviously, falls short. The existence of predictability and coercion is an incomplete yardstick for measuring law as a concept. Nevertheless, each of these concepts allows for rules having a content that dictates behavior. These behavioral norms specify what is permitted and prohibited to natural and artificial persons, whatever their source or justification.

B. *Law and Morality?*

The "legal positivist" school of thought, as formulated by H.L.A. Hart, views law as a social construct, composed of rules with no logical connection

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[21] BLACK'S LAW DICTIONARY 795 (5th ed. 1979).

[22] A comprehensive exposition on the major schools of jurisprudential thought is beyond the scope of this article. Accordingly, this article provides only a brief overview of the major schools in order to demonstrate that, under any of the definitions of "law," "law" is breaking down. For a more complete summary of the schools of jurisprudential thought, see BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 131-92 (1st ed. 1994) (reviewing natural law, legal positivism, legal formalism, functionalism, legal realism, legal process, law and society, critical legal studies, feminist jurisprudence, critical race theory, civic republicanism, postmodernism, and pragmatism).

[23] BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 52 (1924).

[24] Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 461 (1897).

[25] MAX WEBER, LAW IN ECONOMY AND SOCIETY 5 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954) (emphasis omitted).

to, and therefore as a concept distinct from, morality.[26] Hart's concept of law involves the union of primary and secondary rules.[27] "Primary" rules are specific rules governing specific behavior, and thereby impose duties, requiring or restricting individual action.[28] In addition to laws concerning civil and criminal offenses, the requirements of morality and etiquette can be thought of as primary rules.[29] "Secondary" rules confer powers, whether public or private.[30] Secondary rules control the changing, introducing, applying, eliminating, and evaluating of primary rules.[31] The union of primary and secondary rules, according to Hart, is at the heart of our legal system.[32] Similarly, the law and economics school of thought, as formulated by Richard Posner, asserts that moral reasoning is irrelevant to law, and that economic markets dictate legal decisions.[33]

The "natural law" school of thought takes a different approach. As originally formulated by Blackstone, law is a product of natural reason as exemplified by the common law.[34] Contrary to Hart's legal positivism theories, natural law theorists Lon Fuller[35] and Ronald Dworkin[36] view law as having a necessary connection with morality.[37] For example, Fuller argues that rules must take into account eight "desiderata," which constitute the "internal morality of law."[38] Lawmakers must conform to these eight moral constraints

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[26] H.L.A. HART, THE CONCEPT OF LAW 155, 185, 201 (2d ed. 1994); *see also id.* at 185-86 (stating that legal positivism stands for "the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality").

[27] *Id.* at 79-99.

[28] *Id.* at 81.

[29] *Id.* at 85-87.

[30] *Id.* at 81.

[31] *Id.*

[32] *Id.* at 94, 100.

[33] *See* RICHARD A. POSNER, THE ECONOMIC ANALYSIS OF LAW 6 (1973) ("[M]any areas of the law, especially the great common law fields of property, torts, and contracts, bear the stamp of economic reasoning."); *see also* GUIDO CALABRESI, THE COST OF ACCIDENTS (1970) (applying economic analysis to tort law issues).

[34] *See generally* SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (William D. Lewis ed., 1922).

[35] *See generally* LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1964).

[36] *See generally* DWORKIN, *supra* note 8. Dworkin is sometimes referred to as a "neo-natural law" philosopher. *See* KUKLIN & STEMPEL, *supra* note 22, at 164.

[37] Under the "natural law" school of thought, law is formulated by legal authority to achieve the common good and carries with it a moral obligation of obedience. *See* John Finnis, *Natural Law and Legal Reasoning*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 136-37 (Robert P. George ed., 1992).

[38] FULLER, *supra* note 35. Professor Fuller phrases the eight desiderata as follows:

> At the height of the ascent we are tempted to imagine a utopia of [(1)] legality in which [(2)] all rules are perfectly clear, [(3)] consistent with one another, [(4)] known to every citizen, [(5)] and never retroactive[, (6)] the rules remain constant through time, [(7)]

in order to succeed in making law.[39] Fuller's version of natural law is a procedural one because the necessary principles are formal features of a legal system, rather than the substantive aims of legal rules.[40]

Ronald Dworkin, a vocal and persistent critic of Hart's legal positivism theory,[41] asserts that there is more to law than simply rules; rules are a part of law, but law is also a matter of principle.[42] According to Dworkin, the concept of law is closely connected with concepts of justice, rights, and fairness—all of which have a morality component.[43] Deciding cases requires discovering the rights that are derived primarily from rules of law, which are clear and uncontradicted, as well as by principles, which may be ambiguous and uncertain, and may also have some moral content.

> There is inevitably a moral dimension to an action at law, and so a standing risk of a distinct form of public injustice. A judge must decide not just who shall have what, but who has behaved well, who has met the responsibilities of citizenship, and who by design or greed or insensitivity has ignored his own responsibilities to others or exaggerated theirs to him. If this judgment is unfair, then the community has inflicted a moral injury on one of its members because it has stamped him in some degree or dimension as an outlaw. The injury is gravest when an innocent person is convicted of a crime, but it is substantial enough when a plaintiff with a sound claim is turned away from court or a defendant leaves with an undeserved stigma.
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> These are the direct effects of a lawsuit on the parties and their dependents.[44]

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demand only what is possible, [(8)] and are scrupulously observed by courts, police, and everyone else charged with their administration.

Id. at 41.

[39] *Id.*

[40] According to Professor Fuller:

> What I have called the internal morality of law is in this sense a procedural version of natural law . . . . The term "procedural" is, however, broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered . . . .

Id. at 96-97.

[41] Indeed, in the second edition of *The Concept of Law*, Professor Hart's 38-page "Postscript" is devoted almost entirely to rebutting Dworkin's criticisms of Hart's legal positivism approach. *See* HART, *supra* note 26, at 238-76.

[42] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 5 (4th prtg. 1978) (explaining how jurisprudence should respond to principles of fairness).

[43] *See id.* ("Jurisprudence should . . . explor[e] the nature of the moral argument, trying to clarify the principle of fairness which the critics have in mind to see whether judicial practice does, in fact, satisfy that principle.").

[44] DWORKIN, *supra* note 8, at 1-2.

Whether law is purely a social construct or is based on true moral principles is a complex issue. Both positivist and natural law approaches, however, acknowledge a prescriptive role for the resulting legal rules. The complexity of law as a construct, and the fact that law encompasses both substantive and procedural components,[45] renders a fully satisfactory definition impossible.[46] Some helpful generalities—and helpful specifics—are the subject of the next section.

C. *"Law" Is More than the Mere Resolution of Disputes*

Particularly in recent years, "law" has become synonymous with "dispute resolution."[47] In our view, the tendency to equate "law" with "dispute

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[45] *See* STEVEN VAGO, LAW & SOCIETY 8 (4th ed. 1994). Professor Vago contends that

> [s]ubstantive laws consist of rights, duties, and prohibitions administered by courts—which behaviors are to be allowed and which are prohibited (such as prohibition against murder or the sale of narcotics). Procedural laws are rules concerning just how substantive laws are to be administered, enforced, changed, and used in the mediation of disputes (such as filing charges or presenting evidence in court).

Id. (emphasis omitted).

[46] *See, e.g.*, LAWRENCE M. FRIEDMAN, LAW IN AMERICA 4 (2002) ("There are, in fact, many ways to define this elusive term ['law'], and many ways to describe what we mean by 'law.'"); HART, *supra* note 26, at 16 ("There are of course many other kinds of definition besides the very simple traditional form which we have discussed, but it seems clear . . . that nothing concise enough to be recognized as a definition [of law] could provide a satisfactory answer . . . ."); VAGO, *supra* note 45, at 6 ("Even among scholars, there is no agreement on the term ['law']. . . . The question 'What is law?' haunts legal thought, and probably more scholarship has gone into defining and explaining the concept of law than into any other concept still in use in sociology and jurisprudence."); VALVERDE, *supra* note 7, at 11 ("[T]he abstract term 'law' has little utility. Simply using the term 'law' incites certain lines of grand questioning, among which 'What is law?' is foremost. . . . [I]t is important to resist . . . ask[ing] the grand questions—'why' questions and 'what' questions."); *see also* FRIEDMAN, *supra* note 7, at 10 ("There is, of course, no 'true' definition of law."); *id.* at 11 ("The lack of precise definition would, perhaps, be a serious failing, if we believed in a distinctive science of law. But 'law' is not a science . . . ."); E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY OF COMPARATIVE LEGAL DYNAMICS 18 (1954) ("[T]o seek a definition of the legal is like the quest for the Holy Grail.").

[47] In a common law tradition, where much of "the law" springs from litigation that is resolved on appeal, perhaps it is easy to conflate law and dispute resolution. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357 (1978). Professor Fuller explained:

> It is customary to think of adjudication as a means of settling disputes or controversies. This is, of course, its most obvious aspect. The normal occasion for a resort to adjudication is when parties are at odds with one another, often to such a degree that a breach of social order is threatened.
>
> More fundamentally, however, adjudication should be viewed as a form of social ordering, as a way in which the relations of men to one another are governed and regulated.

Id.

resolution" is unduly narrow and misleading. Taking only the dispute resolution component of law,[48] and using that part as a synonym for law in its entirety, results in an erroneous and harmful characterization. This erroneous characterization has played a large and conspicuous role in the end of law phenomenon. The view of "law" as little more than a process for resolving disputes removes its normative content and force, and diminishes law's significance in ordering society. In addition, the view of law as essentially a methodology for resolving individual disputes—a methodology that is seen as flawed and in need of a quick fix—has led to the encouragement and proliferation of alternative dispute resolution methods, both those privately sought and those judicially promoted. To a lesser degree, it has also contributed to the increase in devices and procedures aimed at streamlining and expediting litigation. These consequences lead to pressures to further reduce the availability and impact of law as a normative element.

Characterizing "law" as "dispute resolution" shifts the focus from "law" as a complex, multi-faceted abstraction serving many purposes, to a simplistic device. Using this simplistic approach, any number of alternative methods may be substituted for traditional legal processes because the ultimate goal is simply to find a solution to a particular dispute between particular parties.[49] If a solution is found, the job is done. By taking this narrow "dispute resolution" approach, other considerations within the wider realm of "law"—including providing norms,[50] social control,[51] affording a public forum,[52] providing future guidance for others similarly situated,[53] creating precedent,[54] and building a body of decisions for use both directly and by analogy[55]—are disregarded and discarded without apparent thought.

This article hopes to draw upon a richer meaning for law—a broader definition of "the law," but one nevertheless unlikely to provoke controversy. Law is better understood as embodying multiple purposes. One purpose of "law" is to implement legislatively-, administratively-, and judicially-created

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[48] *See* FRIEDMAN, *supra* note 7, at 8 (asserting that the definition of law as "dispute settlement" illustrates only its functional nature).

[49] *See* Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 222 (1999) ("Under [the dispute resolution view of litigation], bringing peace to the parties is paramount . . . .").

[50] *See* FRIEDMAN, *supra* note 7, at 1 (arguing that one way of looking at "the law" is as "a set of rules or norms, written or unwritten, about right and wrong behavior"); *id.* at 7-8 (stating that the law can be seen as a body of norms).

[51] *See id.* at 18 (opining that one "basic function of the legal system is *social control*").

[52] *See infra* notes 69-88 and accompanying text (discussing public forums).

[53] *See* FRIEDMAN, *supra* note 7, at 45 ("A crucial function of [law] is guiding behavior.").

[54] *See* DWORKIN, *supra* note 8, at 99 ("Precedent also has a prominent place in our practices: past decisions of courts count as sources of legal rights.").

[55] *See* FRIEDMAN, *supra* note 7, at 253 ("Reasoning by analogy is a pervasive feature of common-law cases." (citation omitted)).

rules and standards[56] in specific cases, through reasoned decisionmaking,[57] thereby creating behavioral norms for those similarly situated while also creating precedent and building a body of decisions for future guidance.[58] Another purpose of "law" is to provide a public forum to resolve disputes.[59] A common foundation necessary to both of these purposes is a prerequisite that law and legal proceedings be public. Private, secret laws or legal proceedings can neither provide information that will shape the behavior of others nor provide a public forum.

II. THE END OF LAW: PRIVATIZING LAW

The path currently leading to law's decline and possible end is neither the result of an intentional killing nor the result of a natural, unavoidable chain of

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[56] *See generally* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57-59 (1992) (describing how legal directives can take the form of either fact-specific rules or more general policy-driven standards).

[57] *See* Fuller, *supra* note 47, at 388 ("By and large it seems clear that the fairness and effectiveness of adjudication are promoted by reasoned opinions.").

[58] *See* KUKLIN & STEMPEL, *supra* note 22, at 134 ("Law arose as a means of organizing society and enforcing social norms for the benefit of the community."); VAGO, *supra* note 45, at 8 ("The principal function of law is to regulate and constrain the behavior of individuals in their relationships with one another."); *id.* at 13-14 (stating that one of the "recurrent themes" of the function of law is social control); *see also* FRIEDMAN, *supra* note 7, at 18. As Professor Friedman asserted:

> The law, in other words, announces what the rules and standards are and affirms that society can and will punish wrongdoers—those who step over the line. The goal is not suppression for the sake of order, although probably that is the ultimate goal, but suppression for the sake of emblazoning norms upon the consciousness of society.

Id. at 19; *see also* HART, *supra* note 26, at 98 (suggesting that "the heart of a legal system" involves "the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication"). The prominent jurist Oliver Wendell Holmes wrote:

> What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of this mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.

Holmes, *supra* note 24, at 9.

[59] *See* PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 3 (1976) ("On the one hand, appellate justice is preoccupied with the impact of decisions on particular litigants, but on the other it is concerned with the general principles which govern the affairs of persons other than those who are party to the cases decided."); MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 7 (1988) ("The function of resolving disputes faces toward the parties and the past. The function of enriching the supply of legal rules faces toward the general society and the future.").

events. Rather, the end of law is the largely unintended result of several processes—processes intended, ironically, to improve legal processes or to cope with increased processing costs in a system of limited resources. Many of these changes result in private resolutions, leading to the veiling and disappearance of law.

A. *Privatizing Law Through Settlement and Its Encouragement*

In the pretrial phase, changes instituted to streamline and expedite the civil litigation process[60] include fast-track designations—such as Federal Rule of Civil Procedure 16 orders and conferences—and the increased use of alternative dispute resolution methods—such as arbitration and mediation. The increase in alternative dispute resolution, in particular, has generated voluminous commentary,[61] although the emphasis on settlement more generally has also spawned many law review articles.[62]

Fast-track designations, standing alone, simply set earlier deadlines and trial dates,[63] and therefore facially have no impact on the public nature of legal proceedings. There is some reason to fear, however, that as applied, accelerated scheduling and trial dates pressure parties to settle. Such pressure is exemplified in Federal Rule of Civil Procedure 16, which addresses pretrial conferences and scheduling.[64] The objectives of Rule 16 include:

> (1) expediting the disposition of the action; (2) establishing early and continuing control so that the case will not be protracted because of lack of management; (3) discouraging wasteful pretrial activities; (4) improving the quality of the trial through more thorough preparation, and; (5) *facilitating the settlement of the case.*[65]

In addition to recognizing settlement as one of Rule 16's purposes, the Rule takes a formal position of encouraging settlement, stating that in pretrial conferences judges may consider and take appropriate action with respect to

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[60] *See supra* note 10.

[61] *See, e.g.*, Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81 (stating that litigants might disagree with the supposed advantages of mediation and instead prefer adversarial litigation and adjudication to alternative dispute resolution); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995) (discussing developments in alternative dispute resolution and comparing it to adjudication); Patricia M. Wald, *ADR and the Courts: An Update*, 46 DUKE L.J. 1445 (1997) (examining three different types of alternative dispute resolution); Weinstein, *supra* note 9, at 241 (commenting on the privatization of justice and the forum of alternative dispute resolution).

[62] *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (presenting arguments against the recent trend toward settlement of disputes); Galanter & Cahill, *supra* note 8, at 1339 (advocating lending a critical eye to settlements).

[63] *See* BLACK'S LAW DICTIONARY 623 (7th ed. 1999) (defining "fast-tracking").

[64] FED. R. CIV. P. 16.

[65] FED. R. CIV. P. 16(a) (emphasis added).

"settlement and the use of special procedures to assist in resolving the dispute . . . ."[66]

The phenomenon of "repeat players" in litigation also plays a role in encouraging settlement. Unlike most individuals, who may participate in only a single lawsuit throughout their entire lives, some institutional entities, such as insurance companies, may be parties to litigation on a regular basis.[67] Depending on the specific nature of the case, such "repeat players" may have a particular incentive to settle in order to avoid adverse precedents, which could result in a vast multiplication of similar lawsuits.[68]

Although the notion of law sometimes carries an aura of mystique—which is furthered by legal jargon, procedures largely unfamiliar to the average layperson, and the restriction of the practice of law to those with advanced schooling and a license to practice in a particular state—it is fully accepted that

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[66] FED. R. CIV. P. 16(c)(9); *see also* FED. R. CIV. P. 16(c)(16) ("[T]he court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute."). It is more than a little ironic that federal district court judges have themselves opined that "'a bad settlement is almost always better than a good trial.'" Hispanics United v. Vill. of Addison, 988 F. Supp. 1130, 1149 (N.D. Ill. 1997) (quoting *In re* Warner Communications Sec. Litig., 618 F. Supp. 735, 740 (2d Cir. 1986)); Strong v. BellSouth Telecomms., Inc., 173 F.R.D. 167, 172 (W.D. La. 1997) ("[A]fter all, it is said that a bad settlement is better than a good trial.").

[67] *See* Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1160 (1990) ("Most automobile and property owners deal with one insurance company, and no more than one lawsuit. In contrast, insurance companies are bureaucratic repeat players who deal with many insureds and many lawsuits." (footnotes omitted)).

[68] *See id.* ("[An insurer's] decision to settle or to try a particular case may have effects on the disposition of other lawsuits, on the career of the claims adjustor or attorney who makes the decision, and on future business relations with insureds."); *see also* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 52-53 (1996) (giving examples of how "repeat player" defendants may have varying strategic incentives, resulting in different settlement strategies); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1618 (2003).

> [Some theorists have noted that] when defendants' litigation stakes are higher than plaintiffs'—for example, when defendants are repeat players but plaintiffs are one-shot players—the result is, in general, to encourage settlement. The idea is that trial is particularly costly for such defendants because of the risk of preclusion, bad precedent, and negative reputational effects if they lose. Thus settlements become relatively cheaper.

Id. (footnotes omitted). *See generally* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 25-26 (1984) (discussing how the rate of litigation and the parties' bargaining over settlement is affected when the parties have different stakes). *But see* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 241 (1982) (suggesting that insurance disputes involve repeat players, resulting in an incentive for influencing the expectations of future litigants, and predicting that, "where insurance companies are involved in suits against individuals, the insurance companies will adopt hard bargaining strategies").

legal proceedings are to be played out in a public arena. The public nature of legal proceedings was a feature of the common law,[69] and the continued centrality and importance of a public trial is evident from its inclusion in the Constitution.[70]

Although the constitutional right to a public trial expressly applies only to criminal proceedings,[71] the public nature of legal proceedings is evidenced in civil lawsuits as well.[72] Non-public, or "secret," legal proceedings traditionally have existed only in a very limited number of contexts,[73] such as grand jury

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[69] *See* Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 419 (1979) (Blackmun, J., concurring and dissenting) ("[T]he common law from its inception was wedded to the Anglo-Saxon tradition of publicity, and the 'ancient rul[e that c]ourts of justice are public' . . . ." (quoting F. POLLOCK, THE EXPANSION OF THE COMMON LAW 51 (1904))); 2 JOEL PRENTISS BISHOP, NEW CRIMINAL PROCEDURE § 957, at 767 (2d ed. 1913) ("By immemorial usage, wherever the common law prevails, all trials are in open court, to which spectators are admitted."); Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899, 1900 (1978) [hereinafter Note, *Trial Secrecy*] ("The common law placed great weight on the tradition of holding court in public."); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) (Burger, C.J., plurality opinion) ("[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice." (citations omitted)). *See generally* Max Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381 (1932) (discussing the origins and importance of public trials).

[70] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

[71] *Id.*

[72] The public nature of civil proceedings is of long standing. The first public trial provision in the United States applied to both civil and criminal trials:

> That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner.

Concessions and Agreements of West New Jersey (1677), ch. XXIII, *quoted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 129 (1971).

[73] The use of secret proceedings, however, has increased since the terrorist attacks upon the United States on September 11, 2001. *See, e.g.*, Stephen R. McAllister et al., *Life After 9/11: Issues Affecting the Courts and the Nation*, 51 U. KAN. L. REV. 219, 229 (2003) (finding an "unprecedented use of secret proceedings not observable by the press or the public [since the terrorist attacks of September 11, 2001]" and recognizing that "[t]he problem with closed proceedings is there can be violations of rights and no one is there to observe it"); *see also* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 961 (2002) ("Such an unprecedented and broad-based use of secret proceedings [in the wake of the September 11, 2001 terrorist attacks] raises fundamental questions of fairness, because public scrutiny is critical to a fair process."); Gina Holland, *Court Rejects Challenge to Deportation Hearings*, MILWAUKEE J. SENTINEL, May 28, 2003, at 13A ("The Supreme Court . . . reject[ed] a challenge to secret deportation hearings held for hundreds of foreigners detailed after the Sept. 11 attacks.").

inquests[74] and military court-martials,[75] although a particular proceeding may be closed to the public for various reasons.[76] Even motions heard outside the presence of a jury, such as evidentiary objections, are nevertheless recorded by the court reporter for appellate review. The public nature of law and legal proceedings is an important component of the concept of precedent.

> To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.[77]

Although public trials are often rationalized in terms of defendants' rights,[78] public trials benefit both the defendant and society as a whole.[79]

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[74] *See* FED. R. CRIM. P. 6(e) (prohibiting any disclosure of "matters occurring before the grand jury"); *In re* Grand Jury Subpoena, 103 F.3d 234, 242 (2d Cir. 1996) (describing the rationale for the secrecy of the grand jury process).

[75] *See* 10 U.S.C. § 832 (2003) (describing the procedure for pretrial investigation for court-martials); Gregory E. Fehlings, *Deportation as a Consequence of a Court-Martial Conviction*, 7 GEO. IMMIGR. L.J. 295, 306 n.89 (1993) (stating that court-martials are "'not open to the public and the press'" (quoting F. LEE BAILEY, FOR THE DEFENSE 35 (1975))).

[76] *See, e.g.*, United States v. Bell, 464 F.2d 667, 670 (2d Cir. 1972) (proceedings closed to the public to protect air piracy safeguards); People v. Hagan, 248 N.E.2d 588, 591 (N.Y. 1969) (proceedings closed to the public to protect witnesses testifying against the defendants accused of murdering Malcolm X).

[77] THE FEDERALIST No. 78, at 496 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

[78] *See* Note, *Trial Secrecy*, *supra* note 69, at 1902.

> The sixth amendment right to a public trial is concerned with procedural fairness and the attainment of justice in individual cases. In criminal trials, secrecy has historically been associated with abusive practices that impair the possibility of fair trial; protection of the defendant's rights thus requires some procedural safeguard against secrecy. Neither the wording of the public trial guarantee nor the discussion surrounding its passage suggests that its purpose was anything other than to provide such a safeguard.

Id. (footnotes omitted).

[79] *See id.* at 1901-02 ("A public trial involves a societal interest that is distinct from that of the parties involved. Yet discussions of public access to criminal trials readily become intertwined and confused with questions pertaining to the defendant's sixth amendment right to a public trial." (footnotes omitted)). Indeed, it is likely that the right to a public trial originally developed from public concerns rather than from protecting the interests of defendants. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 418-19 (1979) (Blackmun, J., concurring and dissenting) ("[T]he [English common law] tradition of conducting the proceedings in public came about as an inescapable concomitant of trial by jury, quite unrelated to the rights of the accused . . . ."); *id.* at 421 ("[I]t is most doubtful that the tradition of publicity ever was associated with the rights of the accused. The practice of

> A separate public interest concerned with the role of the court [finds] protection in the first amendment. This first amendment interest differs from the sixth amendment public trial guarantee in three principal ways. First, it is grounded in the rights of public discussion and personal autonomy embraced by the constitutional guarantee of free speech, rather than in a concern for just results in particular cases. Second, because the parties involved in a trial will have no direct concern for the first amendment ramifications of secrecy, the public interest in viewing the proceedings requires separate examination even when the parties are amenable to closure. Finally, the right applies to civil as well as criminal trials, unlike the sixth amendment right, which is explicitly limited to the latter.[80]

The societal benefit of public trials includes not only the public's ability to scrutinize proceedings for any improprieties,[81] but also the public's ability to observe the proceedings for educational purposes[82] or simply out of curiosity.[83]

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conducting the trial in public was established as a feature of English justice long before the defendant was afforded even the most rudimentary rights."). *But see* Resnik, *supra* note 8, at 416 ("[F]ive rationales—history, catharsis, education, control, and accuracy—are what one finds in the legal literature about why the public has a role to play in some adjudicatory procedures, most typically in criminal trials. All the arguments rest upon assumptions, most of which are unverifiable.").

[80] Note, *Trial Secrecy*, *supra* note 69, at 1902-03.

[81] Justice Holmes explained the societal benefit of public trials:

> It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

Cowley v. Pulsifer, 137 Mass. 392, 394 (1884) (Holmes, J.); *see also* 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 103 (1797). Sir Coke reasoned:

> [A]ll [causes] ought to be heard, ordered, and determined before the judges of the kings courts openly in the kings courts, whither all [persons] may [resort]; and in no chambers, or other private places: for the judges are not judges of chambers, but of courts, and therefore in open court, where the parties [councel] and attorneys attend, ought orders, rules, awards, and judgments to be made and given, and not in chambers or other private places . . . . Nay, that judge that ordereth or ruleth a [cause] in his chamber, though his order or rule be just, yet offendeth he the law, (as here it appeareth) [because] he doth it not in court.

Id.

[82] *See Gannett Co.*, 443 U.S. at 428 (Blackmun, J., concurring and dissenting) ("Public judicial proceedings have an important educative role . . . .").

[83] *See* Daubney v. Cooper, 109 Eng. Rep. 438, 440 (K.B. 1829) ("[I]t is one of the essential qualities of a Court of Justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on . . . have a right to be present for the purpose of hearing what is going on."); *see also* United States v. Kobli, 172 F.2d 919, 924 (3d Cir. 1949) ("[M]embers of the general public should be admitted to every criminal trial [even when] most of them come only out of morbid curiosity."); State v. Hensley, 79

Whether viewed from the perspective of safeguarding against judicial abuse,[84] facilitating truth,[85] informing the public,[86] or more generally,[87] keeping law and legal proceedings in the public view is crucial to law itself.[88] Accordingly, "law," as the term is used in the United States, encompasses a public dimension that is essential to its meaning. Unfortunately, settlement and other recent procedural changes aimed at streamlining and expediting litigation have had the concomitant contrary effect of hiding legal processes from public view.

Settlement, whether through traditional negotiations or some form of alternative dispute resolution, raises several concerns. There are concerns that arise when the parties to a formally filed lawsuit elect to settle the matter on their own accord. These concerns include removing litigation from the judicial arena, and thus from a public forum, with a resultant private agreement rather than a publicly available judicial decision.[89] In civil cases, the common

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N.E. 462, 463-64 (Ohio 1906) ("[T]he people have the right to know what is being done in their courts . . . ."); E.W. Scripps Co. v. Fulton, 125 N.E.2d 896, 900 (Ohio Ct. App. 1955) ("It can never be claimed that in a democratic society the public has no interest in or does not have the right to observe the administration of justice."); Davison v. Duncan, 110 Rev. R. 572, 572 (Q.B. 1857) ("It is of great consequence that the public should know what takes place in Court . . . .").

[84] *See* 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524-25 (photo. reprint 1978) (1827) (stating that publicity is the most effective safeguard against judicial abuse).

[85] *See* 3 BLACKSTONE, *supra* note 34, at 373 ("[A] witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal."); *accord* SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 343, 345 (6th ed. 1820) (stating that public trials deter perjury).

[86] *See* BENTHAM, *supra* note 84, at 576-77. Bentham contends that defendants should not be able to request a private trial because "there is a party interested (viz. the public at large) whose interest might, by means of the privacy in question, and a sort of conspiracy, more or less explicit, between the other persons concerned (the judge included) be made a sacrifice." *Id.*

[87] *See* JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 67 (M. Dumont trans., 1825) ("[P]ublicity is the most effectual safeguard of testimony, and of the decisions depending on it; it is the soul of justice; it ought to be extended to every part of the procedure, and to all causes.").

[88] *See* Oxnard Publ'g Co. v. Superior Ct. of Ventura County, 68 Cal. Rptr. 83, 95 (Cal. Ct. App. 1968) ("[T]he judicial process does not unfold legally and normally . . . behind closed doors."); *see also* United States v. Lopez, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971) ("Conducting trials behind closed doors might engender an apprehension and distrust of the legal system which would, in the end, destroy its ability to peacefully settle disputes.").

[89] *See* Lederman, *supra* note 49, at 268 ("The benefits of precedent are often overlooked in discussions about settlement, perhaps because of the inherent bias of the 'dispute resolution' model of litigation, which views precedent as a side effect of resolving the parties' dispute."); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622 (1995) ("[S]ettlements, like private adjudications, produce no rules or precedents binding on nonparties.").

inclusion of a confidentiality agreement in the settlement contract further shrouds the underlying information, reasoning, and outcome in secrecy.[90] In addition, settlements are compromises, in which both sides agree to an outcome that is an adjustment from that to which they believe they are entitled.[91] Accordingly, the "justice" achieved by settlement may be questionable.[92] In criminal cases, plea bargaining is the analog to civil settlement, with all of the concomitant benefits and drawbacks,[93] as well as the

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[90] *See* Galanter & Cahill, *supra* note 8, at 1386.

> The information pool may be further depleted by the presence of a confidentiality agreement attached to the settlement. An agreement not to disclose the terms of a settlement is likely to limit the general effects of the dispute since the parties are blocked from transferring information to other potential disputants and decisionmakers. Of course, some information may still be transferred, such as the fact of a settlement. What general effects this creates are unclear. The reasons for upholding the confidentiality of settlements (such as protection of trade secrets) have to be balanced against the severe constriction of the general effects of the settlement. Where parties and lawyers receive benefits in exchange for the suppression of information about settlements, we have what amounts to the appropriation for private benefit of the public goods produced by the dispute process.

Id. (emphasis omitted).

[91] *See* Fiss, *supra* note 62, at 1086 ("To settle for something means to accept less than some ideal."); Galanter & Cahill, *supra* note 8, at 1371 ("Settlement typically involves arriving at a position between the original offers and demands of the parties. Thus, it involves a process of compromise in the sense that each has sacrificed some part of his claim in order to secure another part.").

[92] *See* Fiss, *supra* note 62, at 1085 ("Parties might settle while leaving justice undone. The settlement of a school suit might secure the peace, but not racial equality."); Lederman, *supra* note 49, at 263 ("Parties generally have no incentive to push for trial in the face of encouragement of settlement because . . . they bear the litigation costs.").

[93] *See generally* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983).

> In contested cases, [plea bargaining] substitutes a regime of split-the-difference for a judicial determination of guilt or innocence and elevates a concept of partial guilt above the requirement that criminal responsibility be established beyond a reasonable doubt. . . . Indeed, [plea bargaining] tends to make figureheads of judges, whose power over the administration of criminal justice has largely been transferred to people of less experience, who commonly lack the information that judges could secure, whose temperaments have been shaped by their partisan duties, and who have not been charged by the electorate with the important responsibilities that they have assumed. Moreover, plea bargaining perverts both the initial prosecutorial formulation of criminal charges and, as defendants plead guilty to crimes less serious than those that they apparently committed, the final judicial labeling of offenses. . . .
>
> Plea bargaining . . . conceals other abuses; it maximizes the dangers of representation by inexperienced attorneys who are not fully versed in an essentially secret system of justice; . . . it merges the tasks of adjudication, sentencing, and administration into a single amorphous judgment to the detriment of all three; . . . and it almost certainly increases the number of innocent defendants who are convicted.

Id. at 932-34 (footnotes omitted). As is true in civil litigation, the vast majority of criminal matters are resolved without trial. *See* Jonathan R. Cohen, *When People Are the Means:*

potential for compromising substantive constitutional protections, including the right to counsel and the presumption of innocence.[94]

Pressures to settle continue into the trial phase. For example, in civil cases, Federal Rule of Civil Procedure 68 intensifies the pressure to settle litigation by imposing post-offer costs if the judgment ultimately obtained at trial is not more favorable than the pretrial offer.[95] Offers of judgment often occur before trial, but can also occur during trial when the proceedings for liability and damages are bifurcated, and thus are a crossover device.[96] By pressuring parties to settle their dispute, Rule 68 carries the same dangers posed by settlements generally.[97]

As Professor Fiss recognized, whatever the virtues of settlement over more definitive adjudication, dangers are inherent in the increased pressure to settle cases.[98] Warning that "[s]ettlement is a poor substitute for judgment,"[99] and

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Negotiating With Respect, 14 GEO. J. LEGAL ETHICS 739, 744 n.5 (2001) (reporting a study finding that eighty-one percent of state felony cases and eighty-seven percent of federal district court criminal cases are resolved short of trial).

[94] *See* Alschuler, *supra* note 93, at 933-34. Professor Alschuler explains:

> The practice of plea bargaining is inconsistent with the principle that a decent society should want to hear what an accused person might say in his defense—and with constitutional guarantees that embody this principle and other professed ideals for the resolution of criminal disputes. Moreover, plea bargaining has undercut the goals of legal doctrines as diverse as the fourth amendment exclusionary rule, the insanity defense, the right of confrontation, the defendant's right to attend criminal proceedings, and the . . . right of the press and the public to observe the administration of criminal justice.

Id. (footnotes omitted).

[95] Rule 68 provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

FED. R. CIV. P. 68.

[96] *Id.*

[97] *See infra* notes 98-111 and accompanying text (describing the pressures attendant in settlement).

[98] *See* Fiss, *supra* note 62, at 1073; *accord id.* at 1076-78 (finding that an imbalance of

noting that alternative dispute resolution erroneously "asks us to assume a rough equality between the contending parties,"[100] Professor Fiss explained: "Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done."[101] These concerns have not dissipated over time. Disparities in wealth and power still exist; some have observed that the differences are becoming even greater.[102]

Even more substantial concerns arise when the motivation—perhaps even pressure—to settle a formally filed lawsuit comes not from the parties, but from the judge.[103] In addition to practical realities, such as large caseloads, congested dockets, and backlogs,[104] formal procedures such as Rule 16 and court-annexed dispute resolution put judges in the position of encouraging settlement.[105] Indeed, "federal judges today devote substantial amounts of

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power between litigating parties can impact settlements); *id.* at 1078-82 (discussing the absence of authoritative consent in settlement transactions); *id.* at 1082-85 (highlighting the lack of a foundation for continuing judicial involvement); *id.* at 1085 (arguing that the emphasis on settlement mistakenly "reduc[es] the social function of the lawsuit to one of resolving private disputes," and recognizing that the "[p]arties might settle while leaving justice undone").

[99] *Id.* at 1089.

[100] *Id.* at 1076.

[101] *Id.* at 1075; *see also* Debra Lyn Bassett, *Three's A Crowd: A Proposal to Abolish Joint Representation*, 32 RUTGERS L.J. 387, 440-42 (2001) (discussing the illusory nature of consent).

[102] *See* Isaac Shapiro et al., *Center on Budget and Policy Priorities, Pathbreaking CBO Study Shows Dramatic Increases in Income Disparities in 1980s and 1990s: An Analysis of the CBO Data* 1 (2000), *available at* http://www.cbpp.org/5-31-01tax.htm (last accessed Jan. 7, 2004) (stating that the study shows "dramatic increases in income disparities . . . in both the 1980s and 1990s"); *id.* ("[I]ncome disparities grew more sharply between 1995 and 1997 . . . than in any other two-year period since 1979.").

[103] The Federal Rules of Criminal Procedure expressly prohibit a federal judge from participating in plea arrangement discussions, although a judge may, of course, review a plea bargain. *See* FED. R. CRIM. P. 11(c)(1), (3). The same prohibition does not exist in civil proceedings. *See* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 534-35 (1986) ("[I]n in the last few years, managerial judges have focused increasingly upon judicial involvement in settlement."); *see also* Galanter & Cahill, *supra* note 8, at 1340 ("[F]irst state and then federal judges have embraced active promotion of settlement as a major component of the judicial role.").

[104] *See* Galanter & Cahill, *supra* note 8, at 1364 ("By definition, settlements mean there is less that courts have to do.").

[105] *See* Lederman, *supra* note 49, at 268 ("[C]ourts have an incentive to encourage settlement—namely, reducing their workloads."); Resnik, *supra* note 103, at 536 ("ADR (in the form of court-annexed arbitration, judicial settlement conferences, summary jury trials, and mediation) offers not only an alternative to, but often a replacement for, adjudication. . . . [A]s judges engage in or supervise the various ADR processes, the line

time to case management. Only when informal discussions fail do judges take their places on the bench at formal trials and hearings."[106]

> The attention paid to the judicial settlement role clarifies one aspect of the impetus for increased court control: the goals include constraining adversarial activity so as to conclude cases without adjudication. The volume of case dispositions (rather than the substantive law in general, the merits of a particular case, improved techniques for factfinding) has become the be-all and end-all of many within the federal judiciary.[107]

When judges encourage settlement, some of the consequences are the same: the litigation is removed from a public forum to a private one, and the resultant settlement will likely be a private agreement. But involving judges in this process has other ramifications as well. Judges may use heavy-handed pressure to urge parties to settle and, in the process, they may offer their assessment of a case's strength or viability. Since the judge's traditional role is one of impartiality,[108] these statements may be accorded undue weight.

In addition, judges are powerful, and "those subject to judges' authority may challenge it only at great risk. Under the individual calendar system, a single judge retains control over all phases of a case. Thus, litigants who incur a judge's displeasure may suffer judicial hostility or even vengeance with little hope of relief."[109]

Moreover, the meetings or conferences at which judges may encourage settlement tend to occur out of public view and off the record,[110] thereby sheltering the judge's actions from scrutiny and eliminating the protections afforded in formal proceedings. For example, basic pretrial information-gathering occurs informally and without evidentiary protections.

> The extensive information that judges receive during pretrial conferences has not been filtered by the rules of evidence. Some of this information is received ex parte, a process that deprives the opposing party of the opportunity to contest the validity of information received. Moreover, judges are in close contact with attorneys during the course of management. Such interactions may become occasions for the development of intense feelings—admiration, friendship, or antipathy. Therefore, management becomes a fertile field for the growth of personal bias.[111]

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between adjudication and the other activities blurs." (footnotes omitted)).

[106] Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 403 (1982).

[107] Resnik, *supra* note 103, at 535.

[108] Resnik, *supra* note 106, at 428.

[109] *Id.* at 425.

[110] *Id.* at 407 ("Pretrial . . . conferences . . . are informal events. The parties talk with, rather than at, each other. The conferences often take place in chambers. The participants sit around tables, and the judge wears business dress.").

[111] *Id.* at 427.

Thus, the judge's participation in the process exacerbates the pressure to settle.

When settlements are the predominant means of addressing legal claims, the system becomes one of secret law. This is not to suggest that judges act lawlessly during settlement efforts. However, the version of law that judges apply in such meetings is almost certainly more subjective, and more tailored to achieve agreement than resolution. Undoubtedly the "law" that judges apply in settlement will range from the same law they would apply in a public, written decision on the merits; to a highly individualized version, tailored to each party to emphasize the difficulties that each side faces; to purely arbitrary, ad hoc rules aimed solely to achieve acquiescence, or even surrender.

The "law" itself is not applied directly in such a system. Instead, a "shadow" law[112] applies—something less than law itself, drained of law's vitality, drained of law's power, drained of law's ability to guide and persuade. Similarly, non-public settlements can easily produce inconsistent results when contrasted with similar cases, simply because settlement terms are often confidential and unavailable to other potential litigants. This potential for inconsistent treatment violates the most fundamental notion of fairness—that those similarly situated are treated the same.[113]

Despite these drawbacks, courts have warmly and enthusiastically embraced settlements, seemingly without concern that settlement will prevent the

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[112] Although not used in the same manner, the term "shadow" was inspired by the title of an article by Robert Mnookin. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); *see also* Cooter et al., *supra* note 68, at 225 ("Pretrial bargaining may be described as a game played in the shadow of the law."). As one commentator has observed, under some circumstances, settlements can rival lawmaking itself:

> [T]he class action—with its tendency toward settlement at the behest of self-appointed agents for the class—has emerged not simply as a procedural supplement to preexisting law but, rather, as an institutional rival to the ordinary process of lawmaking itself. Class settlements aspire to operate as a kind of privatized mini-legislation—a vehicle by which the dealmakers may fashion a binding peace for a constellation of wrongs allegedly suffered by a cross-segment of the populace. In recent decades, many class settlements have gone even further, positing the creation of administrative bodies—private administrative agencies, in effect—to oversee the compensation of class members years into the future. The upshot of all these developments has been to empower class action attorneys to buy and sell rights en masse but largely outside the familiar constraints of the legislative or the public administrative process.

Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 152-53 (2003) (footnotes omitted).

[113] *See* Diane P. Wood, *The Brave New World of Arbitration*, 31 CAP. U. L. REV. 383, 398 (2003) ("The combination of confidentiality and the lack of a requirement for an explanation (written or recorded on an accurate transcript) create a troubling possibility of important public laws that may be unenforced, or mistakenly enforced."); *see also* Hubbard v. Hubbard, 58 A. 969, 970 (Vt. 1904) ("It is the essence of all law that when the facts are the same the result is the same."); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33 (1921) ("It will not do to decide the same question one way between one set of litigants and the opposite way between another.").

development of a valuable precedent or destroy an existing precedent.[114] This is no small matter. "In a forum where most cases settle, legal signals may lose clarity."[115] "[I]n a world where all cases settle[,] it may not even be possible to base settlements on the merits because lawyers may not be able to make reliable estimates of expected trial outcomes."[116]

Moreover, the intensification of efforts to resolve cases through alternative forms of dispute resolution has warped the body of published judicial decisions available for use as precedent.[117] The "average" case today is resolved short of a verdict; only aberrant cases proceed all the way through to trial and a jury verdict or court judgment.[118]

The widespread endorsement of settlements has two major ramifications that contribute to the disappearance of normative law. First, as a result of settlements, there are simply fewer decided cases; the lawsuits settled are "lost" from both judicial and public scrutiny. This means that the body of law has far fewer formal, publicly announced decisions applying rules and standards. Second, settlements distort the law, because they are typically confidential and do not constitute legal precedent. As discussed in the next section, arbitration proceedings present similar, yet distinct, ramifications.

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[114] *See* Galanter & Cahill, *supra* note 8, at 1386. As Professors Galanter and Cahill suggest:

> Many courts are willing to destroy or alter precedent in an adjudicated case for the sake of a subsequent settlement by the parties. In doing so, courts find more compelling "the interests of private litigants in ending litigation through settlement" than the interests of the public in the finality and precedential value of judgments.

Id. (quoting Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 591 (1991)).

[115] *Id.* at 1384; *see also* Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC'Y REV. 585, 599 (1987) (explaining that, according to one study, high rates of settlement resulted in lawyers who "have difficulty discerning court standards and [who] cannot predict the outcomes of court processes").

[116] Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 567 (1991).

[117] *See* Lederman, *supra* note 49, at 268.

> Precedent has public value, and its content is altered by settlements. In fact, settlement is nonrandom, so even settlements made with no thought of the effect of the settlement on a body of precedent influence the substantive content of the body of precedent. Settlement, or refusal to settle, can also be a conscious manipulation of precedent.

Id.

[118] *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1998 REPORT OF THE DIRECTOR 136 tbl.C (1998) (showing that, for every one-hundred civil cases filed in the federal courts in 1998, approximately six were actually tried).

B. *End Runs Around The Law: Arbitration and Private Judging*

In a category entirely separate from notions of avoiding and obscuring the law—although they contribute to the end of law in those ways as well—are the processes of arbitration and private judging. Although arbitration and private judging are forms of alternative dispute resolution, they present issues that are similar to, yet quite distinct from, the settlement issues previously discussed.

In some forms of arbitration, parties may agree, before any dispute arises, to have a third party resolve any future civil disputes. Contracts between the parties will typically define the arbitration parameters.[119] Other forms of arbitration, especially judicially-annexed arbitration,[120] and private judging ordinarily come into play only after a dispute has arisen, and sometimes even after litigation has already begun.[121]

Unlike negotiated settlements, arbitration typically is a mandatory, binding determination from which the parties cannot walk away, and to which the parties have no alternative.[122] Moreover, judicial review of arbitration awards is extremely limited and, indeed, "among the narrowest known to the law."[123]

With respect to arbitration, two points are of particular note. First, there is

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[119] *See* Ronald J. Offenkrantz, *Negotiating and Drafting the Agreement to Arbitrate in 2003: Insuring Against a Failure of Professional Responsibility*, 8 HARV. NEGOT. L. REV. 271, 287 (2003) ("[T]he use of arbitration clauses and referrals to arbitration continues to increase unabated.").

[120] *See* Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledging Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 346 (1996) (defining judicially-annexed arbitration as "a requirement that certain claims be submitted to nonbinding arbitration as a prerequisite to adjudication").

[121] *See* Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 486 (1997) ("[A]rbitration may be mandated by the state, or imposed on a 'take it or leave it' basis in contracts of adhesion. But in the run-of-the-mill case, the task of planning for dispute resolution necessarily requires a high level of party participation.").

[122] *See* Prudential-Bache Secs., Inc. v. Fitch, 966 F.2d 981, 987 (5th Cir. 1992) (arguing that an arbitration agreement "ousts" a court of its jurisdiction to resolve the dispute).

[123] *See, e.g.*, Bowen v. Amoco Pipeline Co., 254 F.3d 925, 932 (10th Cir. 2001); ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1462 (10th Cir. 1995); Richmond, Fredericksburg & Potomac R.R. Co. v. Transp. Communications Int'l Union, 973 F.2d 276, 278 (4th Cir. 1992); *see also* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (contending that, in reviewing an arbitration award, a "court will set that decision aside only in very unusual circumstances"); JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 624 (2d ed. 1996) ("The conventional wisdom is that successful challenges to arbitration awards [under any standard] are rare."); Wood, *supra* note 113, at 400 ("[S]traightforward review for mistakes of fact simply does not happen [in arbitration]. Parties on both sides should realize that when they bargain for arbitration, they are bargaining for the decision of one and only one body on the facts of their case."); *id.* at 401 ("Courts also refuse to review arbitral awards for mistakes of law—or at least, for ordinary mistakes of law. Review of legal conclusions is not among the grounds listed in [the Federal Arbitration Act] section 10(a) . . . .").

an increase in the use of arbitration clauses generally.[124] Second, both the forum and result of arbitration are private in nature, and arbitration uses very different procedures.[125]

The increased use of arbitration clauses is well documented.[126] Arbitration clauses are now regularly used by the securities industry for brokerage employees; by the health care industry as a condition of using hospital services; by the health insurance industry as a prerequisite to applying for health insurance; by the banking and finance industries in standard form consumer contracts; and, increasingly, by employers in employment contracts for non-unionized employees.[127]

Although arbitration has been promoted as providing a speedier alternative to traditional litigation, this increased speed comes at a cost. Arbitrators commonly do not issue opinions,[128] but instead issue awards simply stating who prevailed and the remedies granted.[129] Arbitrators are not required to provide any reasoning for their awards,[130] and, absent consent of the parties,

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[124] *See* Wood, *supra* note 113, at 405 (discussing the increase in arbitration clauses).

[125] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (conceding that the rules governing arbitration are not as extensive or complex as those followed in the federal courts).

[126] *See, e.g.*, Frederick L. Miller, *Arbitration Clauses in Consumer Contracts: Building Barriers to Consumer Protection*, 78 MICH. B.J. 302, 302 (1999) (asserting that "[a]rbitration clauses are fast becoming a standard part of consumer contracts"); Wood, *supra* note 113, at 405 ("[T]he field within which arbitration operates has expanded to cover virtually everything except the criminal law."); *id.* at 411 ("[I]f you continue to use your telephone, you have agreed to arbitrate . . . ."); Mary Flood, *Arbitration Not Always Fair, Cheap for Parties in Dispute*, HOUS. CHRON., Apr. 11, 2001, at 21 (commenting that "most adults with a credit card, long distance phone service, or car insurance have signed away their rights to sue in an arbitration clause, whether or not they realize it"); Bonnie Hayes, *Lawsuit Boom? Here's Evidence to the Contrary*, L.A. TIMES, Mar. 10, 1997, (Orange County Edition), at B3 (observing that "[a]n increasing number of businesses . . . are adding mandatory arbitration clauses to contracts").

[127] *See* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 53-54.

[128] *See* Fuller, *supra* note 47, at 387 ("Under the procedures of the American Arbitration Association awards in commercial cases are rendered usually without opinion," although written opinions are common in labor cases.); Wood, *supra* note 113, at 398 ("[T]he absence of any requirement in the [Federal Arbitration Act] or elsewhere in the law for arbitrators to offer an explanation of their decision has become a source of increasing attention.").

[129] *See* Marc S. Dobin, *Appealing the Unappealable: Vacating Arbitration Awards*, BRIEF, Fall 1996, at 69, 69 ("Awards frequently identify nothing more than the name of the case, the prevailing party, and the relief granted to the prevailing party.").

[130] *See, e.g.*, Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir. 1994) ("[A]n arbitrator is simply not required to state the reasons for his decision. . . . Such a requirement would serve only to perpetuate the delay and expense which arbitration is meant to combat."); *In re* Sobel, 469 F.2d 1211, 1214 (2d Cir. 1972). In *Sobel*, the Second

are not bound by case precedent.[131] Additionally, discovery is typically not conducted in connection with an arbitration.[132] Arbitration proceedings typically are private,[133] and the Federal Rules of Evidence typically do not apply.[134]

As a private proceeding conducted out of public view, and with no precedential value, arbitration resolves disputes without contributing to the body of law and without providing information to the public. The increase in arbitration clauses and arbitration proceedings means that more and more potential law is being lost.[135]

Private judging is one type of arbitration,[136] but one in which the parties have a formal bench trial.[137] Commonly called "Rent-A-Judge,"[138] the

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Circuit stated:

> Obviously, a requirement that arbitrators explain their reasoning in every case would help to uncover egregious failures to apply the law to an arbitrated dispute. But such a rule would undermine the very purpose of arbitration, which is to provide a relatively quick, efficient and informal means of private dispute settlement.

Id.

[131] 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 6.01, at 6-9 (3d ed. 1999) ("The traditional doctrines, whether of stare decisis or broader principles of precedent, are said not to apply to *arbitrators*. They are free to substitute their concepts of fairness for the law, as long as the decision is not a 'manifest injustice.'").

[132] *See* Kevin A. Sullivan, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J. 509, 554 (2002); *see also* Wood, *supra* note 113, at 397 ("One of the most important differences between arbitral procedures and court procedures is the absence of traditional American-style discovery in the former.").

[133] *See* Miller, *supra* note 126, at 303 (explaining the private nature of arbitration proceedings); Wood, *supra* note 113, at 397 ("Everything [in arbitration], from the content of the demand for arbitration, through the materials submitted before the hearing, the hearing, and the ultimate reasons for the disposition, can be, and often is, maintained in absolute confidence.").

[134] *See* Robert L. Ebe, *The Nuts and Bolts of Arbitration*, 22 FRANCHISE L.J. 85, 96 (2002) (stating that the "admissibility of evidence is generally much looser in an arbitration than in a courtroom").

[135] This trend appears likely to continue. *See* Green Tree Fin. Corp. v. Bazzle, 123 S. Ct. 2402, 2407 (2003) (holding that the arbitrator—not the courts—must determine whether the arbitration clause in a contract forbids class arbitration).

[136] *See* Richard M. Calkins, *Mediation: The Gentler Way*, 41 S.D. L. REV. 277, 290 (1996) (explaining that private judging "is a form of arbitration"); Frances E. Zollers, *Alternative Dispute Resolution and Product Liability Reform*, 26 AM. BUS. L.J. 479, 490 (1988) (asserting that private judging "is in the nature of arbitration because a third party is given responsibility for deciding the controversy").

[137] *See* Calkins, *supra* note 136, at 290 (stating that "the parties actually have a formal bench trial").

[138] *See* Zollers, *supra* note 136, at 490 ("The procedure of private judging has been dubbed Rent-A-Judge.").

procedure is especially popular in California, where it is authorized by statute.[139] In private judging, the parties hire a retired judge to hear the case and render a decision.[140] Like traditional arbitration, the proceedings are conducted out of public view and the result is confidential, so the matter has no precedential value.[141] Unlike traditional arbitration, however, legal rules and procedures, such as rules of evidence, typically apply.[142] In addition, at the conclusion of the proceeding, a party may move for a new trial and may file an appeal.[143]

Despite its superficial similarity to a courtroom trial, private judging raises its own distinct concerns. Private judging provides a faster resolution than traditional courtroom trials, yet only litigants with financial resources can reap this benefit.[144] Furthermore, private judging enables wealthy parties to hire their own personally-selected adjudicator, and then conduct their trial out of public view without setting any precedent, unless appealed.[145] This lack of visibility, lack of publicity, and lack of precedent are all part and parcel of the end of law phenomenon.

Settlement, plea bargaining, arbitration, and private judging are notions of long standing. Although flawed, these alternatives serve a valuable purpose: courts probably need not fully hear and decide every case filed. However, particularly with the rise in arbitration, the balance is tipping away from open judicial resolution of disputes—and is tipping instead toward the creation of

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[139] *See* CAL. CIV. PROC. CODE §§ 638-645 (West 2001). *See generally* Note, *The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts*, 94 HARV. L. REV. 1592 (1981) [hereinafter Note, *Rent-A-Judge*] (discussing the benefits and drawbacks of the California private judging provisions).

[140] *See* Calkins, *supra* note 136, at 290 ("Normally, a retired judge is hired to try the case and render a binding decision."); Zollers, *supra* note 136, at 490 ("The parties contract with a referee, often a retired judge, to hear the dispute and render a decision.").

[141] *See* Calkins, *supra* note 136, at 290 (stating that, in private judging, the "proceeding is private and the result is confidential").

[142] *See id.* ("Rules of evidence and courtroom formality are more closely adhered to than in arbitration."); *see also* Zollers, *supra* note 136, at 490 ("Private judging has the look and feel of a formal court proceeding . . . .").

[143] *See* Note, *Rent-A-Judge*, *supra* note 139, at 1597-99 (explaining that motions for a new trial are permitted and that appeals may be taken).

[144] *See* Zollers, *supra* note 136, at 490 n.69 (noting that "[o]pponents indict private judging as a luxury for rich litigants"); *see also* Calkins, *supra* note 136, at 290 (suggesting that private judging "permits [the parties] to avoid the long delays often encountered in many court systems"). *See generally* Robert Gnaizda, *Rent-A-Judge: Secret Justice for the Privileged Few*, 66 JUDICATURE 6 (1982).

[145] *See* Calkins, *supra* note 136, at 290 (stating that private judging "keep[s] the matter private and not subject to the scrutiny of the press"); Zollers, *supra* note 136, at 490 (asserting that, in private judging, "the resolution is private and has no precedential value unless appealed"); Note, *Rent-A-Judge*, *supra* note 139, at 1598 (mentioning that, in private judging, "the parties are under no obligation to admit the general public").

private processes law. In this private processes law, non-judicial decision-makers are applying a spectrum of legal norms, ranging from near law (or shadow law) to private law (as in arbitration) to non-law (such as reaching a resolution contrary to existing legal rules). Not only does this create inconsistency in the applicable norms, but all of these processes are conducted out of public view, resulting in both the obscuring and distorting of law.

In addition to the distortion of law resulting from settlements and other forms of alternative dispute resolution, legal norms are also distorted through judges. Judges regularly employ methods that serve to obscure the law and to minimize a case's impact, as discussed in Part III.

III. THE END OF LAW: AVOIDING AND OBSCURING LAW

Substantive legal norms have, and deserve, a special place in the law. Politicians and lobbyists have become more sophisticated about "lawmaking," however, and have learned that one way to avoid—or outright void—an unfavorable substantive result is to undermine the law through the use of procedural rules.[146] The Prison Litigation Reform Act[147] and the Private Securities Litigation Reform Act,[148] as well as the proposed Class Action Fairness Act of 2003,[149] are recent examples of this phenomenon.[150]

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[146] *See* Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677, 679 (2002) ("Congress [is] increasingly determine[d] to try its hand at developing procedural rules as well as to make substantive impact by tinkering with procedure."); Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 928 (2002) (discussing "the increased willingness of Congress to take action on matters that are, or might appropriately be, the subject of rulemaking"); *id.* at 940 ("[The Private Securities Litigation Reform Act] surely shows that Congress may tinker with procedural rules otherwise governed by the rulemakers in order to have the desired effect on substantive enforcement.").

[147] Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 to -77 (Apr. 26, 1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; 42 U.S.C. §§ 1997-1997h).

[148] Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended at 15 U.S.C. §§ 77z-1, 77z-2, 78j-1, 78u-4, 78u-5).

[149] *Class Action Fairness Act of 2003*, H.R. 1115, S. 274 108th Cong. (2003) (proposed 28 U.S.C. § 1453).

[150] *See, e.g.*, Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 600 (2002). As Professor Fairman explains:

> Congressional motivation for enacting the [Private Securities Litigation Reform Act] was the same as judicial motivation for heightened pleading in civil rights cases—private securities fraud litigation was seen as largely frivolous. Industry groups argued that plaintiffs could easily file class action lawsuits, often the day a stock price dropped, and then use the Federal Rules to subject defendants to vast discovery requests. . . . To correct this inequity, Congress turned to procedural alternatives.

Id. (footnotes omitted); Schlanger, *supra* note 68, at 1627. Professor Schlanger contends:

> The [Prison Litigation Reform Act] did not change much of the substantive law

Nevertheless, lawmakers today still acknowledge that it is important to let courts establish legal norms for public policy reasons. Accordingly, another contributor to the end of law is the enactment of procedures that permit parties to avoid resolution of the substantive issues of a dispute. This loss of connection with primary legal rules is one of the real, if largely unnoticed, elements contributing to the end of law. This phenomenon occurs at the trial level, the intermediate appellate court level, and the Supreme Court level.

A. *Trials Are Not About "The Law"*

Trials are supposed to be the real arenas of "the law"—the centerpiece of our legal system, where the public as jurors and the judge together sift through a mass of disputed facts and norms to achieve justice. This idealized world probably never existed. Trial has always been one of law's most distorted processes. Human error, human failings of perception, recall, and communication; and more fundamental human vices—bias, bigotry, anger, desire for revenge—have always distorted the idealized role of law. Today, however, trial processes are receding even further from the implementation and application of legal norms. Various practices, procedures, and devices that obscure the law, have diminished the availability and development of the law at the trial level.

As an example, few federal district court decisions are published, and even fewer state trial court decisions are published. Unlike many appellate-level decisions, which may be denoted "unpublished" but are nevertheless available through electronic databases such as Westlaw or Lexis, an unpublished trial-level decision is often available only by specifically requesting that particular decision from the court clerk.[151] Accordingly, the public's access to decided trial-level cases that are not subsequently appealed is severely limited. The results of these decisions are quickly lost.

On a related point, because most trial-level decisions are neither appealed nor reported, most "law"—although occurring in a public forum—is, in practical terms, hidden from public view. Trial-level proceedings rarely generate record attendance levels. The public typically "views" only the infinitesimally small number of trial-level cases that are published, and the

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> underlying inmate litigation—mostly it could not, because inmates' federal cases are nearly all premised on constitutional violations over whose definition Congress has no control. But the 1996 statute rewrote both the law of procedure and the law of remedies in individual inmate cases in federal court . . . .

Id.; *see also* Christopher M. Fairman, *Points of View*, LEGAL TIMES, Feb. 17, 2003, at 42 (arguing that the "so-called Class Action Fairness Act" imposes a heightened pleading standard, and that "[h]eightened pleading is quickly becoming the procedural tool of choice when Congress wants to disfavor a claim").

[151] *See* Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 185 (1999) (describing the phrase "unpublished opinion" as a term of art because "unpublished" opinions are nevertheless part of the public record, and appellate decisions typically are available through Westlaw and Lexis).

even smaller number of trial-level decisions of such public interest as to generate a story in the news media.

Finally, many trial-level decisions involve the use of standards or multi-pronged tests, which vest a great deal of discretionary power in the trial court.[152] Judges are also permitted to make discretionary rulings with respect to discovery[153] and evidence,[154] and they are able to render highly fact-based determinations, all of which are subject only to limited, highly deferential appellate review.[155] By according "discretion," the trial judge is given the flexibility of choice.[156] The acknowledgement inherent within "choice" is that more than one option is acceptable, and perhaps even a range of options exists.[157] Accordingly, judges can obscure their reasons for making a particular choice, simply by announcing that they are acting within their discretion. Discretionary decisions and discretionary review can "fudge" or obscure legal rules, rendering primary rules meaningless.[158] Because the vast

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[152] *See* Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1327-28 (1999) (discussing the impact of factor analyses and balancing tests on the trial court's decisionmaking).

[153] *See, e.g.*, FED. R. CIV. P. 26(c) (according district courts the power to "make any [protective] order which justice requires . . . ."). *See generally* Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 655 (1971).

> Of the eighty-six rules that comprise the Federal Rules of Civil Procedure, the term "discretion" appears in ten or so. Nevertheless, appellate courts have held that review-restraining discretion is implicitly present in thirty other provisions of the Rules. Sometimes the courts find it implied in the phrase "the court may" order, decree, compel, or require, a particular result. For example, there are provisions reciting that the court may dismiss the complaint upon failure to take certain steps, or that it may impose costs, etc. The appellate courts reason that if the trial court *may* do something under the Rules, it also may not. That means the judge has choice, *ergo* discretion.
>
> Similarly, discretion is found implicit in the text of rules that authorize the court "for good cause" to order an act done or foreborne; or that declare that the court "in the interest of justice" or "to avoid delay or prejudice" may make certain orders.

Id.

[154] *See, e.g.*, FED. R. EVID. 403 (authorizing the exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time).

[155] *See* FED. R. CIV. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . . .").

[156] *See* FRIEDMAN, *supra* note 7, at 32 ("Discretion commonly refers to a case where a person, subject to a rule, has power to choose between alternative courses of action."); Rosenberg, *supra* note 153, at 636 ("If the word discretion conveys to legal minds any solid core of meaning, one central idea above all others, it is the idea of *choice*.").

[157] *See* Rosenberg, *supra* note 153, at 636-37.

> To say that a court has discretion in a given area of law is to say that it is not bound to decide to question one way rather than another. In this sense, the term suggests that there is no wrong answer to the questions posed—at least, there is no officially wrong answer.

Id. (emphasis omitted).

[158] Many commentators have noted the potential for manipulation that arises from

majority of trial court decisions are not appealed and therefore not reviewed, and because trial court decisions are largely unpublished, the result is ad hoc decisionmaking by the trial court—largely hidden from public view, largely unreviewed, and largely shielded from any kind of scrutiny.

The appellate process is the foundation of law's creation in a common law system. Appellate decisions have traditionally been the most visible, public, and permanent part of our judicial system, operating through open, public argument and culminating with a reasoned, written justification of the result: the appellate opinion. Today, however, appellate proceedings, although generally more public than trial proceedings, have also developed a number of devices and procedures that undercut their public nature and serve to hide appellate law and reasoning from public view. The next section addresses this problem.

B. *Avoiding and Obscuring Law on Appeal: Do We Have to Decide?*

The appellate portion of the litigation process raises notable opportunities to avoid and obscure the law. Examples include emphasis on standards of review, use of the harmless error doctrine, the tension between judicial minimalism and judicial maximalism, and the publication (or non-publication) of appellate decisions. These tools have long been a part of appellate review, permitting some "fudging" with the legal rules and the law. Recently, these notions have expanded to become doctrines in their own right that are embraced by both the federal and the state courts. Accordingly, these developments are contributing to the end of law—in direct contravention of the traditional purpose of the appellate courts.[159]

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judicial discretion. *See, e.g.*, David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 394 (2001) ("[J]udges possess unaccountable and discretionary power, and they have enormous discretion in manipulating open-textured and ambiguous concepts and doctrines."); Carlos E. González, *The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms*, 80 OR. L. REV. 447, 547 (2001) (arguing that "[c]ourts . . . use their relatively unconstrained interpretive discretion to select and avoid substantive outcomes"); Roy A. Schotland, *In* Bush v. Gore*: Whatever Happened to the Due Process Ground?*, 34 LOY. U. CHI. L.J. 211, 212 (2002) (suggesting that unfettered discretion is subject not only to error, but also to manipulation).

> Clear rules normally constrain the judiciary much more effectively than do general standards for decisionmaking. Factor analyses and balancing tests often are derided as fronts for the "personal preferences" of judges. While one might argue that endowing judges with considerable balancing discretion better promotes the optimal legal resolution of individual cases, this position depends on the power of naive formalism and assumes that judges sincerely seek optimal legal resolutions without regard to personal policy proclivities. It is surely too late in the day to embrace formalism so vigorously. Discretionary balancing tests simply enable judicial manipulation of law in pursuit of policy ends.

Cross, *supra* note 152, at 1327-28 (footnotes omitted).

[159] *See* EISENBERG, *supra* note 59, at 4 (asserting that one of the primary functions of

1. Standards of Review

Standards of review indicate the degree to which the appellate court will defer to—or disregard—a determination rendered by the trial court.

> A standard of review indicates to the reviewing court the degree of deference that it is to give to the actions and decisions under review. In other words, it is a statement of the power not only of the appellate court but also of the tribunal below, measured by the hesitation of the appellate court to overturn the lower court's decision.[160]

De novo review requires the appellate court to make an independent evaluation, according no deference to the trial court's determination.[161] Issues of law, for example, are subject to de novo review.[162] Review for an abuse of discretion, on the other hand, accords wide latitude and substantial deference to the trial court's determination.[163] "*[D]iscretion* implies the power to choose within a range of acceptable options,"[164] and thus the appellate court may not reverse a lower court decision merely because the panel would have made a different choice.[165] Rather, the appellate court may reverse only if "it appears that [the trial court's ruling] was exercised on grounds, or for reasons, clearly untenable or to an extent clearly unreasonable."[166]

Standards of review raise several issues pertinent to this article's thesis. One issue arises when an appellate court uses the standard of review as its sole legal reasoning.

> [M]ost opinions of the appellate courts have indulged in a form of automated verbiage or knee-jerk terminology which has very little idea content. The prime example of this is the phrase "abuse of discretion," which is used to convey the appellate court's disagreement with what the trial court has done, but does nothing by way of offering reasons or guidance for the future. The phrase "abuse of discretion" does not communicate meaning. It is a form of ill-tempered appellate grunting and

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appellate courts is "the enrichment of the supply of legal rules").

[160] Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROC. 47, 47-48 (2000).

[161] *See* 1 CHILDRESS & DAVIS, *supra* note 131, § 2.14, at 2–79 (describing de novo review as "one of no particular deference" or "an independent conclusion on the record" (emphasis omitted)).

[162] *See id.* § 2.13, at 2–72.

[163] *See id.* § 4.02, at 4–13 (the abuse of discretion standard involves "substantial deference"); *id.* § 4.21, at 4–134 ("[T]he abuse of discretion phrase is meant to insulate the [trial] judge's choice from appellate second-guessing.").

[164] *Id.* § 4.01, at 4–2 n.3.

[165] *See id.* § 4.02, at 4–13 n.3 (noting that the abuse of discretion test sometimes is stated in terms of "clear abuse or manifest error" (emphasis omitted)).

[166] Bringhurst v. Harkins, 122 A. 783, 787 (Del. 1923); *accord* Rosenberg, *supra* note 153, at 641.

should be dispensed with.[167]

Appellate courts often use standards of review and other formulaic approaches as analytical shortcuts, rather than explaining their results with thorough, reasoned decisionmaking.[168] "[The appellate courts] are creating formulas for appellate courts to follow rather than elucidating legal principles to guide trial courts in the future."[169] A few perceptive federal appellate judges have recognized what is happening.

> [F]ederal appellate decisions have increasingly become collections of assertions of legal doctrine, lacking persuasive explanations to enlighten the reader on the justification for their result. To put it baldly, we are reacting to the appalling mass of cases by devising pontifical formulas which relieve us of the burden of reasoned decisionmaking.
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> Of particular concern . . . has been the development of certain styles or techniques which permit the appellate judge to avoid ever having to explain what the law is, much less how people or government institutions should conduct themselves in order to obey the law. We disclose who wins without explaining why the losing party lost. For example, if the legal issue involves the soundness of a position involving a government policy, we "defer." If the issue is whether the trial court or prosecutor violated a certain rule or statute, then we may tell the district court to apply a multi-pronged test, weighing a variety of conflicting factors which permit a variety of different results, often depending upon highly subjective evaluations. In addition, we are preoccupied with applying the proper "standard of review," a technique which permits the appellate court openly to tolerate a large margin of error in the trial court without ever making a close examination of the trial court's ruling.[170]

By employing standards of review as substitutes for analysis, appellate courts

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[167] Rosenberg, *supra* note 153, at 659.

[168] One prominent jurist has expressed concern over the use of clichés in judicial opinions:

> I write separately . . . to express my concern regarding the use of clichés in judicial opinions, a technique that aids neither litigants nor judges, and fails to advance our understanding of the law. . . . Such clichés too often provide a substitute for reasoned analysis. . . . Metaphors enrich writing only to the extent that they add something to more pedestrian descriptions. Clichés do the opposite; they deaden our senses to the nuances of language so often critical to our common law tradition. The interpretation and application of statutes, rules, and case law frequently depends on whether we can discriminate among subtle differences of meaning. . . . A cliché like "three bites at the apple" provides a formalistic rule that does not account for the particularities of an individual case.

Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1053-54 (9th Cir. 2003) (Reinhardt, J., concurring) (citation omitted).

[169] Mary M. Schroeder, *Appellate Justice Today: Fairness or Formulas, The Fairchild Lecture*, 1994 WIS. L. REV. 9, 11 (emphasis omitted).

[170] *Id.* at 9-10.

avoid principled legal explanations that would contribute to the understanding and application of law. Appellate reliance on standards of review has increased tremendously in recent years,[171] thus contributing to the end of law.

2. The Harm in So-Called "Harmless" Error

The so-called "harmless error" doctrine is another example of the phenomenon of using analytical shortcuts in appellate decisionmaking. The harmless error doctrine is used in both the civil and criminal contexts.[172] Indeed, Rule 61 of the Federal Rules of Civil Procedure requires that federal courts "disregard any error or defect in the proceedings which does not affect the substantial rights of the parties."[173] And it is a settled legal principle that the parties are entitled "to a fair trial, not a perfect one."[174]

Nevertheless, harmless error is, in essence, a legal mistake without consequences. In determining that an error was harmless, appellate court judges "decide that even if there was a legal violation it would not have changed the result. [They] avoid deciding whether there was a legal violation by discarding the question."[175]

Harmless error, especially as applied in criminal cases, is a relatively recent development.

> Throughout most of the history of the United States, appellate courts reversed convictions for most any error committed at trial. The slightest error, no matter how insignificant, resulted in automatic reversal. . . . [H]owever, . . . in the early part of this century courts came under intense

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[171] *Id.* at 19 & n.31 (demonstrating that, in Ninth Circuit opinions, the phrase "standard of review" did not appear at all from 1960 to 1969; the phrase appeared in 5 cases in 1970; 15 cases in 1975; 93 cases in 1980; 261 cases in 1985; 380 cases in 1990; and 603 cases in 1992).

[172] *See* 28 U.S.C. § 2111 (2001) ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."); Henry P. Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 SUP. CT. REV. 195, 200 (discussing how the harmless error doctrine allows judge-centered analysis that emphasizes the sufficiency of guilt).

[173] Rule 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

FED. R. CIV. P. 61; *see also* FED. R. EVID. 103 ("[E]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . .").

[174] Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).

[175] Schroeder, *supra* note 169, at 10 (footnote omitted).

> criticism for reversals based on insignificant errors. Consequently, Congress passed legislation that prohibited appellate courts from reversing convictions unless the error "affected the substantial rights" of the accused. . . .
>
> After the federal legislation passed, courts began developing the concept of "harmless error."[176]

In the abstract, it might seem uncontroversial that a trivial error should not constitute a basis for reversing an otherwise valid judgment. Difficulties arise, however, in the doctrine's application. The courts have stretched the concept of harmless error to encompass a broad range of errors, including many constitutional errors.[177] As a result, the harmless error doctrine now reaches mistakes for which the adjective "harmless" seems highly questionable. For example, appellate courts almost routinely deem errors in jury instructions harmless,[178] despite an almost instinctive reaction to the contrary. The actual impact and importance of an erroneous instruction upon the verdict is impossible to ascertain because the court required the jurors to follow the erroneous instructions and the deliberations where those jurors applied these instructions were conducted in private. Instead of focusing on the impact of a mistake, harmless error tends "to shift the emphasis of the analysis . . . away from the error and towards the guilt of the accused."[179]

Harmless error contributes to the end of law by reducing legal guidance and explanation. The harmless error doctrine permits appellate courts to "discard[] the question."[180] Designating an error as harmless makes the problem go away. "Appellate judges merely apply a 'drop' of harmless error, and the coerced confession, warrantless search, erroneous jury instruction, faulty exclusion of evidence, unfair restriction on cross-examination, and a host of other errors simply vanish as though they never had occurred."[181] Thus,

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[176] Charles S. Chapel, *The Irony of Harmless Error*, 51 OKLA. L. REV. 501, 502 (1998) (footnotes omitted).

[177] *Id.* at 503 ("[T]he breadth of constitutional errors to which the [harmless error] rule has been extended is astonishing . . . .").

[178] *See, e.g.*, People v. White, 79 Cal. Rptr. 2d 347, 349-50 (Cal. Ct. App. 1998) (holding that the given jury instruction regarding the duress defense violated due process by effectively discouraging the jury from deliberating on all relevant issues, but nevertheless finding the error was harmless beyond a reasonable doubt); People v. Diaz, 78 Cal. Rptr. 2d 315, 315 (Cal. Ct. App. 1998) (holding that "the failure to instruct on the presumption of innocence in a criminal case is not reversible per se").

[179] Chapel, *supra* note 176, at 503-04; *see also* Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1170 (1995) ("[W]e have applied the harmless-error rule to such an extent that it is my impression that my colleagues [on the District of Columbia Circuit] and I are inclined to invoke it almost automatically where the proof of a defendant's guilt seems strong.").

[180] Schroeder, *supra* note 169, at 10.

[181] Edwards, *supra* note 179, at 1170.

dismissing the error as harmless is a way in which appellate courts avoid, obscure—and even ignore—the law.

Harmless error also undermines the examination of legal rules and thus law's impact. "[E]ach time we employ the imaginary tonic of harmless error, we erode an important legal principle. When we hold errors harmless, the rights of individuals, both constitutional and otherwise, go unenforced. Moreover, the deterrent force of a reversal remains unfelt by those who caused the error."[182] Accordingly, harmless error is a particularly powerful tool contributing to the end of law.

3. Judicial Minimalism and Judicial Maximalism

Even when legal proceedings are conducted in public view and result in a written judicial opinion, different judicial styles—whether phrased as judicial minimalism versus judicial maximalism,[183] or as rules versus standards[184]—have an impact on the guidance and helpfulness judicial opinions provide. Judicial minimalists decide "cases" by employing "standards,"[185] and thus "increase the space for further reflection and debate at the local, state, and national levels, because they do not foreclose subsequent decisions."[186] The danger of minimalist rulings is that they "leave a vacuum in which lower courts can exercise great power . . . ."[187] Judicial maximalists, on the other hand, seek clear rules.

> [W]hen, in writing for the majority of the Court, I adopt a general rule, and say, "This is the basis of our decision," I not only constrain lower

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[182] *Id.*

[183] *See generally* Linda Greenhouse, *Between Certainty & Doubt: States of Mind on the Supreme Court Today*, 6 GREEN BAG 2D 241 (2003) (discussing judicial minimalism and maximalism).

[184] *See generally* Sullivan, *supra* note 56, at 57 ("[L]egal directives take different forms that vary in the relative discretion they afford the decisionmaker. These forms can be classified as either 'rules' or 'standards' to signify where they fall on the continuum of discretion.").

[185] *See id.* at 58-59.

> A legal directive is "standard"-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation. Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules. Standards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances. Thus, the application of a standard in one case ties the decisionmaker's hand in the next case less than does a rule—the more facts one may take into account, the more likely that some of them will be different the next time.

Id. (footnotes omitted).

[186] CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4 (1999).

[187] LISA A. KLOPPENBERG, PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF LAW 1, 126 (2001).

> courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle.[188]

There is no "right" versus "wrong" in the concepts of rules and standards. "[The] distinctions between rules and standards . . . mark a continuum, not a divide."[189] Both are useful concepts, and until we reach the day that we all think alike, both rules and standards are necessary to ensure a form of checks and balances in judicial and political ideologies.[190] The use of standards, however, requires care in explanation to avoid what has been called the "technique[] of avoidance."[191] "[E]very norm, every time, requires explanation and justification in context."[192]

The growing sensitivity to this distinction between rules and standards helps illuminate the concern regarding the end of law. A law of standards—with few narrow opinions—leaves room in which judges at all levels retain considerable space in which to maneuver. One could consider this space a vacuum, an area of lawlessness, or merely a set of gaps bounded by the fabric of the law, when

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[188] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989); *see also* Sullivan, *supra* note 56, at 57-58. Dean Sullivan explains:

> Rules, once formulated, afford decisionmakers less discretion than do standards. . . .
>
> . . . A legal directive is "rule"-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere. . . . A rule necessarily captures the background principle or policy incompletely and so produces errors of over- and under-inclusiveness. But the rule's force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result.

Id. (citations omitted).

[189] Sullivan, *supra* note 56, at 61; *accord* Margaret Jane Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823, 828-32 (1991) (stating that rules and standards are theoretical endpoints on a continuum, rather than consistently sharply distinct categories).

[190] *See* Sullivan, *supra* note 56, at 99 ("[N]either rules nor standards correspond systematically with the left or the right. It depends on who has the upper hand and what form their directives take.").

[191] As Judge Schroeder explained:

> These, then, are techniques of avoidance: describing factors to be balanced, applying discretionary standards of review, examining the trial court process rather than the substantive meaning of statutes and rules. They avoid the difficult task of deciding whether the trial court actually reached the right or fair result in the particular case. This totally changes the focus of a court review. We are creating formulas for *appellate* courts to follow rather than elucidating legal principles to guide *trial* courts in the future.

Schroeder, *supra* note 169, at 11.

[192] Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 76 (1986).

a judge must figure out how to decide a case not bounded by an existing decision. For the most part, the rule of law and the popular desire for limits on an unelected, undemocratic judiciary, requires that judicial actors in this "lawless" territory act with restraint—aware of their legal surroundings and the landmarks of judicial decisions in order to properly navigate the legal landscape.

4. Memorandum Dispositions

Yet another factor contributing to the end of law is the federal and state court practice of designating the vast majority of the opinions in decided cases as unpublished dispositions.[193] This is, literally, law elimination. "[T]he number of non-precedential opinions currently outnumber by far the ones that count as authority, reaching a four-to-one ratio in the federal circuits as a whole."[194] These decisions, which are not published in the Official Reports—although they are regularly available on Westlaw and Lexis,[195] as well as in the Federal Appendix[196]—are commonly called "memorandum dispositions" in the federal courts.[197] The general notion behind memorandum dispositions is to avoid cluttering case reporters with nondescript judicial decisions that add nothing to the current state of the law.[198] Accordingly, in run-of-the-mill cases

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[193] *See* Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 308 (1990) ("[I]t is clear that at present a majority of all final decisions by judges on the courts of appeals are unpublished . . . ."); *see also* Keith H. Beyler, *Selective Publication Rules: An Empirical Study*, 21 LOY. U. CHI. L.J. 1, 7 n.19 (1989) (finding that 80.7% of the Sixth Circuit's decisions were unpublished); Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 210 (2001) ("[Unpublished opinions have] 'come to dominate appellate courts' disposition of all types of cases.'").

[194] Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 757-58 (2003).

[195] *See* Martin, *supra* note 151, at 185 ("[U]npublished opinions regularly are 'published' on Westlaw and LEXIS.").

[196] *See* Brian P. Brooks, *Publishing Unpublished Opinions: A Review of the Federal Appendix*, 5 GREEN BAG 2D 259, 259 (2002) (explaining that West Publishing Company's introduction of the Federal Appendix publishes unpublished opinions in every relevant sense).

[197] *See* Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 43 (discussing memorandum dispositions and their precedential value in the Ninth Circuit).

[198] Although this is the conventional understanding of the purpose of memorandum dispositions, such dispositions have, at least on occasion, been misused. *See* Linda Greenhouse, *Texas Death Penalty Case to Get Supreme Court Review*, N.Y. TIMES, Apr. 22, 2003, at A22 (reporting that a Fifth Circuit opinion concerning a death row inmate, which raised claims of prosecutorial misconduct and defense incompetence and had been reversed on habeas review by the district court, resulted in a 78-page disposition marked "not for publication"—a designation "almost always reserved for straightforward rulings in cases of

involving no extension of existing law, no novel issues, and no unusual or distinctive facts, the resulting judicial decision is provided to the litigants but is not published. In most courts, this decision is therefore not citable as precedent (unless necessary to invoke the doctrine of res judicata).[199] It is the inability to use most memorandum dispositions as precedent that creates concern.[200] The United States Judicial Conference advisory committee's recent proposed rule that would allow the citing of memorandum dispositions does not moot this issue because the proposed rule does not specify the precedential value to be given to such dispositions.[201]

The development of "unpublished" judicial decisions followed a now-familiar path. Concerns about the mounting number of cases have existed for centuries. In the mid-1600s, Sir Francis Bacon recommended omitting cases from the case reports that consisted "merely of iteration and repetition,"[202] and in 1777, Sir Edward Coke complained about the existence of too much case

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limited consequence," and recognizing that "[a] dismissive disposition in a case of this magnitude is highly unusual, and possibly helped draw the Supreme Court's attention to the appeal"); *see also* Donald R. Songer et al., *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963, 975-76 (1989) (concluding that "many controversial cases are ending up in unpublished opinions").

[199] *See* Suzanne O. Snowden, *"That's My Holding and I'm Not Sticking to It!" Court Rules that Deprive Unpublished Opinions of Precedential Authority Distort the Common Law*, 79 WASH. U. L.Q. 1253, 1254 (2001) ("Although the publication plans vary from circuit to circuit, all of the plans share a common element: unpublished opinions generally are not treated as precedent."); *see also* Jerome I. Braun, *Eighth Circuit Decision Intensifies Debate Over Publication and Citation of Appellate Opinions*, 84 JUDICATURE 90, 94 (2000) ("All courts (except, now, the Eighth Circuit), agree that these opinions are not precedent."); *see, e.g.*, 1ST CIR. R. 36(b)(2)(F) (citation of unpublished dispositions); 2D CIR. R. 0.23 (unreported cases shall not be cited); 9TH CIR. R. 36–3 (citation of unpublished dispositions); FED. CIR. R. 47.6 (use and citation of non-precedential opinions). *But see* 5TH CIR. R. 47.5.4 (unpublished opinions are not binding precedents, but may be cited as persuasive authority); 8TH CIR. R. 28A(i) (same); 10TH CIR. R. 36–3(B)(1) (same); 11TH CIR. R. 36–2 (same). The District of Columbia Circuit recently changed its rule to permit the citation of unpublished opinions as precedent. D.C. CIR. R. 28(c)(1)(B) (unpublished opinions entered on or after January 1, 2002 may be cited as precedent).

[200] *See* Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & The Nature of Precedent*, 4 GREEN BAG 2D 17, 18 (2000) ("When lawyers refer to 'unpublished opinions,' they generally refer not to truly secret dispositions, but to opinions whose citability as precedent is restricted by court rule. This no- or limited-precedent aspect of unpublished opinions is at bottom what the 'unpublished opinion' debate is all about.").

[201] *See* Tony Mauro, *Toward Citing the Uncitable: A First Step in What Could Take 2 Years*, NAT'L L.J., June 2, 2003, at P1 (reporting that the U.S. Judicial Conference advisory committee had taken the first step in approving a rule that would permit lawyers to cite unpublished opinions, but that the committee "has sidestepped, for now, the thornier question of what precedential value can be placed by advocates on such opinions").

[202] *See* John J. O'Connell, *A Dissertation on Judicial Opinions*, 23 TEMP. L.Q. 13, 14 (1949) (quoting Sir Francis Bacon).

precedent.[203] In 1824, one commentator observed:

> [T]he multiplication of reports, emanating from the numerous collateral sources of jurisdiction, is becoming an evil alarming and impossible to be born[e]. . . . Such has been this increase, that very few of the profession can afford to purchase, and none can read all the books which it is thought desirable, if not necessary to possess. By their number and variety they tend to weaken the authority of each other, and to perplex the judgment.[204]

As caseloads grew, so did concerns about the accumulating case law.[205] In 1964, the Judicial Conference of the United States noted the "ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities,"[206] and recommended that the federal circuit courts authorize the publication of "only those opinions which are of general precedential value."[207] In 1972, the Judicial Conference directed the federal courts of appeals to develop rules to limit the publication of judicial decisions,[208] and by 1974, each of the federal circuit courts had developed a publication plan.[209]

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[203] *See* Edward H. Warren, *The Welter of Decisions*, 10 ILL. L. REV. 472, 472 (1916) (discussing Sir Edward Coke's preface to the third part of his reports).

[204] E. Bliss & E. White, *The Common Law*, 10 N. AM. REV. 411, 433 (1824), *quoted in* J. Myron Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Decisions*, 27 STAN. L. REV. 791, 791 (1975).

[205] *See* Charles W. Joiner, *Limiting Publication of Judicial Opinions*, 56 JUDICATURE 195, 195-96 (1972) ("Common law in the United States could be crushed by its own weight if present trends continue unabated.").

[206] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964).

[207] *Id.* (discussing a resolution passed at the Judicial Conference of 1964).

[208] *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 33 (1972). For detailed accounts of the history of the development of the unpublished opinion practice, see DONNA STIENSTRA, FEDERAL JUDICIAL CENTER, UNPUBLISHED OPINIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS 5-14 (1985); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 121-26 (1995).

[209] *See* Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 551 (1997) (stating that these publication plans were "intended to serve as a sorting device, separating the wheat from the chaff" and noting that "[o]pinions that have general precedential value or other public significance are separated from those that do not"). *See generally* Songer, *supra* note 193, at 308 ("It is not known how many decisions of the courts of appeals were not published before 1964, but apparently the number was relatively small."). Court rules establish which judicial decisions should be published and which should remain unpublished. *See, e.g.*, 1ST CIR. R. 36.2 (establishing the criteria for published opinions); 9TH CIR. R. 36 (establishing the criteria for publication and requests for publication); 10TH CIR. R. 36.2 (establishing the publication criteria); CAL. R. CT. 976 (establishing the publication criteria).

Although one cannot seriously contend that all judicial decisions need to be published, and although there is no reason to believe that courts intentionally abdicate their responsibilities by declining to publish decisions that obviously satisfy the publication requisites, the practice nevertheless has negative ramifications. As an initial matter, judges are not prescient and cannot predict with complete accuracy those cases that might serve as useful precedent in the future.[210] In fact, research suggests that judges are often inaccurate in their assessments as to which cases have precedential value.[211] Moreover, the historical notion of precedent encompasses not only the initial articulation of a rule, "but also the expansions and contractions of old, verbally stable rules" found in cases applying the rule.[212]

> Even if resolution of the new case is easy, the new decision has precedential value because the rule has been applied to a fact variation. The general rule or exception has expanded, despite its verbal stability, by sweeping in the new complex of facts. In areas of law where factual settings are diverse—due care, bad faith, unconscionability, reasonableness, duress, and proximate cause—which is perhaps the bulk of the law, the true content of law is known not by the verbal rule formulations, but by the application of those verbal formulations to specific settings. Astute lawyers look for cases analogous to theirs

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[210] *See* Cappalli, *supra* note 194, at 775 ("The common law method accepts the impossibility of such prevision by judges and wisely leaves the implications of a precedent in the hands of future courts . . . . [T]he process of interpreting and applying a precedent is in the hands of the future user . . . .").

[211] *See id.* at 791 ("Research supports the hypothesis that appeals are often incorrectly assessed as non-precedential."); *id.* at 797 ("The courts have set up a Catch-22 system that seeks to spot precedentially valueless appeals as early as possible in order to conserve energy while failing to invest the time and effort essential to making that judgment accurately."); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 119 (2001) (finding that the reversals, dissents, and concurrences found in unpublished opinions suggests that results were reached in those cases with which other reasonable judges would disagree); Songer et al., *supra* note 198, at 980-83 (finding greater likelihood of publication for issues related to governments and corporations and a lesser likelihood of publication for issues related to prisoner appellants, welfare beneficiaries, and other "underdogs"); *see also* Cappalli, *supra* note 194, at 790 ("Dependent on clerks fresh out of law school to advise them on whether issues raise new questions or are decided by controlling authority, the appellate judge can guarantee neither careful sorting nor full consideration of those appeals labeled non-precedential.").

[212] Cappalli, *supra* note 194, at 769; *see id.* at 772 ("The non-precedent regimen starkly reverses centuries of common law tradition."); *see also* Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) (holding unconstitutional under Article III the Eighth Circuit Rule declaring that unpublished decisions are not precedential), *vacated en banc*, 235 F.3d 1054 (8th Cir. 2000); *id.* at 901 ("[E]ach exercise of the 'judicial power' requires judges 'to determine the law' arising upon the facts of the case." (quoting 3 WILLIAM W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 25 (1765))).

> decided under abstract rule formulations; they search for on point precedents. In sum, the actual scope of a doctrinal formulation is learned through its applications and not through the words chosen to express the doctrine.[213]

Undoubtedly, this practice dramatically decreases the number of judicial decisions available for use as precedent, contracts the world of law, and increases the risk that legal processes will be further distorted by highlighting the few cases—likely cases at the fringes of the law—that are published. It seems too much to expect that the public, or even the trial and appellate judges themselves, can be expected to consider how the many unpublished appellate decisions relate to the few cases that do reach the daylight of publication and public notice.

Accordingly, memorandum dispositions constitute a shortcut to judicial decisionmaking that reduces the available law. Memorandum dispositions typically are shorter in length than published decisions,[214] and sometimes are written with less care and detail precisely because they are solely for the use of the original parties to the lawsuit and have no precedential value.[215] Eager to plow through burgeoning dockets, appellate courts can be tempted to eschew detailed, reasoned decisionmaking and instead issue opinions that are less detailed, less reasoned, and accordingly, less helpful and ultimately offer less of a contribution to the law itself or the understanding of law. A related issue arises with respect to appellate courts' widespread reduction in the use of oral argument.

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[213] Cappalli, *supra* note 194, at 768-69.

[214] *See* Martin, *supra* note 151, at 190 ("[U]npublished decisions are, as a rule, shorter than published decisions."); *see also* Kozinski & Reinhardt, *supra* note 197, at 43. Judges Kozinski and Reinhardt explain:

> [W]e can succinctly explain who won, who lost, and why [in a memorandum disposition]. We need not state the facts, as the parties already know them; nor need we announce a rule general enough to apply to future cases. This can often be accomplished in a few sentences with citations to two or three key cases.

Id.; William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 600-01 (1981) (claiming that some unpublished opinions "are so short that they raise serious questions concerning the exercise of judicial responsibility")

[215] *See* Cappalli, *supra* note 194, at 789 ("Without public accountability, an appellate panel is likely to be less conscientious regarding its decision and the accompanying justifications."); William L. Reynolds & William M. Richman, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 284 (1996) ("It should come as no surprise that unpublished opinions are also dreadful in quality."); *see also* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 124 (1985) ("[U]npublished opinions are less carefully prepared because the judges put less time into them, not because they are lazy but because they are trying to use their limited time as productively as possible.").

5. Oral Argument

Oral argument is another casualty of case streamlining and expediting.[216] In the name of expediency, the opportunity to present oral argument has been eliminated in some cases and restricted in others,[217] and the time allotted for oral argument has generally been reduced.[218]

> For a small but significant number of jurisdictions, the default provision is for *no oral argument* unless the parties affirmatively request it or the court explicitly orders it. A number of courts deny the right to oral argument if it is determined that the appeal is frivolous, the dispositive issue has already been authoritatively decided, or, given the simple or routine nature of the case, settled principles of law will govern its disposition.[219]

Most appellate judicial decisionmaking is conducted in non-public actions—in case conferences among the judges after oral argument, in private or limited circulation bench briefs or memos, and in private discussions or correspondence among the judges.[220] Apart from the final opinion or the

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[216] *See* Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 3-4 (1986) (stating that among the procedures adopted for judicial streamlining are restrictions on or the elimination of oral arguments).

[217] *See id.* at 3 ("[M]any appellate courts have eliminated or severely restricted oral argument."); Richard W. Millar, Jr., *Friends, Romans and Judges—Lend Us Your Ears: The Tradition of Oral Argument*, ORANGE COUNTY LAW., Jan. 2002, at 11 ("While all courts of appeal necessarily allow oral argument, few, if any, encourage it."); Martha F. Newcomb, *Speaking Out—Recent Rule Changes Streamline Appellate Process*, R.I. B.J., Jan. 1998, at 21 ("[M]any appellate courts throughout the country now eliminate oral argument in some cases. In several busy federal Courts of Appeals, between 40 and 50 percent of appeals decided on the merits are decided without oral argument."); Michael A. Wolff, *From the Mouth of a Fish: An Appellate Judge Reflects on Oral Argument*, 45 ST. LOUIS U. L.J. 1097, 1097 (2001) ("We are at a point in our history when oral argument in appellate courts has greatly shrunk."); Warren D. Wolfson, *Oral Argument: Does It Matter?*, 35 IND. L. REV. 451, 451 (2002) (pointing to "a growing disdain for oral arguments").

[218] *See* Stanley Mosk, *In Defense of Oral Argument*, 1 J. APP. PRAC. & PROC. 25, 26 (1999) ("In almost all courts, the amount of time allocated for oral argument has diminished over the years.").

[219] *Id.* at 25 (footnotes omitted).

[220] *See* Maria D. Corrigan, *Effective Appellate Advocacy in Criminal Cases in the United States Court of Appeals for the Sixth Circuit*, 12 U. TOL. L. REV. 495, 498 (1981).

> The work of a federal appellate judge can be lonely and frustrating. The hours are long and the salaries are certainly not commensurate with the responsibility. The process of research and writing incident to deciding cases is necessarily quite monastic. The appellate judge's function calls for many more scholarly research skills than those which a trial judge must develop in refereeing courtroom battles. The court's proper concern is not so much with litigants, but with questions of law and policy which will govern future cases. The scholarship necessary to make reasoned decisions takes place in a private atmosphere, quite remote from the public eye.

Id. (footnotes omitted).

publication of briefs, oral argument is the only public proceeding in the appellate process.[221]

> [O]ral argument to an appellate tribunal serves the public interest. Primarily it enables the client—a member of the public—to have his point of view presented out in the open to the reviewing court. He believes it is his right, and for that purpose he engages an attorney to make his voice heard. In addition, the argument and its subsequent reporting in the media enable members of the public to hear and understand the contentions of the conflicting litigants. Ordinary observers cannot be expected to seek out the respective briefs, unless, of course, they have a peculiar or potential financial interest in the result of the litigation.[222]

Accordingly, widespread restrictions on oral argument serve to further reduce the public nature of law and further obscure the law by veiling the proceedings and the court's reasoning.[223]

C. *The Supreme Court Checks Out: The Wealth of Avoidance Devices Available to the Nation's Highest Court*

Proceedings in, and Justices of, the United States Supreme Court are widely covered by the press and media,[224] and thus the Court should be the most transparent judicial lawmaker, law interpreter, and law creator in the United States. Despite this public nature, the Supreme Court is armed with a wide array of devices and procedures that serve to avoid addressing legal norms. These devices and procedures include: certiorari, standing, mootness, ripeness, and restrictions on habeas review.

1. Certiorari and the Rule of Four

In the federal courts, the vast majority of district court decisions are unpublished,[225] and thus most citable case law comes from the circuit courts of

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[221] *See* Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35, 36 (1986) ("'[O]ral argument provides the attorney with his or her only opportunity to face and speak directly to the judges about the case and the contentions made by counsel.'" (quoting Myron H. Bright, *Oral Argument, Why? How?*, 7 MINN. DEF. 9, 10 (Summer 1986))).

[222] Mosk, *supra* note 218, at 26.

[223] *See* Cappalli, *supra* note 194, at 793 (stating that "most federal appeals cases are now decided without oral argument, which is another development weakening the American legal system").

[224] *See* Richard Davis, *Supreme Court Nominations and the News Media*, 57 ALB. L. REV. 1061, 1072-73 (1994) (contending that media coverage shapes the Supreme Court nomination process); Robert M. Jarvis, Bush v. Gore*: Implications for Future Federal Court Practice*, 76 FLA. B.J. 36, 36 (2002) (describing the Supreme Court's "celebrity status" and the debut of two "prime-time television series" about the Supreme Court).

[225] *See* K.K. DuVivier, *Are Some Words Better Left Unpublished? Precedent and the Role of Unpublished Decisions*, 3 J. APP. PRAC. & PROCESS 397, 400 (2001).

appeals and the Supreme Court.[226] Restrictions on appeals, therefore, necessarily impact the number of citable cases. Despite its power and prominence, the Supreme Court hears startlingly few cases and issues fewer than one-hundred plenary decisions annually,[227] which necessarily means fewer Supreme Court decisions from which to obtain legal interpretations and guidance.[228]

The Supreme Court's complete control over its plenary docket—over the number and nature of its cases—is a relatively recent development.

> Beginning in the 1989 Term, the Court's docket—which had remained fairly constant at about 150 plenary decisions for the past decade—suddenly began to decline. In the 1988 Term, the Court issued 145 plenary decisions; in the 1989 Term, the number fell to 132; and in the 1990 Term, in fell to 116. It dropped slightly to 110 in the 1991 Term, held steady at 111 during the 1992 Term, then plunged to 90 in the 1993 Term. At present, the number of plenary decisions seems to have come to rest at a remarkably low plateau, ranging from 76 to 92 over the seven most recent Terms.[229]

The certiorari procedure, whereby at least four Justices must vote to take a

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> Nationwide, over 260,000 civil cases were filed in the federal district courts during fiscal 1999. The federal district courts have a West reporter specifically dedicated to their opinions—the *Federal Supplement*. Yet, each year only a few of the federal district court decisions are designated for publication by each district court judge.

Id. (footnotes omitted).

[226] *See* Priest & Klein, *supra* note 68, at 1 ("Virtually all systematic knowledge of the legal system derives from studies of appellate cases.").

[227] *See* 2002 YEAR-END REPORT ON THE FEDERAL JUDICIARY, *available at* http://www.supremecourtus.gov/publicinfo/year-end/2002year-endreport.html (last accessed May 26, 2003). The Supreme Court's website states that during its 2001 Term, it heard eighty-eight cases and disposed of eighty-five in seventy-six signed opinions—even though 7,924 cases were filed. *Id.*

[228] Similarly, if changes were implemented with respect to appeals to the federal circuit courts, rendering appellate review discretionary, this would similarly reduce the number of judicial opinions. *See* Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 605-06 (1985) (discussing a speech by Chief Justice William Rehnquist in which he urged that "the time has come to abolish appeal as a matter of right from the district courts to the courts of appeals, and allow such review only when it is granted in the discretion of a panel of the appellate court"). Fortunately, such a change does not appear imminent.

[229] Cordray & Cordray, *supra* note 14, at 743 (footnotes omitted). *See generally* DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT (1980). Professor Provine asserts:

> At every turn, the Court has acted to maximize its institutional independence from Congress, litigants, and other courts.... [T]he Court has whittled away... its jurisdiction that was intended to be obligatory. The Court has now worked itself into the position that it is no longer expected to decide any case as a matter of course.

Id. at 43-44.

case or it will not be heard,[230] leaves complete discretion within the Court itself as to which petitions, and how many, it will grant. The precipitous drop in the number of cases in which the Court grants certiorari necessarily constrains the development of law and the guidance that Supreme Court decisions provide.[231] The remarkably few cases that the Supreme Court agrees to hear each year, however, constitutes only the tip of the avoidance iceberg. In addition to issuing few decisive rulings and issuing limited holdings, the Court has perfected an entire system of review avoidance devices, including standing, mootness, and ripeness.

2. A Sampling of Other Avoidance Procedures: Standing, Mootness, and Ripeness

The Supreme Court[232] employs doctrines of standing, mootness, and ripeness to limit the development of law.[233] Standing "require[s] concrete adversity between the parties,"[234] to ensure that the parties have a sufficient stake in the controversy.[235] A case is moot when either there is no longer a "live" controversy or the "'parties lack a legally cognizable interest in the outcome,'" such as when the disputed matter has already been resolved.[236]

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[230] *See* Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 951-52 (2003) (discussing the Supreme Court's development of the "Rule of Four" for granting certiorari).

[231] Cordray & Cordray, *supra* note 14, at 737 (explaining that the decline in the number of certiorari petitions granted has led some to question "whether the limited size of the Court's docket enables it adequately to supervise and guide the lower courts").

[232] Although these avoidance doctrines are discussed here in the context of the Supreme Court, they apply to the lower level federal courts as well.

[233] There are other devices and procedures that serve to limit the development of law as well. For example, cases involving political questions are also non-justiciable. *See, e.g.*, Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 297 (1979) (examining the appropriateness of justiciability requirements).

[234] Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 33 (2003).

[235] *See* Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972) (discussing the necessary standing requirements for judicial resolution); *see also* Lederman, *supra* note 49, at 237 n.92 ("'Standing' doctrine requires a plaintiff to have a legally cognizable interest in a lawsuit to bring a claim.").

[236] U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)); *id.* at 397 (stating mootness is "'the doctrine of standing set in a time frame'" (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973))). *See generally* Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373 (1974) [hereinafter Note, *Mootness*] (declaring a case moot when all current and future claims have been extinguished). An important exception to the general mootness doctrine is when otherwise "moot" cases are "capable of repetition, yet evading review." Moore v. Ogilvie, 394 U.S. 814, 816 (1969) (quoting S. Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1910)).

Ripeness looks to whether the disputed matter has sufficiently matured and presents sufficient immediacy so that a matter is not adjudicated prematurely.[237]

Each of these doctrines serves to remove certain cases, or at least certain issues, from the Supreme Court's docket.[238] There are, of course, constitutional implications in this area due to Article III's prerequisite to federal judicial power that any questions posed must arise in a "case or controversy."[239] However, these doctrines also implicate judicial choice, since the guidelines in this area are unclear. As a result, they provide an additional method for disposing of cases without addressing the merits and with little explanation, thus avoiding both law itself and the development of law.[240]

3. Restrictions on Habeas Review

Changes in the appealability or availability of review of certain types of cases also affect this area. One prime example involves the restrictions imposed upon habeas review.[241] The primary function of the writ of habeas corpus is to permit review of an allegedly unlawful imprisonment, and the device enjoys constitutional protection.[242] Its value to democracy has

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[237] *See* Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 506-07 (1972) (discussing the test to be applied in order to determine whether a controversy is ready for a decision); *see also* Lederman, *supra* note 49, at 237 n.91 ("A case is not 'ripe' if its resolution is legally premature.").

[238] *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring) (discussing these and other practices as avoidance techniques); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 51 (1996) (observing that "principles of justiciability—mootness, ripeness, reviewability, standing—can be understood as ways to minimize the judicial presence in American public life"); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 462 n.238 (2003) ("[C]ourts use a variety of 'avoidance doctrines,' . . . [including] general doctrines like standing and judiciability."); Note, *Mootness*, *supra* note 236, at 378 n.24 (noting that mootness has the characteristic of an avoidance technique).

[239] *See, e.g.*, Honig v. Doe, 484 U.S. 305, 317 (1988) ("Under Article III of the Constitution this Court may only adjudicate actual, ongoing controversies."). *See generally* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 12, at 61-65 (6th ed. 2002) (discussing judicial power and the "case or controversy" requirement).

[240] *See* WRIGHT & KANE, *supra* note 239, § 12, at 62.

> Whether the decisions on justiciability are cast in terms of Article III limitations on judicial power or in terms of wise refusal to exercise acknowledged power, there are few clear rules. The precedents are sufficiently malleable to afford ample opportunity for courts to avoid decision on justiciability grounds simply because decision is thought inconvenient.

Id.

[241] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended at 28 U.S.C. §§ 2244, 2253-2255, 2261-2266 (Supp. IV 1999)) (reforming federal habeas corpus procedures).

[242] *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall

repeatedly been extolled.[243]

In an effort to streamline and expedite state prisoners' federal challenges to their confinement[244]—challenges characterized as resulting in "acute problems of unnecessary delay and abuse"[245]—Congress enacted major restrictions on federal habeas corpus proceedings as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[246] Among these restrictions were new time limits,[247] higher standards for granting evidentiary hearings,[248] and a prerequisite for habeas relief that the challenged state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[249] This latter change was particularly significant because the federal courts previously had employed a de novo standard of review.[250]

In addition to these new statutory restrictions on habeas review, the Supreme Court has taken a narrow view of the habeas review now permitted under AEDPA, thus further constricting the availability of habeas relief.[251] In *Williams v. Taylor*,[252] the Supreme Court effectively held that

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not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[243] *See, e.g.*, Fay v. Noia, 372 U.S. 391, 400 (1963) ("'[T]here is no higher duty than to maintain [the federal writ of habeas corpus] unimpaired' . . . ." (quoting Bowen v. Johnston, 306 U.S. 19, 26 (1939))); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1868) (stating that the writ of habeas corpus is "the best and only sufficient defence [sic] of personal freedom"); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807) (stating that the writ of habeas corpus is a "great constitutional privilege").

[244] *See* Larry Yackle, *Federal Habeas Corpus in a Nutshell*, 28 HUM. RTS. 7, 8 (Summer 2001) ("The ostensible purpose of [AEDPA's] procedural requirements is to streamline and expedite habeas cases in federal court . . . .").

[245] H.R. REP. NO. 104-518, at 111 (1996).

[246] 28 U.S.C. §§ 2244, 2253-2255, 2261-2266.

[247] *See* 28 U.S.C. § 2244(d) (establishing a one-year time limit for application for a writ of habeas corpus).

[248] *See* 28 U.S.C. § 2254(e)(2)(B) (requiring the applicant to show that "but for constitutional error, no reasonable factfinder would have found the applicant guilty").

[249] 28 U.S.C. § 2254(d)(1).

[250] *See* Miller v. Fenton, 474 U.S. 104, 112 (1985) (providing that federal habeas court review demands "independent federal consideration"); Brown v. Allen, 344 U.S. 443, 460-65 (1953) (holding that federal courts have discretion to hear petitions already heard in state courts to rectify constitutional errors).

[251] *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 108 (1982) (interpreting the habeas corpus act, and precluding habeas review for state prisoner); Wainwright v. Sykes, 433 U.S. 72, 72 (1977) (barring habeas corpus review because applicant failed to make a timely objection); Stone v. Powell, 428 U.S. 465, 466 (1976) (holding that applicant had already been given the opportunity for just resolution of the claim and was therefore barred from habeas corpus relief despite minimal errors at trial); *see also* United States v. Frady, 456 U.S. 152, 152 (1982) (narrowing decisionmaking opportunities for federal prisoners seeking habeas relief).

[252] 529 U.S. 362 (2000).

> a federal court's decision that the prisoner was convicted or sentenced to death in violation of the Constitution does not, in and of itself, enable the federal court to grant relief. If a state court adjudicated the merits of the prisoner's claims and reached a different result, the federal court can save the prisoner from execution only if the state court decision against the prisoner was not only wrong but unreasonably wrong.[253]

The demise of traditional habeas relief has, for this article's purposes, at least two consequences. One consequence stems from the Supreme Court's lack of guidance in applying this new standard, which has resulted in "an intellectual disaster area."[254] This lack of guidance contributes to the previously identified problem of ad hoc decisionmaking.[255] The second consequence is that the restrictions on habeas corpus serve to limit review of state court decisions for constitutional error.[256] In effect, the standard of review in a habeas petition approximates complete deference to the state court. Only in the most extreme circumstances—beyond the equivalent of an abuse of discretion—can a federal court intervene, even when the error is clear and

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[253] Yackle, *supra* note 244, at 8; *see also Williams*, 529 U.S. at 411 ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."). As one commentator explained:

> A federal court may no longer grant habeas relief merely because it concludes that a state court erroneously applied federal law when it rejected a prisoner's claim. Instead, a federal court must allow a state to imprison or execute a habeas petitioner whose federal constitutional rights have been violated, so long as the state court's erroneous application of law to fact was objectively reasonable.

Todd E. Pettys, *Federal Habeas Relief and the New Tolerance for "Reasonably Erroneous" Applications of Federal Law*, 63 OHIO ST. L.J. 731, 732 (2002).

[254] Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1756 (2000); *see, e.g.*, Neal v. Puckett, 239 F.3d 683, 695 (5th Cir. 2001) ("[E]ven after *Williams*, it is not immediately clear to us whether a federal habeas court looks exclusively to the objective reasonableness of the state court's ultimate conclusion or must also consider the method by which the state court arrives at its conclusion."); Francis S. v. Stone, 221 F.3d 100, 109 n.12 (2d Cir. 2000). In *Francis S.*, the Second Circuit stated:

> Justice O'Connor took some comfort [in *Williams*] in the fact that "unreasonable" is "a common term in the legal world and, accordingly, federal judges are familiar with its meaning." The difficulty, of course, is that we are familiar with its many meanings in the different contexts in which the word (or its antonym) is used. We have no experience in determining when a state court has made an unreasonable application of constitutional law, as expounded by the Supreme Court.

Id. (citations omitted); *see also* Van Tran v. Lindsey, 212 F.3d 1143, 1151 (9th Cir. 2000) ("[F]ederal courts have not ordinarily judged the reasonableness, rather than the correctness, of a court's applications of federal law.").

[255] *See supra* notes 154-158 and accompanying text.

[256] *See* Yackle, *supra* note 244, at 8 (observing that a prisoner may be saved from execution only if the state court is unreasonably wrong).

absent that error the prisoner would not be on death row.[257] Thus, an area of law of vital interest to the parties and the public—whether the law was followed in obtaining a state court conviction—becomes for practical purposes inconsequential. The "law" involved disappears as an effective regulator of conduct and as a restraint upon actors with enormous practical coercive power, such as police and prosecutors.

IV. THE END OF LAW: ERADICATING LAW

Even after a case has been heard and decided, a number of practices have evolved in the federal and state appellate courts that eliminate decided case law from the realm of precedent. These practices include vacatur and depublication.

A. *Erasing the Law: Vacatur*

Vacatur, as a general concept, means "[l]et it be vacated. In practice, a rule or order by which a proceeding is vacated; a vacating."[258] Federal Rule of Civil Procedure 60(b) gives federal courts the power to vacate a judgment rendered under unjust circumstances, such as those involving fraud, mistake, or newly discovered evidence.[259] This Rule is necessary to prevent law from being a fraud, sham, or instrument of injustice.[260]

To this extent, vacatur is neither new nor harmful to law. Indeed, it is essential. But courts have, in essence, "rediscovered" the vacatur procedure in the context of post-judgment settlements, and have created something very

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[257] *See id.* (arguing that the standard of habeas review damages the ability of federal courts to defend federal rights).

[258] BLACK'S LAW DICTIONARY 1388 (5th ed. 1979).

[259] FED. R. CIV. P. 60(b). Rule 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party); (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Id.

[260] *See* 28 U.S.C. § 2106 (2000). This section provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Id.

different and potentially dangerous to law.[261] In this new context, vacatur has become a practice whereby a party who lost at trial offers the prevailing party a sum of money in exchange for an agreement to vacate the judgment.[262] "By vacating a decision, a court erases it from the books forever and generally eliminates its precedential or preclusive effect,"[263] thus "clear[ing] the path for future relitigation of the issues between the parties and eliminat[ing the] judgment . . . ."[264]

Thus, vacatur has been reconfigured into a device permitting certain decisions to be erased, at a party's request, in exchange for a payoff to the other party involved in the litigation. In its reconfigured state, vacatur robs similarly situated litigants of the precedential value of a court's decision.[265]

Although the Supreme Court has stated that a court may vacate a case mooted by settlement in "exceptional circumstances," the Court observed that "[w]here mootness results from settlement . . . the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur."[266] Accordingly, "exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur . . . ."[267] Of particular relevance to this article, the Court expressly noted the impact that such a practice would have upon judicial precedents:

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[261] *See* Fisch, *supra* note 114, at 589 ("The power of courts to vacate their prior judgments is not a recent innovation. In the past several years, however, courts have begun to embrace the practice of vacating judgments following a postjudgment settlement of the litigation.").

[262] *See* Daniel Purcell, *The Public Right to Precedent: A Theory and Rejection of Vacatur*, 85 CAL. L. REV. 867, 867 (1997) (suggesting that wealthy litigants can "shape the law according to their interests"). One commentator has claimed that many postjudgment settlements

> are really compromise verdicts, in which parties compensate for perceived weaknesses in the prevailing party's case by settling for an amount much less than the initial judgment. Moreover, the initial judgment, although adverse, may be so small as to make it economically unwise for the loser to appeal, even if the prospects of success on appeal are substantial.

Fisch, *supra* note 114, at 622. To this extent, vacatur shares the benefits and harms of other settlements. But vacatur, used after judgment and after an appellate decision, has a qualitatively greater potential for law destruction.

[263] Purcell, *supra* note 262, at 871; *see* Michael W. Loudenslager, *Erasing the Law: The Implications of Settlements Conditioned Upon Vacatur or Reversal of Judgments*, 50 WASH. & LEE L. REV. 1229, 1242 (1993) ("Insurers have considerable incentive to avoid the establishment of adverse precedent concerning their policy provisions in any state or federal court because insurance contracts tend to be standardized throughout the United States.").

[264] United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950).

[265] *See* Purcell, *supra* note 262, at 871.

[266] U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 25 (1994).

[267] *Id.* at 29.

> "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." Congress has prescribed a primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments. To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system.[268]

As Justice Stevens so cogently observed, "While it is appropriate to vacate a judgment when mootness deprives the appellant of an opportunity for review, that justification does not apply to mootness achieved by purchase."[269]

Law has always had an elusive quality. Opinions get reversed; private procedures settle matters in quiet settings creating no precedent. Despite the Supreme Court's pronouncements, however, private parties now actually purchase public legal goods—appellate court decisions—simply to remove them from the public domain.

B. *Selling Off Law to the Highest Bidder: California's Practices of Depublication and Stipulated Reversal*

As a large and populous state, it is no surprise that California would have concerns about burgeoning court dockets. However, two of California's most unique procedures—depublication and stipulated reversals—have no connection to caseloads, but instead serve solely as methods for eliminating existing law. Accordingly, these procedures do nothing to reduce a court's workload, but instead, after a court has completed its work and rendered its decision, these procedures permit the erasure of the final product: the court's decision.

The first of California's unique procedures involves the California Supreme Court's practice of "depublishing" certain decisions issued by the California courts of appeal.

> Depublication, or "decertification," is the California Supreme Court's practice of ordering that a court of appeal opinion, certified by the court of appeal as important enough for publication in the Official Reports

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[268] *Id.* at 26-27 (citations omitted) (quoting Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 40 (1993) (per curiam) (Stevens, J., dissenting)); *see also* Fisch, *supra* note 114, at 629 ("[P]ostjudgment vacatur may sacrifice certain public values. . . . A judgment includes elements of legal analysis which may have important consequences in other cases involving unrelated parties."); Loudenslager, *supra* note 263, at 1255 ("[J]udicial decisions often affect large groups of people not directly before the court.").

[269] *Izumi Seimitsu Kogyo Kabushiki Kaisha*, 510 U.S. at 40 (Stevens, J., dissenting) (citation omitted).

> under the standards of California Rule of Court 976, not be published after all and therefore not be citable as precedent. The court takes this action without hearing the case or giving reasons, but also without affecting the result; despite depublication of the opinion, the decision of the court of appeal stands. Begun in 1971 with three depublication orders, the practice reached a high of 142 depublished opinions in 1988-1989 and has now receded to about 100 per year. This is still more cases than the supreme court decides each year by signed written opinion. Depublication thus is a major way in which the California Supreme Court shapes California's law.[270]

California Rule of Court 979(e) specifies that a depublication order "shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion."[271] Thus, under California practice, not only is the depublished case not citable, but no conclusions may be drawn from the fact of depublication. The practice of depublication is unique to California,[272] and has been roundly criticized.[273]

In its second unique procedure, California has overstepped even the bounds of vacatur with the use of "stipulated reversals," which were not only approved but encouraged in *Neary v. Regents of the University of California*.[274] In *Neary*, the plaintiff won a seven–million dollar jury verdict.[275] During the pendency of the appeal, the parties agreed to settle.[276] Under the terms of the settlement, in exchange for three-million dollars, the plaintiff agreed to join in asking the appellate court to dismiss the appeal, vacate the trial court's judgment, and dismiss the action with prejudice.[277] Despite the reference to "vacate" in the settlement agreement, the parties asked the appellate court to "reverse the trial court's judgment and remand the case to the Superior Court

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[270] Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033, 1034-35 (1993) (footnotes omitted).

[271] CAL. R. CT. 979(e).

[272] *See* Philip L. Dubois, *The Negative Side of Judicial Decision Making: Depublication as a Tool of Judicial Power and Administration on State Courts of Last Resort*, 33 VILL. L. REV. 469, 472-73 (1988) (stating that the California Supreme Court is the only court with discretionary jurisdiction that has the power to depublish opinions of the courts of appeal); *see also* Barnett, *supra* note 270, at 1037 (stating that "no other state supreme court appears to have adopted the practice [of depublication]").

[273] *See, e.g.*, Barnett, *supra* note 270, at 1037-45 (criticizing depublication as an overstepping of judicial power, a denial of a reasoned decision, and as a denial of equal treatment to similarly situated litigants).

[274] 834 P.2d 119, 120 (Cal. 1992) (holding that, absent extraordinary circumstances, a stipulated reversal is obtainable by parties who settle after a trial court decision).

[275] *Id.*

[276] *Id.*

[277] *See* Barnett, *supra* note 270, at 1058 & n.127 (citing to Petitioners' Brief at 5).

for dismissal with prejudice."[278] Indeed, the defendants expressly stated that they did "not seek . . . a reversal of the trial court's judgment (as opposed to its vacatur)."[279]

The California Supreme Court held that a "strong presumption" favored stipulated reversal in order to "respect the parties' choice and assist them in settlement."[280] A stipulated reversal, however, goes beyond mere vacatur.

> The difference between "reversing" and "vacating" a judgment would seem significant. Courts and commentators have debated stipulated "vacatur," with the majority apparently in opposition, but stipulated "reversal" is a stronger and more questionable measure. To "reverse" a judgment means to reject it, undo it, turn it around. "To reverse a judgment, according to Webster's dictionary, means to overthrow it by a contrary decision, to make it void, to undo or annul it for error." A national legal newspaper has described the procedure approved in *Neary* as "agreeing that a four-month trial came out the opposite of how it did."[281]

The *Neary* court, in reaching its decision, emphasized that public policy favored settlement, and insisted that "[t]he courts exist for litigants."[282] Dissenting, Justice Kennard asserted that "[b]ecause a judgment embodies an act of government, its annulment must be reconciled with public as well as private interests."[283] Accordingly, private parties "should not be free . . . to include within those terms of settlement the destruction of a judgment, a public product fashioned at the cost of public resources, and to require an appellate court to accomplish that destruction merely to facilitate resolution of their private dispute."[284]

Neary represents a high water mark in the end of law phenomenon, bringing together issues of privatization, distortion, elimination, and loss of landscape in one fell swoop. In effect, *Neary* represents a transformation of law as a public good into law as a private commodity for sale. The *Neary* majority's emphasis on the principle that the courts exist for litigants ignores the equally important precedent-setting function of the courts.

> The courts are not, as the majority in *Neary* asserts, little more than a dispute-resolution service. If parties want an essentially private resolution of their dispute, they can go to arbitration or other forms of alternative dispute resolution, and pay for it themselves. Court judgments, produced with a substantial expenditure of public resources,

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[278] *Id.* at 1058 & n.128.

[279] *Id.* at 1066 (quoting from Petitioners' Answer to the Amici Curae Briefs at 1).

[280] *Neary*, 834 P.2d at 123, 125.

[281] Barnett, *supra* note 270, at 1067 (footnotes omitted).

[282] *Neary*, 834 P.2d at 123.

[283] *Id.* at 127 (Kennard, J., dissenting).

[284] *Id.* at 132-33.

> are designed to benefit the public as well as litigants. . . .
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> . . . .
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> . . . These judgments interpret the laws of the state, explicate the values embodied in those laws, establish rights and liabilities between parties engaged in activities that affect the public, decide questions of public justice . . . and otherwise declare law and do justice in ways of deep interest to the public. Part of the reason for public financing of the judicial system lies in the public value of judicial decisions. All these benefits are to some extent denied to the public when a court's judgment is "reversed" by a higher court simply because one party has paid the other's price.[285]

Accordingly, depublication and stipulated reversal contribute to the eradication of law by "making judicial decisions disappear."[286] Most offensively, the practice of stipulated reversal permits the selling off of legal decisions to the highest bidder.[287]

V. THE END OF LAW: THE EFFECTS

The myriad innovations intended to streamline and expedite legal proceedings are bringing about the end of law by striking at the very core of "law" itself. The privatization of law, although certainly contributing to this phenomenon, is only one part of this development. It is true that a private resolution, whether by traditional negotiated settlement or the use of alternative dispute resolution methods, eliminates the public nature of legal proceedings by trading a public forum for a private one that sets no precedents and might not follow traditional evidentiary and other procedural rules.[288] These devices

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[285] Barnett, *supra* note 270, at 1077-78 (footnotes omitted).

[286] *Id.* at 1084 ("Depublication and stipulated reversal, two distinctive devices adopted by the California Supreme Court for making judicial decisions disappear, both ultimately raise the question whether any gains they produce in judicial efficiency are worth the harm they may inflict on the integrity and reputation of California's courts.").

[287] *See id.* at 1078 (highlighting the fact that lower court decisions are overruled only because a party has later agreed to pay).

[288] *See* Calvin William Sharpe, *Integrity Review of Statutory Arbitration Awards*, 54 HASTINGS L.J. 311, 314-15 (2003) ("While judicial proceedings must conform to the Constitution, the Federal Rules of Civil Procedure and the Federal Rules of Evidence, which guarantee due process to litigants, the procedural and evidentiary requirements of arbitration are much less demanding."). As the Fifth Circuit explained:

> The arbitration process is a speedy and informal alternative to litigation, and, by its very nature, is intended to resolve disputes without confinement to many of the procedural and evidentiary strictures that protect the integrity of formal trials. . . .
>
> Submission of disputes to arbitration always risks an accumulation of procedural and evidentiary shortcuts that would properly frustrate counsel in a formal trial . . . .

Prestige Ford v. Ford Dealer Computer Serv., Inc., 324 F.3d 391, 394 (5th Cir. 2003) (citations omitted).

and procedures are eradicating and undermining potential precedent and are distorting the public's view of law. "Normal" law springing from "normal" cases is being hidden from public view,[289] leaving the unusual, abnormal, or grotesque cases and procedures to be highlighted, which further damages the public's view of the legal system.

Each of the devices and procedures examined in Parts II through IV contributes to hiding law, eliminating law, or both. Electing to denominate a decision as a "memorandum disposition" and thereby preventing its use as citable precedent serves to hide law: a decision was reached, but the decision remains almost secret because the use of that decision is sharply circumscribed. Similarly, employing standards of review as a means of circumventing full legal analysis, ad hoc decisionmaking by trial courts, discretion-enhanced pretrial and trial management systems, and restricting forms of appellate review serve to hide law and dilute its efficacy. In some cases, explanations are so limited as to be nearly useless, or the results in previous proceedings are effectively upheld without explanation. Vacating or depublishing citable precedent, on the other hand, eradicates existing law. Moreover, settlement, other forms of alternative dispute resolution, and the various procedures that encourage or pressure settlement—such as fast-track procedures, pretrial conferences under Rule 16, and offers of judgment under Rule 68—both hide and eradicate law, since they occur out of public view and result in agreements that have no precedential value.

In each instance, the problem developed naturally enough: amid cries of unmanageable caseloads, techniques sprouted for reducing these caseloads. In addressing genuine concerns related to caseloads, delay, and inefficiency, the proposed "solutions" have approached the underlying problem from a narrow perspective, viewing cases merely as disputes in need of "fixing," without adequately considering the necessity of the public forum and the impact on the body of case law. As a result these "solutions" have created an entirely new problem—a form of legal erosion. The proposed solutions have consistently disserved law: removing the decisionmaking process from public view, removing the decision itself from scrutiny, or distorting the decisionmaking process by using conclusory analytical shortcuts. These drawbacks have a common thread: they reduce the understanding of law in the normative sense by reducing its visibility or hiding it altogether. Judges, lawyers, litigants, and the public at large all feel the impact of this reduced visibility.

When lawmaking processes develop to deal with a flood of cases, risking the obscuring or elimination of landmarks, the very sense of "legal place" is rendered less concrete. This is the danger of the end of law: that it extracts much of the vitality out of the rich fabric of the law and gives it an evanescent quality, with only a few, grotesque landmarks left visible. The underlying law and its richness are there; what is needed is a dissipation of the fog generated

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[289] *See* Gross & Syverud, *supra* note 68, at 2 n.2 (estimating that the national trial rate of cases filed in state and federal courts is only 2.9%).

by these end of law devices and procedures.

For judges, lawyers, and litigants, the impact of the reduced visibility of law has eminently practical ramifications. Cases involving similar facts or similar legal issues may have settled, leaving no precedent upon which to rely and no guidance as to the viability of the claim or its potential value. Cases involving similar facts or similar legal issues that did not settle, but which resulted in an unpublished opinion, typically cannot be cited as precedent, and may essentially reveal only the result, yielding little analytical guidance. Even cases involving similar facts or similar legal issues resulting in a published opinion may be of little assistance if the decision sets out a rule or standard but then summarily concludes that the rule or standard was (or was not) satisfied, without providing a detailed legal analysis.

The public at large also suffers when law becomes less visible. To the extent that law helps to establish behavioral norms, if legal guidance does not exist, or if law is not publicly available, the public will not know the behavioral expectations or consequences. Moreover, when the public's understanding is that the vast majority of lawsuits do not proceed to trial, but instead are resolved by settlement, this can lead to a cynical perception that lawsuits, lawyers, and plaintiffs are motivated by greed and seek only to be "paid off" by defendants. When the vast majority of lawsuits do not proceed to trial, this means that only the unusual—perhaps even aberrant—cases are tried. When, from the relatively small percentage of cases tried, the most outlandish ones—in terms of their facts, their claims, or their verdicts—are highly publicized, this serves to reinforce a public perception that law is frivolous, foolish, and absurd.

These considerations call for a reevaluation of the very nature of law as currently understood, used, and created. From their first day in law school, law students are taught the importance, indeed the primacy, of case precedent. In evaluating a client's claim, lawyers seek precedent for raising particular legal issues as they pertain to particular facts. The availability or lack of precedent shapes the lawyer's approach to the case, steering the lawyer toward—or away from—particular arguments and analogies. Yet these approaches to precedent are based on assumptions that precedent is both representative and reflects the state of the law—assumptions that may no longer be true.[290]

If we approach a decided, published case from the perspective that the case we are about to read is an anomaly rather than a prototype, we may no longer view precedent as rigid and restrictive, but rather as providing one path, but not the only path. The results of this approach may be mixed—expanding both strong, useful arguments and weak, useless arguments. In any event, however, this perspective far more accurately reflects the realities of available precedent.

Moreover, useful precedent—and the identified purpose of law as serving to

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[290] *See* H. Lee Sarokin, *Justice Rushed is Justice Ruined*, 38 RUTGERS L. REV. 431, 431 (1986) ("The study of law focuses on reported cases, which represent about two or three percent of all suits which are instituted.").

establish behavioral norms—requires more than an ultimate conclusion. As we tell first-year law students, any nitwit can copy a black-letter rule out of a book. What turns "copying" into "understanding," and what turns black-letter law into precedent, is legal analysis—the questions of "how" and "why." The detailed, step-by-step analysis that law professors expect in strong exam answers is precisely what is needed from judicial decisions.

Providing the detailed, step-by-step analysis needed for useful precedent does not require one to choose between rules and standards or between judicial minimalism and maximalism. It takes no stance as to broad versus narrow holdings. It requires only that whatever the rule or standard used, the court analyze how that rule or standard applies in this particular factual instance.

CONCLUSION

Concerns about delay and efficiency have resulted in new devices and procedures without sufficient attention to the effects of these new procedures upon law itself. Law in the normative sense is vanishing—veiled by procedures that hide law from view and eradicated by procedures that eliminate existing law. The result of these procedures is privatized law, distorted norms, diminished case resolution and explanation, and loss of the full landscape of law. The surge in private resolutions, the limitations on and changes in appellate review, the increase in unpublished opinions, and the use of vacatur all serve to obscure law and create law in only the most unusual cases—as well as decreasing precedent even among those cases that are actually decided. Despite the usefulness of these devices and developments, their adoption without a full examination of the repercussions—with an eye instead only to ridding the court of that additional dispute—is shortsighted. Will we really have achieved our goal when the courthouses are empty, so long as disputing parties have a private alternative?