What's Different about Law?

A Response to Omri Ben-Shahar, *The Paradox of Access Justice, and Its Application to Mandatory Arbitration*, 83 U Chi L Rev 1755 (2016).

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INTRODUCTION

If you had to sum up Professor Omri Ben-Shahar's Article[1] in a couple of tweets, it might suffice to say something like "being poor sucks" or "the system is rigged." Of course, there is a lot more than a tweet in this important Article, but it comes down to this: when access to goods and services is ostensibly equalized by public provision or subsidy, the net effect may be only to make inequality worse. This is because those with wealth and other resources, such as education, are relatively better able to take advantage of the free or reduced-cost access afforded by public provision or subsidy. Free or low-cost university, for example, may exacerbate inequality if admission to the best universities is highly competitive and only those who have prior access to high-quality education and expensive application-building activities, such as test preparation services and exotic volunteer opportunities, are likely to gain admission. Subsidizing a good or service that only the well-off can access in the first place means that the rich get richer at the expense of the (tax-paying) poor.

Ben-Shahar identifies several settings in which this form of perverse regressivity can arise: subsidized or mandatory health insurance disproportionately benefits those in a better position to understand and make use of benefits; rent control benefits those who can afford housing in the first place; mandatory disability accommodations in education are more likely to be

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1 See generally Omri Ben-Shahar, *The Paradox of Access Justice, and Its Application to Mandatory Arbitration*, 83 U Chi L Rev 1755 (2016).

secured by wealthy families with the resources to demand them; and many forms of subsidized insurance are of use only to those fortunate enough to own the property or participate in the activities that are the object of insurance.[2] In each of these cases, moreover, the cost of the benefit is paid in part by those unable to enjoy it, either through their tax contributions (which even the poorest pay in the form of sales taxes) or higher prices for goods and services.

Ben-Shahar's focus, however, is not only on goods and services that are either conventionally provided in markets (such as insurance) or that could be (such as education). He also takes aim at a quintessential equal-access public good—law and courts. More specifically, he examines the impact of refusals to enforce mandatory arbitration clauses in consumer and employment contracts. Here his analysis is both important and clearly correct. Depriving consumers and employees of access to public courts through mandatory arbitration clauses does not do ordinary individuals any harm for the same reason that depriving them of access to subsidized disaster relief for beachfront properties hit by hurricane doesn't do them any harm: ordinary individuals can't afford courts or beachfront properties anyway. Drawing this analogy between courts and other goods and services that might be provided by governments thus enriches our understanding of the issues at stake in the policy debate over mandatory arbitration—which is Ben-Shahar's aim.

But the analogy between access to courts and access to other goods and services breaks down in ways that matter for our understanding of the broader issues raised by access to justice. In this Response, I look at what's different about law. I begin in Part I by summarizing Ben-Shahar's analysis of the ways in which access to courts is usefully analogized to other goods and services. I then turn to ways in which the analogy breaks down. Part II begins with the observation that for standard goods and services, such as education or home insurance, it is appropriate for policymakers deciding the conditions of access to those goods and services to treat background inequality as given. In the case of access to courts, however, policymakers have the ability to reduce the impact of background inequality. In this Part, I

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[2] See, for example, Omri Ben-Shahar and Kyle D. Logue, *The Perverse Effects of Subsidized Weather Insurance*, 68 Stan L Rev 571, 592–619 (2016).

consider two such types of policies: (1) those that reduce obstacles to access, and (2) those that reduce the need to go to court to enjoy the protection of law. In Part III, I argue that there are considerations at stake—relevant to designing policies for access to justice—that are not implicated when simply evaluating whether to provide equal access to standard goods and services. I explore two. First, I address the fact that for many, the use of court services is not a matter of choice. Either they are compelled to participate in court as a defendant, or the court is the only provider of the services they need, such as a divorce or authorization to remain in the country. Second, I examine the fact that the right of access to courts has noninstrumental value, namely recognition of an individual's social, political, and moral status in a democratic society. Ultimately, as I conclude in Part IV, while the background facts showing that large segments of our society lack practical access to courts compel the conclusion that mandatory arbitration clauses do little harm, the facts also compel the conclusion that we should, and could, be doing more to remedy that fundamental inequality.

I. WHY REFUSALS TO ENFORCE MANDATORY ARBITRATION CLAUSES MAY HARM ACCESS (TO) JUSTICE

Professor Ben-Shahar's primary goal is to analyze the impact of mandatory arbitration clauses in employment and consumer contracts on the equality of well-being. These clauses are often criticized for interfering with the goal of promoting equal access to our public courts for dispute resolution.[3] Arbitration is private dispute resolution, for which the participants must pay. Moreover, arbitration provisions often eliminate various mandatory benefits available in public courts. For example, litigants lose their right to pursue a claim in a public and local forum, to take advantage of the state's rules of civil procedure (including class action procedures) and evidence, and to obtain a written ruling and appeal to a higher court. Ben-Shahar's analysis pushes back on the critique of mandatory arbitration by suggesting that access to courts is another example of a potentially regressive access policy: only those with

[3] See, for example, Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L J 2804, 2839–42 (2015); Mark E. Budnitz, *The High Cost of Mandatory Arbitration*, 67 L & Contemp Probs 133, 135–50 (Winter/Spring 2004).

substantial levels of income and sophistication can take advantage of the benefits of public courts, and yet rich and poor alike pay for those benefits through the impact of litigation costs on wages and prices. This is a point that has been recently shown empirically with respect to access to small claims courts by Professors Anthony Niblett and Alfred Yoon. They found that an increase in the ceiling for small claims in Ontario, Canada, led to no increase in total filings by plaintiffs, but it did lead to a shift in the composition of plaintiffs, with wealthier plaintiffs (with more actively litigated cases over higher stakes) displacing poorer plaintiffs.[4] Ben-Shahar concludes that "in a variety of contexts, access to courts [through class actions] does not benefit large groups of less sophisticated, less affluent consumers."[5] Hence, laws that limit the enforceability of mandatory arbitration clauses systematically benefit the rich and sophisticated at the expense of the poor and disadvantaged.

Access to public courts for dispute resolution is burdened with each of the obstacles in Ben-Shahar's five-handicap taxonomy:

Cost handicap. Exercising one's right to appeal to public courts to resolve a complaint against a retailer or employer involves fees other than those charged by the dispute resolution forum itself, most notably the cost of acquiring the legal expertise needed to frame and pursue a complaint in court—whether appearing *pro se* or through an attorney—and the cost of complying with court procedures (hiring a process server, paying filing fees, producing documents, taking time off work to appear in court, traveling to the courthouse, etc.).

Network handicap. Less sophisticated and less affluent consumers and employees are less likely to be connected to people and organizations that provide them with either the knowledge or the assistance needed to pursue legal claims. For example, they are less likely to have acquaintances who are lawyers, to listen to public radio shows about legal rights, or to have access to legal insurance as an employment benefit.

Information handicap. Obviously, pursuing a legal claim requires knowledge. Less obviously, even being a beneficiary of a

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[4] Anthony Niblett and Albert H. Yoon, *Unintended Consequences: The Regressive Effects of Increased Access to Courts*, 14 J Empirical Legal Stud 5, 10–21 (2017).

[5] Ben-Shahar, 83 U Chi L Rev at 1763 (cited in note 1). See also Resnik, 124 Yale L J at 2839–42 (cited in note 3); Budnitz, 67 L & Contemp Probs at 135–50 (cited in note 3).

class action can require sufficient sophistication to read and understand notices about how to participate.

Benefit handicap. More affluent and sophisticated consumers and employees have larger claims to bring in courts and consequently benefit disproportionately from the availability of publicly subsidized forums where they can seek compensation and redress.

Affordability handicap. Even public goods are often provided for a nonzero price, in part to reduce moral hazard or what is perceived as otherwise excessive use. And this is true of courts: all users of the court system except the truly indigent are charged a variety of fees, such as filing fees and fees to obtain a copy of the record.[6]

Given these obstacles, access to courts seems to fall into the same paradox into which other publicly provided or subsidized goods and services fall: access is "a useless privilege to most,"[7] paid for by the higher prices and lower wages that compensate a retailer or employer for the costs of litigation by the few.

The litany of obstacles that Ben-Shahar identifies barring ordinary people from reaching the courts is sobering and entirely accurate. Modern courts are effectively out of reach for the vast majority of the population—even the relatively well-off.[8] Few people facing legal problems obtain formal legal help and millions show up in court every day without lawyers. A 2010 study of New York courts found that 99 percent of borrowers in consumer credit matters, 98 percent of those facing eviction, and 95 percent of parents in child-support cases were unrepresented.[9] In 2013, 46 percent of New Yorkers facing foreclosure (and against a well-represented mortgage lender) did

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6 Ben-Shahar, 83 U Chi L Rev at 1771–79 (cited in note 1). For example, California state courts charge $225 for a complaint or answer involving less than $10,000 (and up to $435 for those involving more than $25,000 or for any family law or probate matter), $500 to file a motion for summary judgment, and daily or hourly fees for juries and court reporting services. See *Statewide Civil Fee Schedule* (Cal Super Ct, Oct 10, 2015), online at http://www.courts.ca.gov/documents/StatewideCivilFeeSchedule-20151010.pdf (visited Aug 25, 2017) (Perma archive unavailable).

7 Ben-Shahar, 83 U Chi L Rev at 1817 (cited in note 1).

8 See, for example, Deborah L. Rhode, *Access to Justice* 79 (Oxford 2004) ("[A] large national survey . . . found that about two-thirds of the civil legal needs of moderate-income consumers were not taken to lawyers or to the justice system."). See also Gillian K. Hadfield and Jamie Heine, *Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans*, in Samuel Estreicher and Joy Radice, eds, *Beyond Elite Law: Access to Civil Justice in America* 21, 30–39 (Cambridge 2016).

9 Hadfield and Heine, *Life in the Law Thick World* at 30–39 (cited in note 8).

so without a lawyer.[10] Similar percentages in the 80 to 90 percent range are found throughout the country.[11]

As Ben-Shahar recognizes, the obstacles to accessing courts aren't only of distributive concern, with the less affluent unable to vindicate their right to valuable, legally mediated benefits, such as compensation for defective goods or employment protections. Litigation is also a means by which public benefits—notably deterrence of wrongful conduct—are secured. But this implies that rather than agitating for equal access to courts, consumers and employees should be seeking to protect the selective access of the powerful few who can shoulder the burdens of litigation, especially in the form of class actions.

II. CHALLENGING THE CONDITIONS OF UNEQUAL ACCESS

One of the contributions of Professor Ben-Shahar's Article is his taxonomy of the handicaps that hamper the ability of poorer and less sophisticated individuals to access particular goods or services. By emphasizing that there are many factors that contribute to meaningful access, beyond the price charged by a supplier, Ben-Shahar focuses the reader on the second-best nature of the equal-access question. When so many of the other resources needed to avail oneself of access—such as income, education, and social connections—are already distributed in highly unequal ways, equal access may only compound rather than alleviate that background inequality.

Taking this background inequality as fixed is probably the right approach when we're talking about the tradeoffs between public and private provision of goods and services, such as health care, disability accommodations, insurance, or even public amenities like parks. Whatever we do with the disaster insurance market, we're not going to make much of a dent in the background factors that lead to the differential ability between rich and poor to buy expensive beachside homes. A shift in our approach on disability accommodations in schools isn't going to change the underlying reality that there are wide differences in the wealth and education of parents—factors that lead some to benefit from accommodations and others to merely pay for them with their taxes or school fees.

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10 Id.

11 See Id at 37–39; Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, 143 Daedalus 83, 83–86 (2014).

But is it appropriate to treat as largely fixed the factors that make access to justice illusory for so many? I don't think so. The question whether to enforce mandatory arbitration clauses is, at root, a question about the optimal design of our legal institutions and markets. The same courts that have the power to implement policies in favor of alternative dispute resolution also have the power to implement policies that could make courts cheaper, simpler, and more accessible to all. And the legislatures that enact the laws regulating the enforcement of arbitration agreements also have the power to enact laws that alleviate the need to go to court to enjoy the benefits of law and regulation. Let me address each of these policy options in turn.

A. Policy to Reduce Obstacles to Access

Those of us writing about the economics of access to justice are primarily focused on how the rules about access—the design of the legal system—are substantially responsible for the extraordinary limitations on meaningful access to public courts.[12] Instead of starting with the question of whether should courts enforce the mandatory arbitration clauses in consumer and employment contracts, start instead by asking why these clauses have proliferated. What is the retailer's or employer's incentive to put them in their contracts in the first place? The answer is: the extraordinary cost, complexity, and unpredictability of court-based litigation.[13] And while there are multiple reasons for that state of affairs, a substantial one is what we might call the industrial organization of the provision

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[12] See, for example, Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice through the (Un)corporate Practice of Law*, 38 Intl Rev L & Econ 43, 44–46 (Supp 2014); Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 Fordham L Rev 969, 974–75 (2004); Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 Mich L Rev 953, 963–98 (2000); Hadfield, 143 Daedalus at 83–86 (cited in note 11); Geoffrey C. Hazard Jr., Russell G. Pearce, and Jeffrey W. Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 NYU L Rev 1084, 1107–09 (1983).

[13] The incentives to use private arbitration also include confidentiality and the ability to select the arbitrator or judge. These are less significant in the context of consumer and employment arbitration than they are in large-stakes commercial arbitration. There are fewer trade secrets potentially exposed in consumer and employment arbitration, and consumer and employment arbitration is often conducted by arbitrators who are retired federal and state judges with general rather than specific expertise. Arbitration provisions that provide for arbitrators that may be consistently biased against the consumer or employee are likely to be held unenforceable. See, for example, *Chavarria v Ralphs Grocery Co*, 733 F3d 916, 924–26 (9th Cir 2013).

of law.[14] Courts operate with a form of monopoly over public dispute resolution, implemented through conflict of laws and forum rules.[15] The lawyers who provide essential services operate in some of the most closed markets in the economy, with extensive regulation (administered by lawyers themselves) of who may participate as a supplier in the market, what business forms they must use, and how businesses must be financed.[16] Moreover, the complexity of law—which can also be in part attributed to the closed nature of the legal system—generates a natural barrier to entry and interferes with the achievement of a perfectly competitive market.[17]

In a very narrow sense, courts making decisions about whether to enforce mandatory arbitration clauses are making decisions about how to interpret private contracts (for example, is clicking "I agree" to an adhesive provision that few do or could read a true manifestation of intent to be bound?)[18] and the Federal Arbitration Act[19] (for example, did Congress intend to extend this law, originally thought to apply only to federal courts and enacted in the interests of commercial trade associations, to state courts and to ordinary consumers and employees?). But in a broader frame, courts deciding whether to enforce arbitration provisions are acting in their role as policymakers, regulators of our legal markets and institutions. Courts are ultimately responsible for establishing the rules and procedures that shape the expense of litigation. When making the policy choice regarding the optimal mix of public and private provision in the market for dispute resolution, there are options available to these policymakers that include policies that would reduce the cost of litigation. For example, courts might simplify procedure or open the legal services market to corporate actors and professionals other than lawyers. Either approach would

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14 See generally Gillian K. Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It for a Complex Global Economy* (Oxford 2017).

15 This has not always been the case. English courts before the nineteenth century competed for cases. See Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U Chi L Rev 1179, 1179–82 (2007).

16 See Hadfield, 38 Intl Rev L & Econ at 46–48 (cited in note 12); Hadfield, 143 Daedalus at 85–86 (cited in note 11).

17 Hadfield, 143 Daedalus at 85–86 (cited in note 11).

18 See, for example, Peggy Radin, *Boilerplate: The Fine Print* 83 (Princeton 2013); Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J Legal Stud 1, 32–33 (2014).

19 43 Stat 883 (1925), codified at 9 USC § 1 et seq.

allow for greater competition and use of technology. And by reducing the cost of litigation, those policies diminish the impact of the multiple handicaps on access that Ben-Shahar identifies. Simpler, less expensive public dispute resolution is subject to fewer distortions in equal access than our current regime.

Unlike policymakers choosing whether to protect publicly funded disaster relief or school disability accommodations, policymakers choosing whether to protect "equal" access to public courts—or to enforce contract terms limiting that access—are thus not constrained to treat as fixed the background handicaps that distort the practical capacity to take advantage of "equal" access. And indeed, critics of mandatory arbitration take aim precisely at the interconnection between policies on mandatory arbitration and policies on access to courts writ large. Professor Judith Resnik, for example, has long drawn a straight line from the development of judicial policies favoring alternatives to public courts to the withering of policies that could help protect access to public adjudication,[20] such as civil procedure rule changes. And as she also emphasizes, the diversion of dispute resolution into private venues limits the visibility of the unequal conditions of access and thus reduces the pressure on courts and the legal profession to change the rules that contribute to unequal access. Courts and lawyers currently occupy the primary policymaking roles that impact the extent to which poorer and less sophisticated litigants are handicapped in their ability to make use of public courts.[21] Ben-Shahar's tightly framed focus on the impact of mandatory arbitration on already highly restricted access to courts clearly contributes to our understanding of the tradeoffs, but it should not divert attention from the critique of judicial policies that shut down access in the first place.

B. Policy to Reduce the Need to Go to Court

Ben-Shahar recognizes in his discussion of deterrence that litigation does more than resolve individual disputes; it also secures the incentives of retailers and employers to comply with their obligations under contract, tort, and statute. Those

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[20] See, for example, Resnik, 124 Yale L J at 2804 (cited in note 3). See also generally, for example, Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 Harv L Rev 924 (2000); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U Chi L Rev 494 (1986).

[21] Hadfield, 143 Daedalus at 83–86 (cited in note 11).

benefits spill over beyond the individual litigant to others. An individual consumer or employee is harmed by a mandatory arbitration clause only if the world without the clause is one in which the right kinds of class actions are being brought—the ones that bring that individual the benefits of public courts. A class action that enjoins entire school districts to provide adequate services to students with disabilities has those characteristics; one that secures coupons for the purchasers of expensive computer equipment does not.

This analysis is correct and important, but it may distract us from the deeper question about the extent to which individuals have to bear the costs of enforcing the law in order to enjoy its benefits. As Professor Robert A. Kagan has emphasized, the American system of regulation is exceptional in the extent to which it relies on litigation, rather than administration, to implement public policies.[22] In many developed economies, consumer and employment protection is delivered largely through bureaucracy, achieved through a combination of premarket approval, licensing, and administrative enforcement of rules governing the activities of firms. American law, in contrast, frequently relies on litigation to implement regulation. It creates legal duties and rights and leaves enforcement largely up to individuals bringing lawsuits. This litigation-heavy approach substantially privatizes the enforcement function—and therefore subjects it to all the inequality-producing handicaps that Ben-Shahar identifies.

However, equality in access to the benefits of law and regulation doesn't require equality in access to courts. It could be achieved with a shift to greater reliance on public enforcement. Public enforcement is a classic public good that generates nonexcludable, and hence equally distributed, benefits. Thus legislatures evaluating the optimal policy with respect to arbitration are not in the same position as when they are deciding the optimal policy with respect to health insurance benefits or rent control. In the latter, they don't really have an option available to eliminate unequal access to the resources needed to take advantage of health benefits or rent control. But in the former they do have the option to shift public resources into public enforcement and more hierarchical approaches to

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[22] See Robert A. Kagan, *Adversarial Legalism: The American Way of Law* 3 (Harvard 2001).

regulation, diminishing the need to go to court (or arbitration) in the first place.

III. ACCESS TO JUSTICE: VALUES BEYOND CONSUMPTION

Professor Ben-Shahar's analysis of the access to justice problem builds on his analysis of access to publicly funded goods and services. Courts provide a service, dispute resolution, which can also be obtained through private providers. Dispute resolution is a service the purchase of which can be traded off against other goods and services by an individual seeking to maximize his or her utility within a fixed budget. That is the basic insight of the affordability handicap: "If people have different price-quality tradeoffs, the higher quality obtained by mandated rights may price out the bargain basement shoppers who prefer low-quality, low-price bundles."[23] If mandatory arbitration reduces the cost of goods and services or raises wages, then individuals with no practical access to courts anyway will be better off because they can purchase more of what they can use and less of what they can't.

Again, the point is correct and important. But the framework Ben-Shahar is using—treating courts as service providers—elides important differences between ordinary goods and services and the work done by law and public courts. Courts don't only provide dispute resolution services; they are not just one among many choices on the menu when individuals are deciding how to allocate their (limited) resources. Courts play a central role in the administration of the modern democratic state. They are the means through which many of the relationships between individuals and between citizens and the government are constituted. And that means that there are values at stake in access to justice that are not present in ordinary consumption decisions. I will note two such values here: (1) cases in which accessing a court is not appropriately analyzed as a choice; and (2) cases in which the right to go to court generates noninstrumental values not taken into account in the standard economic framework.

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[23] Ben-Shahar, 83 U Chi L Rev at 1778 (cited in note 1).

A. The Absence of Choice

In the consumer and employment contract setting, individuals without resources don't go to court to enforce their contracts. And so, they forgo the benefits to which they might otherwise be entitled—a refund of fees they were improperly charged on their cellphone or bank account, or compensation for harassment they suffered at work. But many individuals have little choice about going to court. They have to be there, handicaps and all. More individuals are summoned to court as defendants than choose to go there as plaintiffs. They are there because they are charged with a crime or have received a citation or notice to appear for failure to pay a fine.[24] They are there because they are being evicted from housing or sued for collection on a debt. Many are in court because only a public court can provide them with what they need: a divorce, time with their children, relief from child support obligations, protection from an abusive partner, a declaration of bankruptcy, or status as a legal immigrant. These are the people who are showing up in court 80 to 90 percent of the time without the legal resources needed to adequately protect their interests at critical points in their lives. Developing policy that reduces the obstacles to getting to court (by simplifying procedures and reducing the cost of legal help) or the need to go to court (by relying more heavily on public enforcement of, for example, child support obligations) is of critical importance to achieving more equal access to justice. Whereas the analogy to consumption of other publicly provided or subsidized goods and services is fit for Ben-Shahar's purposes, it is important not to lose sight of the fact that the analogy can seriously distract from the multiple ways in which individuals have no choice but to access courts.

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[24] For a dramatic account of the escalating consequences of interactions with courts over even initially relatively minor infractions, see generally Civil Rights Division, US Department of Justice, *Investigation of the Ferguson Police Department* (March 4, 2015), archived at https://perma.cc/R5J5-8A83. Another controversial police encounter involved an African American named Walter Scott, who was shot in the back in North Charleston, South Carolina, after a routine traffic stop. According to his family, Scott ran from the police because of an outstanding arrest warrant for unpaid child support, a civil family law matter he almost certainly faced in court without legal help. Francis Robles and Shaila Dewan, *Skip Child Support. Go to Jail. Lose Job. Repeat.* (NY Times, Apr 19, 2015), online at http://www.nytimes.com/2015/04/20/us/skip-child-support-go-to-jail-lose-job-repeat.html (visited Aug 29, 2017) (Perma archive unavailable).

B. Noninstrumental Values

In the standard economic framework that Ben-Shahar draws on in his Article, there is no value associated with the existence of the opportunity to consume something that one cannot afford. In this framework, when individuals give up the right to go to court, they are giving up nothing if they couldn't overcome the obstacles to getting there in the first place.

There are, however, other values at stake in the right to take one's disputes into a public forum for resolution. The right to take another to court for a public adjudication of a claim of wrongdoing can have noninstrumental value. A right can be a source of value in and of itself, even if it cannot be adequately exercised. As I have put the point elsewhere: "A right to be free of workplace harassment may be valued differently than a harassment-free workplace. The right expresses a social, political, and moral status. It is a manifestation of dignified and equal relations."[25] The instrumental value of a right is, of course, of critical concern. But it is not accurate to say that there is no loss associated with taking on the status of one who is not only practically but also legally deprived of the right.

I have explored this point in some depth in work investigating the impact of the concerted effort to divert the claims of the families of those killed in the September 11, 2001, terrorist attacks out of public courts and into a private arbitration forum.[26] I was interested in a very simple question: What did the people who had to give up the right to go to court feel they had lost, if anything, by being offered a simple, low-cost, and certain payout from a public compensation fund? In the framing of much law and economics, and from the perspective of many in the legal profession and on the bench who think that a trial is a failure and "a bad settlement is almost always better than a good trial,"[27] being relieved of the uncertainties, delays, and expense of litigation should have been greeted with unalloyed delight.

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[25] Gillian K. Hadfield, *Feminism, Fairness, and Welfare: An Invitation to Feminist Law and Economics*, 1 Ann Rev L & Soc Sci 285, 292 (2005).

[26] See Gillian K. Hadfield, *Framing the Choice between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 L & Socy Rev 645, 653–73 (2008).

[27] Resnik, 113 Harv L Rev at 926 (cited in note 20).

My study, however, identified a sizable number of claimants who were anything but delighted.[28] Even though they almost all turned to the fund, they felt they had given up very important values in doing so. I elucidated three: (1) the right to take advantage of the subpoena power to obtain information and explanations from powerful individuals and corporations about what happened to cause the death of their loved ones;[29] (2) the ability to participate in the process by which policies—about fire safety in tall buildings, for example, or security on airplanes—are developed to make sure that others do not suffer what they and their families have suffered;[30] and (3) the opportunity to obtain a public declaration of wrongdoing by those who failed to do their jobs or fulfill their obligations to protect others from harm.[31] These people saw access to public courts as offering something fundamentally different from what a private arbitration can offer.

As Professor Dan Ryan and I explored in subsequent work, the right to access public courts can be understood as playing a role in the constituting of democratic relations.[32] It is one thing to know that there is real empirical inequality in the world—that the New Jersey housewife whose husband died in the World Trade Center because of what she believes to be inadequate fire-safety measures has no power to call up the authorities who own and operate the buildings and demand an explanation. But it is quite something else, we argue, to be told that there is no public forum in which such explanations must be produced. The consumer or employee who has no choice but to agree to forgo access to courts in order to buy a cellphone or accept a job is well aware that he or she lacks power and status vis-à-vis the cell phone carrier or corporate employer. But it is difficult to maintain even the belief in democratic equality if that power imbalance entitles the powerful to stamp such a person "excluded" from the one place where people appear as abstract equals—"plaintiff" or "defendant." The harm here is to self-understanding, done by the knowledge that you are a person who lacks even the legal right to pursue what public courts

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28 See generally Hadfield, *Framing the Choice between Cash and the Courthouse* (cited in note 26).

29 Id at 668.

30 Id at 662.

31 Id.

32 Gillian K. Hadfield and Dan Ryan, *Democracy, Courts, and the Information Order*, 54 Eur J Sociology 67, 75–79 (2013).

offer—public accounting for wrongdoing—not merely in the deprivation of the instrumental benefits that courts offer those who can make their way to their doors.

CONCLUSION

Professor Ben-Shahar has made an important contribution to an issue that has garnered extensive attention both in courts and the public domain: How should courts manage the widespread growth in the use of mandatory arbitration clauses in consumer and employment contracts?[33] But he has done so by appealing to a far more critical issue—the fact that for most ordinary people, access to public courts is effectively illusory—so much so that depriving people of the right to access courts is of little consequence. To my mind, that poses a deeper set of policy challenges than whether to enforce mandatory arbitration clauses. That is what makes access to justice a distinctive case of access justice more generally. The underlying inequalities in income and education that make access to public benefits like insurance or health care illusory are ones that are systemic in a market economy. But the underlying inequalities in access to courts are ones that courts, and legislatures, have the means to change. The reasons to do so go far beyond the goal of achieving distributive justice. Reasonable access to courts and to the benefits of law and regulation is essential to a fair and democratic society.

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[33] See, for example, Jessica Silver-Greenberg and Noam Scheiber, *Court Rules Companies Cannot Impose Illegal Arbitration Clauses* (NY Times, May 26, 2016), online at http://www.nytimes.com/2016/05/27/business/dealbook/court-rules-companies-cannot-impose-illegal-arbitration-clauses.html (visited Jan 10, 2018) (Perma archive unavailable).