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# Private Courts and Public Authority

by

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*If civil disputes can be satisfactorily resolved by arbitrators, why is there ever any need to settle them at public expense? Why should the taxpayers have to support a civil court system? More to the point, why should jurors have to pay in time and lost wages to enable a condo developer to extract a cash settlement from a builder? Private disputes, unlike criminal proceedings, often have no social consequences. The full costs should fall on the litigants themselves.*

—The Wall Street Journal
("Editorial" 1985)

This view of civil litigation from the *Wall Street Journal* (cf. Savas 1987, p. 21) cannot survive the most cursory examination. The news pages of the same day's Wall Street Journal reported the Chapter 11 filing of the A. H. Robins Corporation, driven to invoke the protection of bankruptcy by a mounting tide of damage claims from users of its Dalkon Shield intrauterine device. But the cavalier dismissal of any public function for civil courts raises in stark form the question of what these functions are and how they can be filled. We propose

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to address this question indirectly by examining the public aspects of "private" courts.

This paper analyzes how various tribunals may be considered to be private courts, why it may or may not be desirable to have them, and in what ways they should be private (or public). We suggest that the many sorts of private courts vary in their "privateness" along numerous dimensions that are not necessarily correlated, and that virtually all "private courts" contain significant public elements. (Conversely, American "public" courts contain important private aspects.) Given this perspective, the policy issue is not whether cases should be processed by "public" courts or "private" courts, but rather what *dimensions* of courts should be public or private. This analysis of courts according to various dimensions of publicness and privateness suggests the need for research and regulation focused on particular dimensions of specific tribunals.[1]

## THE BURGEONING OF PRIVATE COURTS

Judges are not the only people who make binding decisions in disputes. Many kinds of adjudicators sit in forums other than official courts and are legally empowered to decide disputes (Galanter 1986). Indeed, legal professionals and scholars often overemphasize the importance of official justice-dispensing institutions and fail to recognize the significance of forums in other institutional settings, such as schools, sports associations, workplaces, and businesses (Galanter 1981). "Indigenous" forums embedded in institutions such as these have been a prominent if neglected feature of our legal life—a feature that has grown in recent years. Alongside this sort of institutionally embedded private court, there has been a striking growth in the number of independent and freestanding providers of dispute-processing services, such as Judicate and Judicial Arbitration and Mediation Service, to name just two. There is no reliable information about the amount of private-court activity. It was recently reported that in California approximately 20,000 of the 650,000 civil cases filed in Superior Court in 1989 were handled by private judges (Slind-Flor 1990).

Apart from anecdotes and generic descriptions, relatively little is known about private courts. Some of the questions we need to answer include: What is the number, location, staffing of private courts of these various types? What kinds of cases are brought to them? What are the matters in dispute? What are the stakes? What kinds of parties are involved? Do these cases proceed through the whole course of the process or is there settlement in the shadow of these private courts (Mnookin and Kornhauser 1979; Galanter 1986, pp. 212-14)? Is the role of lawyers in these private proceedings similar to their role in ordinary public court litigation?

How has the use of private courts changed over time? Why has the demand for (certain kinds of) private courts emerged just now? Is it the availability of new technology? Does it reflect changes in the relationships between disputants? Or is it a matter of ideology? Or does it reflect growing impatience with state services (as we become accustomed to finding better service at Federal Express than the Post Office)? Or is it due to changes in the professional needs and aspirations of judges and lawyers? Why do parties choose to use private courts and why are certain courts chosen by parties (cf. Lind and Tyler 1988)? What information do parties have when making these choices?

Generally, disputing parties are permitted (and even encouraged) to go off and make a deal by themselves. In such settlements, the disputants are free to ignore many requirements of the official law as well as the expectations and interests of third parties. Given the option of settlement alongside that of official adjudication, why do parties find the third option of private courts attractive? We may assume that a sophisticated party will not forego the substantial advantages conferred by use of the public courts unless there is some offsetting advantage. What then would induce both parties to agree to move to a private court? Is it the attraction of speed, process control, privacy, and general flexibility of private courts? Has the attractiveness of public courts declined? Has there been a decrease in the predictability of outcomes in public courts?

Is it more difficult to arrange satisfactory settlements with opposing parties? Has the increase in transaction costs increased settlement ranges, so that parties find it more difficult to reach agreement within these wider ranges? In the latter view, private courts can be seen as part of a proliferation of settlement brokers (e.g., judges, mediators, special masters) and devices (mini-trials, summary jury trials, etc.) that provide signals to identify points of convergence within the broader settlement ranges created by higher transaction costs. To help address the preceding questions, we need to consider the arguments for and against use of private courts.

## THE CLAIMED ADVANTAGES OF PRIVATE COURTS

This is a catalog of the various claims that are (or could be) made for private courts. Claims regarding private courts are often conflated with claims regarding alternative dispute resolution generally. We confine ourselves in this paper to claims about private courts, but this list makes no attempt to sort claims by the particular type of private court. The following claims are not entirely consistent with one another. For example, a court that produces predictable results may not produce creative ones or ones that comport with the values of the disputants.

### Control Over Timing

1. Cases can get handled quickly, whether through settlement or adjudication.
2. Parties can control the scheduling of hearings to meet their needs.
3. Hearings can be completed more quickly or, if parties want more thorough proceedings, additional time can be arranged.
4. Private courts can announce decisions sooner after trials are completed.

### Control Over Decision-Makers

5. Parties have more control in the choice of judge.
6. Parties can select judges who have expertise in the subject matter of the dispute.
7. Parties can avoid the extra time, cost, and unpredictability of juries or, if desired, impanel private juries.

### Control Over Rules To Be Used

8. Parties can devise procedures to fit particular disputes.
9. Parties can agree on the substantive rules to be used, such as trade customs or other indigenous norms.
10. By controlling procedural and substantive rules, parties can reduce the risk that their cases will be decided by "new law."

### Cost Savings

11. Parties can realize net savings of attorneys' fees and other litigation costs.
12. Parties can realize indirect savings as a result of spending less time handling disputes and increased opportunities to engage in productive activities.

### Privacy

13. Parties can control (and often prevent) disclosure of information regarding the existence of disputes, the facts and papers produced in disputing, and the outcomes.

### Outcomes

14. Parties can authorize private courts to develop creative and integrative solutions that maximize the joint gains (or minimize the joint losses) of the parties.
15. Parties can resolve specific disputes without establishing precedents for later disputes.
16. Private court proceedings may facilitate the preservation of relationships with opposing parties.

17. Private court decisions that are virtually unappealable (or in some cases, quickly appealable in the public courts) bring litigation to an early conclusion.
18. Decisions produced by private-court procedures may elicit greater compliance.

### General Effects

19. Use of private courts relieves burdens on public courts.
20. Availability of diverse court procedures promotes competition and thus improves the efficiency of all courts.

Which claims are made for which private courts? Are certain advantages correlated with others, either in terms of actual results or parties' reasons for choosing particular courts? Most of these are comparative claims. The other term of the comparison is litigation in the government's courts. Typically, it remains unclear whether the comparison is with full-blown adjudication or with what occurs more frequently, settlement in the shadow of the government court. Nor is it always clear whether the claim is that particular government courts happen to be low in these desirable qualities—which might be remediable conditions—or that public courts inherently have less of these qualities.

## THE ALLEGED DISADVANTAGES OF PRIVATE COURTS

Unlike the claimed advantages of private courts, virtually all of which redound to the benefit of the parties themselves, the alleged disadvantages are mostly general effects (i.e., effects on others than the specific parties in a proceeding) or externalities. Thus, the following claims are (or could be) made about a court system involving widespread and unregulated use of private courts:

### Inequality

1. A system involving widespread use of private courts would be a stratified, multi-tiered system providing worse adjudication service for weaker and disadvantaged members of society than for private-court users.
2. Such a system would provide unequal access to information, favorable judges, appellate review, and "precedents."
3. Weaker and less sophisticated parties would lose some legal protections in private courts because the choice of rules and procedures confers advantages on repeat players since they are aware in advance of their needs and interests as disputants and because private courts may favor repeat players to gain future business.

4. The development of a less visible cadre of adjudicators may reduce the ethnic, cultural, and gender representativeness of the overall pool of adjudicators.

### Institutional Weakening Of Courts

5. Private courts would encourage the withdrawal of elite litigants from public courts who would thus have no incentive to support reform of the public court system.
6. Private courts would drain public courts of good personnel by offering greater amenities (such as pay, hours, and facilities) and a better mix of interesting cases.

### Undermining Of Public Policy

7. Private courts would diminish the stock of precedent because private courts avoid making general rules (to avoid unhappy customers); the absence of public precedents would lead to inefficient relitigation and would obstruct the preventive effects of visible and precedential rulings.
8. The secrecy and lack of public authority of private courts would diminish the educative effects of court decisions on wider publics.
9. Secrecy in private-court cases creates the possibility that parties would collude in some cases to create a private-court record that would be used to set public court precedents.
10. Secrecy in private-court cases deprives the public and future potential claimants of information about legal violations.

### Lack Of Accountability

11. Private courts allocate resources and make determinations with little or no accountability to public agencies or the public at large.

### Lack Of Participation

12. Interested third parties do not have access to, let alone participation in, private-court proceedings.

Again, there is the question which of these outcomes result from which kinds of private courts. Since most of these purported outcomes are system effects rather than the results of individual decisions, what configurations and conditions of the systems would be required to produce these effects? Can any of these claimed effects be measured?

## DIMENSIONS OF PRIVATIZATION

As a starting point for inquiry, we posit a preliminary definition of a *public* court: an institution constituted and operated by public (governmental)

*Table 1.* Dimensions of Publicness and Privateness in Courts

| | *More Public* | *Intermediate* | *More Private* |
|---|---|---|---|
| Access to process | Available to all without discrimination or cost | Available to all who have ability to pay | Available only to selected groups (e.g., members) |
| Selector of forum | Any aggrieved party | | Agreement of all parties |
| Location of proceedings | Government premises | Officially designated premises | Private premises |
| Openness of proceedings | Open to public | Limited access | Open only to parties |
| Personnel/decision-makers | Government officials, citizen jurors | Government-certified or licensed adjudicators | Private adjudicators or jurors |
| Selected or assigned by: | Government | | Private parties |
| Paid by: | Government | | Private parties |
| Procedures specified by: | Government | Standing body | Private parties |
| Discovery of information | Government-enforced | By rules of standing body | Subject to negotiation |
| Norms | Official, public, etc. | Unofficial body of rules or public rules that are not binding | Idiosyncratic |
| Sanctions and enforcement | Imposed by government | Backed up by government | Self-help only |
| Accountability and review | Appellate courts and legislatures | Only narrow review for procedural defects | No accountability in public forums |
| Record of proceedings and decisions | Public records | | Records in control of parties |

authority that determines rights or entitlements and resolves claims according to publicly authorized norms, in judicial form, whose decisions are backed up by public force. By "judicial form" we refer to the hearing of proofs and arguments by a neutral third party who is committed to render decisions on the basis of a preexisting body of norms (Galanter 1986, pp. 152-60).

This definition of public courts, which invokes public authority, public procedures, public norms, and public force, suggests that there are many different sorts of "publicness" entailed in the notion of a public court. Table 1 catalogs some of the principal ways in which a court may be public and the various kinds of departures from publicness that may characterize a court. Thus, we would not expect every court considered to be public or private to exhibit each of the features that lie at the extremes of all the different public-private continuua.

Table 1 represents an ideal-typical version of public courts. In the real world, a process need not lie at the public end of the scale on each of these dimensions to be regarded as a "public" court. Departures from the public end of the scale may be commended as adaptations to pluralism. For example, in deciding contract cases, our public courts give weight to norms that are not promulgated by official sources (such as "the usages of the trade") or make accommodations to other important values (such as closing otherwise public court proceedings to prevent harmful publicity).

## A TAXONOMY OF PRIVATE COURTS

Obviously there are many possible combinations of private and public elements. Here we note a few of the prominent types and provide examples of how they work:

1. *Court-annexed Arbitration.* ("CAA") refers to a mandatory, non-binding adjudicatory process instituted by public courts to divert some cases from their dockets. In general, CAA programs authorize courts to require arbitration of specified civil-damage suits before the suits may be tried in court (Ebener and Betancourt 1985). Although some CAA programs include civil actions that involve remedies other than damages, the jurisdiction of these programs is typically limited to suits demanding damages up to a specified amount such as $15,000 or $50,000. Some programs are limited to automotive torts. Other programs exclude certain categories, such as medical malpractice, family, juvenile, mental health, unlawful detainer, title of realty, or equitable matters, as well as class actions and small claims. To protect the parties' rights to jury trials, these programs permit parties to demand court trials de novo if they are dissatisfied with the results of the arbitration. If none of the parties in a case "appeal" by requesting a court trial, the award has the effect of a court judgment. To discourage parties from requesting "frivolous appeals," in most programs, parties who request trials de novo are subject to additional costs if they do not improve their results from trial as compared with arbitration, sometimes improving their results by specified percentages over the arbitration awards (Rolph 1984, p. 26; Ebener and Betancourt 1985, pp. 8-11).

CAA programs (sometimes with the participation of the parties) appoint the arbitrators, who are typically attorneys or retired judges (Rolph 1984, p. 19). Typically, the arbitrators are paid by the court, although some donate their time or are paid by the parties at rates substantially lower than their normal rates (Ebener and Betancourt 1985, pp. 8-10; Rolph 1984, p. 29). Hearings are usually held at facilities provided by the court or arranged by the arbitrators, such as their own offices (see, e.g., California Rule of Court 1611). State law or court rules may define the procedures to be used and specify the time periods in which the hearings must be held. Arbitration hearings are generally less formal and thus briefer than in court; prehearing discovery may be limited, and the rules of evidence at hearings are relaxed, particularly in the admissibility of documentary evidence instead of testimony of witnesses (see, e.g., California Rules of Court 1607-1615). Generally, arbitration hearings are private and the proceedings are not recorded, since an "appeal" is heard as a trial de novo. Generally, the parties may attend and participate in the proceedings. Arbitrators may be required or expected to use applicable law in making their awards (see, e.g., California Rule of Court 1614(a)(7)). Arbitrators usually are required to render awards shortly after the hearings. Studies by the Institute for Civil Justice of the Rand Corporation have found that CAA programs "can contribute significantly to reducing court congestion, costs and delay and to diminishing the financial and emotional costs of litigation" but the results depend on the design and implementation of the programs as well as the attitudes of local lawyers and judges (Hensler 1986, pp. 271-73).

2. *The "Nested" Private Court: California Rent-a-Judge.* Although private judges (referred to in the statute as "referees," commonly called "private judges" or "rent-a-judges") need not have previously been public judges, many private judges have previously served in the public judiciary. Thus, they have been given an aura of authority that many litigants value in choosing adjudicators. By consent of the litigants and order of a public court, a private judge is authorized by statute to make decisions which stand as the decisions of the public court (California Civ. Proc. Secs. 638, 644). The private judge must use state procedures and rules in rendering a decision that is enforceable by the state and appealable in the state appellate courts (Chernick 1989, p. 22). A private judge may even use public physical facilities, courtroom personnel, and potential jurors summoned for service in the public courts if they are not needed by the public courts. (The California Judicial Council recently stated that such uses of public resources should be discouraged, pending further study ["California Courts to Revise Private-Judge Rules" 1991].) The private judge is selected and paid for by the parties. What they get is a user-friendly, customized version of state justice.

business-like" than a likely public court decision. Although the agreement was not reduced to a detailed settlement document, according to the attorney all the parties performed their obligations under the agreement. He added that, despite the extra costs, the private trial saved the parties money compared with a public trial because the parties would have continued expensive discovery until a public trial that would not have been held until much later ("Expert Jurors Spur Accord At High-Tech Private Trial" 1987; Bauer 1991).

3. *The "Embedded Tribunal"* is a forum within an association or organization that is not in the court business but uses the tribunal as part of its regulatory apparatus. Such tribunals are commonly found in sports associations, trade groups, condominium homeowners associations, educational institutions, and religious bodies. These tribunals may be the general body or a specialized unit; they may be standing bodies or organized ad hoc. Often such tribunals apply their own corpus juris and wield the sanction of expulsion or withdrawal from beneficial relations. They may use the forms of arbitration to secure legal enforceability.

In a recent, highly publicized case, the Assemblies of God Church "defrocked" television evangelist Jimmy Swaggart as a minister of that church. Swaggart admitted sinning—that is, violating church rules, reportedly by paying a prostitute to pose nude for him in a New Orleans motel room. The Louisiana District Presbyters, a state-level body of church officials, recommended that Swaggart be suspended from preaching for three months. However, the 13-member Executive Presbytery, a body of national-level church officials that serves as the board of directors of the church, rejected that recommendation and decided to bar Swaggart from preaching for one year. The national church officials held that a three-month suspension for a minister confessing moral misconduct was too lenient in view of past precedents. Swaggart was intent on resuming preaching after three months and resigned from the Church to avoid the church sanctions ("Church Defrocks Swaggart For Rejecting Its Punishment" 1988; "Final Decision Due in Swaggart Case" 1988).

Another example of an embedded tribunal is found within the National Collegiate Athletic Association (NCAA), an unincorporated association of approximately 960 colleges and universities which governs the athletic programs of member institutions. The NCAA adopts rules governing such matters as academic standards, admissions, financial aid, and recruiting of student athletes. To enforce its rules, the NCAA has established a Committee on Investigations, which supervises a professional staff. In the case of Jerry Tarkanian, the basketball coach of the University of Nevada, Las Vegas (UNLV), the NCAA Committee on Investigations initiated a preliminary inquiry in 1972 into alleged violations of NCAA rules regarding student recruitment. Three-and-a-half years later, the Committee decided to conduct

In a much publicized "rent-a-judge" case, actress Valerie Harper and Lorimar Productions used California's general reference procedure to litigate claims about Harper's firing from a TV series. Lorimar sued Harper for breach of contract due to her allegedly "substandard performance," seeking $70 million; Harper countersued for breach of contract, seeking $180 million. The case went to trial within a year, compared with the five-year wait that Harper's attorney estimated would have been required in the public court system. The month-long trial was conducted in a public courtroom that was not regularly assigned to a sitting judge; bailiffs were hired for the trial. The case was heard by a retired judge who was paid $250 per hour. Jurors were picked from the county's regular jury list and received the standard $5 per day jury fees. Unlike some rent-a-judge trials, the courtroom was open to the public. The jury awarded Harper about $12 million, including a percentage of the profits from "The Hogan Family," the renamed series that Harper had been hired to act in. The total cost for the trial (presumably excluding attorney's fees and pretrial costs) was more than $100,000 (Tuller 1989; Oliver 1988; Stolberg 1988; Frankel 1988; Hiscock 1989).

In another rent-a-judge case, the jury was composed of technical experts. The case involved several engineers who left one company to work for another company. The first company filed suit in San Jose (California) Superior Court in mid-1985, alleging misappropriation of trade secrets relating to a new semiconductor chip. The Court could not hold a trial on its first two scheduled trial dates, in December 1986 and February 1987, due to court overcrowding. (Because the case was expected to take at least eight weeks to try, the judge had an incentive to assign shorter cases to trial first.) The attorneys were pessimistic about receiving an early trial date, despite a rule giving priority for cases that had been repeatedly rescheduled. So the parties decided to use the California general reference law to appoint a retired judge. After settlement conferences designed to mediate a settlement failed to produce agreement, a trial was held beginning in March 1987. Because the factual issues were so technically complex, eight consulting engineers were hired to act as a jury (for about $250 per day each). The parties hired a bailiff and court reporter; witnesses testified under oath; the judge enforced rules of evidence; and attorneys vigorously contested motions. The trial also included an innovative procedure: the jurors were permitted to ask questions of the witnesses and lawyers. Some questions were simple clarifications and others were more like cross-examination. The jurors' questioning gave the parties immediate feedback about how the case was going and this prompted them to reconsider settling the dispute. After six weeks of trial, and with the prospect of six more weeks of trial, the parties reached a confidential agreement in principle in April 1987.

One of the attorneys involved said that the settlement included remedies that a public court was not authorized to order and he called the settlement "more

an "official inquiry" of UNLV and Tarkanian. The Committee later held four days of hearings at which counsel for UNLV and Tarkanian denied any wrongdoing and challenged the credibility of the NCAA investigators and their informants. The Committee decided that many of the allegations could not be supported but it found 38 violations of NCAA rules, including 10 allegedly committed by Tarkanian. The Committee proposed sanctions, including the potential for additional sanctions if UNLV failed to remove Tarkanian from the intercollegiate program for two years. UNLV appealed most of the Committee's findings and recommendations to the NCAA Council, which is the NCAA's governing body. The Council approved the Committee's investigation and hearing process and adopted all its recommendations. Under pressure from the NCAA decision, UNLV decided to end Tarkanian's involvement in its intercollegiate program following the terms of the NCAA suspension. Tarkanian filed suit against UNLV and the NCAA claiming that he had been denied due process protected under the Fourteenth Amendment. A state trial court issued an injunction prohibiting UNLV from disciplining Tarkanian and awarded Tarkanian $196,000 in attorney's fees, 90% of which was to be paid by the NCAA. In 1988, after a decade of legal skirmishing in the state and federal courts, the U.S. Supreme Court reversed the decision against the NCAA on the ground that it was a private entity and its actions leading to Tarkanian's suspension did not constitute "state action" and thus that its tribunals were not obliged to afford "due process" to those appearing before them (*National Collegiate Athletic Association* v. *Tarkanian* 1988).

4. *The "External" Private Tribunal* is a variant on the embedded tribunal in which the group or organization supports a tribunal not to deal with disputes among its members, but with claims against its members by outsiders. Examples of these tribunals include automobile warranty panels and arbitration of investors' claims against stockbrokers. These tribunals may be authorized or regulated by statute. Some tribunals are required to follow procedures that are specified in some detail, as with many of the automobile warranty panels; other tribunals simply operate under general laws authorizing private arbitration.

Tribunals handling automobile consumers' warranty complaints are operated by auto manufacturers in response to federal and state laws (15 U.S.C. Secs. 2301 *et seq.*; 16 C.F.R. Part 703; Vogel 1985, pp. 647-49) encouraging them to establish "informal dispute settlement mechanisms" (IDSM) for handling these complaints.[2] Although the mechanisms are operated and financed by private entities, they are instruments of government policy to settle consumer disputes "fairly and expeditiously" (15 U.S.C. Sec. 2310(a)). The government establishes incentives to create the mechanisms, procedural requirements, substantive legal standards, and opportunities for review (and, in effect, enforcement) of IDSM decisions. If a manufacturer establishes an

IDSM that meets the minimum standards under the law, its consumers must exhaust the mechanism's procedures before they may file suit in a public court (15 U.S.C. Sec. 2310(a)(3)). For a manufacturer to qualify for this procedural benefit, the IDSM must be funded by the manufacturer, not charge the consumer any fee for using the mechanism, ensure that the adjudicators are "insulated" from the manufacturer (16 C.F.R. Secs. 703.3(a), (b), 703.4), comply with various procedural requirements such as procedures governing presentation of evidence and notification of appeal rights (see generally 16 C.F.R. Sec. 703.5), and provide any remedy available under the law or written warranty (16 C.F.R. Sec. 703.5(d)(1)). The decisions are supposed to be made within 40 days after the manufacturer rejects a consumer's claim (16 C.F.R. Sec. 703.5(d)). Federal regulations do not require IDSMs to make their decisions binding on either party (16 C.F.R. Sec. 703.5(j)) (though some IDSMs provide that their decisions are binding on manufacturers), and if the dispute is later litigated in a public court, the IDSM decision is admissible in the lawsuit (15 U.S.C. Sec. 2310(a)(3)).

In one case, a car buyer in Maryland received a Ford Lincoln Versailles with an emission-control system designed to meet California's more stringent pollution regulations, which produced a loud noise when he shifted gears. After complaining unsuccessfully to the dealer who sold the car and then to an owner-relations representative in Ford's regional service office, he took his complaint to Ford's Consumer Appeals Board in his local area. The Board is a standing body composed of three consumer representatives and two Ford dealers. The Board decided that the car should be exchanged for another that did not make the noises. The customer was required to pay 10 cents a mile for the 4,000 miles he had driven the car, and Ford was to pay the tax and title fees for the new car. The Board's decisions are binding on Ford and its dealers but not on buyers, who may seek remedies in court if dissatisfied with the Board's decisions (Yenckel 1979).

Tribunals handling complaints by investors against their stockbrokers are operated by "self-regulatory organizations" (SRO), such as the New York Stock Exchange and the Chicago Board of Trade, which are owned and controlled by securities brokerages and regulated by the federal Securities and Exchange Commission (SEC). Under most contracts between stockbrokers and their customers, any disputes between them must be handled by arbitration through an SRO rather than in court (see *Shearson/American Express* v. *McMahon* 1987). The Securities Industry Conference (which is composed of representatives of SROs, the Security Industry Association on Arbitration and the public) developed a Uniform Code of Arbitration which was adopted in 1979 and 1980 by SROs offering customer-broker arbitration. The number of arbitrations conducted by SROs has grown steadily from 830 in 1980 to 6101 in 1988 (Kalish 1990). The Uniform Code of Arbitration provides for panels of three to five arbitrators, a majority of whom generally may not be from

the securities industry. Parties are entitled to request information about proposed arbitrators and are entitled to one peremptory challenge and an unlimited number of challenges for cause. Parties are entitled to be represented by counsel, obtain subpoenas for production of documents and witnesses, and make a record of the proceeding. Extensive prehearing discovery is not available and the hearings are conducted using informal rules of evidence. The arbitrators generally make awards without detailed written opinions. Remedies generally may not include punitive damages or attorney's fees. Judicial review of arbitration decisions generally is limited to narrow grounds of bias, corruption, or exceeding arbitral authority (Katsoris 1984, pp. 279-91; Oliver 1987, pp. 546-49; McGurrin 1988). A study of 3,731 cases found that 51% of customers "won," and securities industry officials estimate that if settlements are included, 75% of customers receive some amount. A study of 102 cases found that customers received an average of about half the amount claimed (Fatsis 1990), and a study of 41 cases reported that for 77% of the customers who received monetary awards, the amount was 60% or less of the amount claimed (Lipton 1985, pp. 158-59). In one case, Prudential-Bache admitted that it had miscalculated the amount of margin calls and that it had inaccurately informed the customer, Joseph T. Hajec, about the call, resulting in the premature sale of his stock. Hajec claimed $250,000 in losses but the arbitrators awarded only $14,000, which was $3,000 less than his legal fees (McGurrin 1988).

5. *The Free-standing Purveyor* (FSP) of third-party services offers private (i.e., not court-annexed) arbitration in the general marketplace. Federal and state laws establish general requirements about the conduct of these cases. FSPs may sell their services wholesale (by contracting with an entity to handle a regular class of complaints against the entity) or retail (by selling the services to parties in individual disputes after the disputes arise or as required by contract between the parties). Some FSPs are sole practitioners; others are for-profit entities (such as Judicial Arbitration and Mediation Services and Judicate) or nonprofit entities (such as the American Arbitration Association). Many FSPs offer a wide range of third party services including other adjudicatory services such as rent-a-judges or administration of "external" tribunals. For example, the AAA is an FSP that arbitrates stockbroker-investor disputes and the Better Business Bureau (BBB) is an FSP that handles auto warranty complaints as described above. (Some FSPs also offer nonadjudicatory services such as mediation, mini-trials, and settlement conferences; these activities do not constitute what we refer to as private courts although they are conducted by many private courts.)

In one BBB case, Arizona resident John Jones used mediation and arbitration in his dispute with Chevrolet over whether his new car leaked water when it rained. The car was still under warranty and Jones complained to his

dealer and the local Chevrolet zone office without success. Jones accepted an offer to mediate the dispute through BBB's Autoline Program. The BBB has a contract to handle auto warranty disputes involving General Motors, the manufacturer of Chevrolet. The BBB attempted to mediate the dispute but Jones and the local Chevrolet office failed to reach agreement. The parties did, however, agree to arbitration that was binding on both parties. The BBB provided a list of volunteer arbitrators and the parties jointly selected one. Since it was the dry season in Arizona, the arbitrator suggested conducting the arbitration at a carwash. The car was sent through the wash, didn't leak, and, according to a news report, "everyone was satisfied" (Phillips 1982).

An example of a "retail" FSP case involved a contract dispute handled by the AAA. Dade County Florida had contracted with Parsons & Whittemore to build a solid waste facility. The contract included a provision requiring the parties to arbitrate disputes arising from the contract. Dade County claimed that the facility did not meet the terms of the contract and thus refused to pay the $200 million claimed by the contractor. The local AAA office administered the case according to its regular rules of arbitration. The contract provided for a panel of three arbitrators; each party would select one arbitrator and agree on a third arbitrator. If the parties could not agree on the third arbitrator, the chief judge of the local federal district court would appoint the third panelist. The parties did not agree and the chief judge named a retired judge, who served as the chair of the panel. The parties agreed to several "time-outs" for negotiations during the prehearing process. The arbitrators permitted unlimited discovery but imposed a 60-day time restriction. The panel held 100 days of hearings during a six-month period and heard about 80 witnesses. The panel also employed an engineering firm to provide independent advice. Two months after the hearings ended, the arbitrators rendered an award for the contractor of $162.5 million plus interest. The case was completed within two-and-a-half years after the demand for arbitration; it would have been completed in less than half that time if the parties had not agreed to take time to negotiate (Crowe 1983).

## THE PURSUIT OF THE PRIVATE

We have described various kinds of tribunals that are referred to as private courts, in contrast to the official public courts. Earlier, we noted that the degree of publicness of courts varies along several dimensions (see Table 1). Now we take up the question of the sense in which these "private courts" are truly private. Are there such things as private courts?

If we look at our list of the various kinds of private courts, we note immediately that several varieties (court annexed arbitration and the nested court) are formally tied to public institutions. CAA operates on cases filed in

a public court in accordance with procedures specified by that court, under the supervision of the court, and its decrees are enforceable by the court or can be overridden by the court. Its dependence upon the authority and coercive power of public courts is evident. In the case of the nested private court, the role of the public court is typically more limited and indirect: the parties may or may not have filed in the public court; the parties take the initiative in selecting the private judge; the court rubber-stamps the appointment and provides virtually no supervision; review is infrequent. But the nested court applies the public law and its decree is enforceable as a decree of the public court. The dependence of nested courts on public authority and coercive power is less direct, but ultimately its potency as an institution derives from its relation to public institutions.

If we move to free-standing purveyors like the AAA or Judicate, we find institutions which are not part of or even indirectly attached to the public courts. They typically do not get their cases from the public courts; they may apply the law binding in the public courts, but they can depart from it; and they are not supervised by the public courts. But again we find that their potency derives from their relation to these courts; these tribunals depend on the fact that they can deliver resolutions that are binding because they will be "backed up" by enforceability in the public courts.

When we move to embedded tribunals, the public element seems less prominent. In the self-contained trade association, the rules are trade rules rather than official law; the personnel are volunteers or private employees rather than public officials; the effective sanctions of exclusion, avoidance, and reputational damage are delivered by the group itself and do not depend on governmental endorsement or coercion. Usually it is sufficient if public courts refuse to intervene with the decisions of the embedded tribunal. Thus, sports leagues and college athletic bodies can apply drastic sanctions against players, coaches, and universities without interference from the public courts. For example, after a state court judge enjoined the Commissioner of Baseball from holding hearings on allegations of gambling by baseball star Pete Rose, the Commissioner successfully sought to have the case removed to federal court because the federal courts have traditionally recognized the commissioner's exclusive disciplinary authority. Shortly after the U.S. Court of Appeals upheld the removal to the federal courts, Rose acknowledged the Commissioner's exclusive authority to resolve the matter and agreed to be banished from baseball for life (Newhan 1989a, 1989b; "Rose's Suit to Remain a Federal Court Case" 1989). Such non-interference is reinforced by the United States Supreme Court decision in the Tarkanian case (described above) that public law does not require the National Collegiate Athletic Association to afford "due process" to parties in its proceedings. This de facto delegation of judicial power prevails even where the resources of the private group consist of property rights (television contracts in the case of the NCAA) created and guaranteed by the public legal system.

To get a sense of the range of privateness in tribunals, we introduce here some embedded tribunals that lie outside of our earlier analysis. In some ethnic enclaves in the United States, indigenous tribunals have adjudicated a variety of civil and criminal matters. In their heyday, decisions of associations in America's Chinatowns were "given as a command with implied threats of economic boycott or social ostracism" (Doo 1973, p. 651).[3] In the background there was a residual reliance on the support of public law for the deliberative and sanctioning process, even if that support consisted only in tolerance or noninterference. For an indigenous tribunal or a trade association with a capacity to generate effective sanctions, it is sufficient if public courts decline to interfere with its decisions or their enforcement. Reliance on public authority is attenuated; all that is needed is the tacit support of de facto noninterference.[4]

In other instances, not only are tacit support and noninterference not present, but there is active official hostility. The private adjudication and enforcement that occurs in tribunals in delinquent gangs and in the world of organized crime is not only not approved; it is condemned by the official law. Such settings as the Mafia's provision of arbitration services to participants in illegal markets (described by Peter Reuter 1983, ch. 7) reach the absolute minimum of public authority: there is no back-up enforcement of the tribunal's decisions, nor is there a norm of noninterference. But even this illegal tribunal, it should be noted, enjoys a bit of indirect de facto support from the legal system. The official law's institution of property and its privacy and procedural guarantees enclose the activities of the illegal tribunal in a zone of immunity. In that zone, it can enforce norms that run counter to official law, using disapproved sanctions to support or require conduct that is condemned by the official law.

Thus our search for a purely private court has led us to the marginal, the deviant, the illegal. This is not surprising because activities that are respectable and socially approved are institutionalized and supported by the public law. If all of our more respectable private courts are public in important ways, does it follow that there is no such thing as a private court? Our point is that private adjudication is not separate and remote from the public sphere, but that it is confirmed, elaborated, and extended by official legal institutions. There is some private adjudication that is remote from the public courts, but the main regions of the realm of private adjudication are constructed with the concepts and idiom of public law and enjoy its institutional support to one degree or another.

Proponents of privatization sometimes talk as if the private is primary and natural while the public sphere is secondary and artificial. But our review of private courts suggests that the private does not necessarily precede and underly the public; nor is it a residuum that is left over after the formation of the public realm. Instead, public and private are the joint products, the twin offspring, of a process of constructing social regions by law and regulation.

This point is brought home in William Miller's (1990) fascinating account of medieval Iceland, where there were elaborate legal institutions but no state

institutions for enforcement of their decrees, which was left to the initiative of the disputants and their allies. Miller rejects the notion that the Icelandic system was "private" since private enforcement does not mean much when there is no public alternative:

> Can the "private" as an analytic category exist unless it is paired with and distinguished from "public?" The very pairing itself is part of the history and theory of the state; it only makes sense in the context of the coercive state. There was thus no "private" enforcement of rights in Iceland. There was simply enforcement by people seeking aid from the various overlapping social solidarities they could claim connection with (p. 305).

The problem of the private then is not one of recognizing its untrammeled natural character, but of deciding which of its regions should be exempt from further public controls. For example, in the United States, we have decided that religion is in large measure to be exempt from public control. In this society, religion is the paradigmatically private matter—although at an earlier time and in many other societies, religion has been seen as public in important senses, even as *the* paradigmatically public matter. What is private is a political or public decision—sometimes a decision that is made directly and sometimes the inadvertent product of our other commitments (such as respect for property or self-determination).

What about private courts? Are there such things as private courts? Certainly there are, if we may strain the language, privater and publicer courts. In some, the influence of public authority is quite attenuated and indirect. But the private courts that are of interest in current policy debates—rent-a-judges and various forums for commercial, consumer, environmental, and employment disputes that are presently in the courts—are all located much closer to the public end of the spectrum. We could imagine these courts becoming more private (or more public) in various ways. How public or private they should be does not admit of a single correct answer. We have tried to show that it is not even a single question, and to ask about the consequences of privatizing or publicizing particular courts along particular dimensions.

This, then, raises the need to actually do the assessment of what difference it makes. We submit that the consequences of proposed modifications of courts are not knowable a priori. We can, of course, patch together suggestive answers from other things we know about courts, but we could give better answers if we had more systematic information about these private courts. Most of the literature to date has been taken up with "how to do it" and with theoretical polemics about the advantages and disadvantages of various private courts. This debate needs to be more informed by data about what is actually happening and why. That data will be available only if researchers have access to private courts. One significant initiative that would enhance the quality of

policy-making in this area would be regulation designed to secure public access to information about private judicial proceedings.

We do not imply that answers to the questions raised by the operation of private courts are only a matter of more information. We must also clarify what we want private courts to accomplish and this takes us to fundamental questions about the nature and sources of the justice that we expect from courts, private and public. Views of the threat or promise of private courts are anchored in competing visions of public courts and their relation to justice. We conclude by briefly sketching the most prominent of these rival views that frame the inquiry into the performance of private courts.

One view sees private courts as more efficient producers of dispute resolution. In this technocratic vision, private courts are commended insofar as they provide dispute resolution more cheaply and with fewer nasty side effects than do public courts. Dispute resolution is a service that can be assessed simply on technical grounds. A radical variation of this perspective, implicit in the quotation from the *Wall Street Journal* with which we began, holds that the jurisdiction of government courts should be limited to those cases directly involving some clear public interest (e.g., protection from crime). This argument for privatization is based on the notion that public courts have more normative firepower than is needed for ordinary dispute resolution. But this is an impoverished view of what courts do. Courts not only resolve disputes, they also provide mechanisms for citizens to assert grievances, contest issues, and participate in public life. Moreover, government courts formulate public standards, radiating messages that educate public attitudes and provide guidance for private behavior.

A second privatization view proceeds from the belief that public courts are normatively deficient and private courts are needed to tap the deepest sources of justice. This second vision, which we might call the communitarian view of private courts, draws on a tradition in thinking about law that sees justice as emanating from society and its component formations rather than from the state. Because private courts can be more responsive to the indigenous sources of justice, they hold the promise of access to a richer, more fulfilling normative life for society. This communitarian view was the basis of much of the support for alternative dispute resolution (ADR) in the 1960s and 1970s and lingers today, although technocratic arguments have become the dominant considerations in the institutionalization of ADR.

We do not think that communitarianism provides an adequate framework for assessing private courts. It exaggerates the distinction between society and state, attributing a priority and primacy to the former. It is too optimistic about society and too pessimistic about the state, ignoring the possibility that spontaneous social relations may be oppressive rather than just. Moreover, it misreads the partial and multiple character of communal bonds in contemporary pluralist society in a doomed search for inclusive gemeinschaft.

We also find unattractive a third, "legal centralist," view which is in a sense the polar opposite of this communitarianism. Idealizing the state, the legal centralist vision sees public institutions as the exclusive vehicles of values. In this view, private courts are parasitic, "bleeding value from public courts." We find this view both deficient as a descriptive picture of the normative life of modern society and unappealing as a prescriptive vision of that life.

We find more congenial a fourth perspective, eclectic and pluralist, which sees community as fragmentary and emergent, and envisions public institutions as a frequent source of encouragement and support to community rather than as inevitably hostile to it. At the same time, institutions that are private in significant ways may embody and implement widely shared public values. Such eclectic pluralism has informed Karl Llewellyn's (Twining 1973) vision of commercial law as interactive between grand-style judging and the emergent custom of business communities. In a contemporary version, Robert Baruch Bush (1989) envisions both public and private institutions fostering relationships that are animated by self-determination and consideration for others.[5]

In a world in which the governmental machinery for redressing injustice does not have the capacity to handle all of its potential business, it is good that government is not the only producer of justice. But government is not only the largest single producer of justice, it also regulates the trade in justice services, directly (by prescribing some procedures of private courts) and indirectly (by establishing public norms influencing private courts and by selectively enforcing decisions). If government can secure important public values by regulating the private-justice industry, there is no need for public courts to deny recognition to private forums. Even if, miraculously, government could somehow handle all the work, we submit that it is valuable to permit citizens to choose private forums so long as this does not violate public norms.

From the perspective of eclectic pluralism, private courts contain the possibility of dialogue, exchange, and enrichment between different kinds of courts. Whether this potential can be fulfilled at an acceptable cost cannot be decided in advance by tendentious theorizing. Nor does assessment require never-ending research. As evidence accumulates, we would expect to identify patterns that enable us to make prudential judgments without examining the specifics of every proposed arrangement. Good public policy depends on accumulating an adequate fund of evidence about contemporary experiments with private courts (as well as long-overlooked private forums such as embedded tribunals). Attention to private alternatives should not be an excuse to permit public courts to decay. We believe that public courts will continue to play the preeminent role in the administration of justice and accordingly deserve undiminished support.

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## NOTES

1. Our discussion of publicness focusses on the characteristics of courts. Other important dimensions of publicness, such as the identity of parties in a dispute, the nature of the issues at stake, and impacts on nondisputants are outside the scope of this paper.
2. Some manufacturers, such as Ford and Chrysler, have established mechanisms exclusively dedicated to handling claims against them. Other manufacturers, such as General Motors, use outside agencies, such as the Better Business Bureau's Autoline Program to operate the informal dispute-settlement mechanism (Reitz 1987, p. 191). We refer to the latter class of tribunals as "free standing purveyors," as described below.
3. Doo points out that as Chinese have become more assimilated and accepted, "most serious disputes today are handled through lawyers and formal [public] court proceedings" and disputes brought to the associations are resolved noncoercively.
4. The literature on legal pluralism contains some suggestive accounts of the ways that indigenous tribunals manage to extract normative and coercive clout from the public system. See, for example, Santos' (1977) account of the Residents' Association in an illegal squatter settlement in Brazil, where threats to use the public system are part of the apparatus of enforcing the Association's decisions (see also Ruffini 1978).
5. We use the term "pluralism," somewhat differently than Bush's (1989) article, to refer to multiple sources of norms and institutional vehicles for embodying them. We distinguish pluralism from technocratic, communitarian, and legal centralist perspectives. Bush uses the term "process pluralism" to refer to advocacy of matching disputes with appropriate resolution processes. Although he identifies himself as a mediation advocate rather than a process pluralist, Bush's specific arguments in favor of mediation reflect pluralism in our sense of the term.

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