

COLLOQUIUM

**ACCESS TO JUSTICE AND
THE LEGAL PROFESSION IN AN ERA
OF CONTRACTING CIVIL LIABILITY**

FOREWORD

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On October 27, 2017, the Stein Center for Law and Ethics in conjunction with the *Fordham Law Review* hosted a Colloquium entitled *Access to Justice and the Legal Profession in an Era of Contracting Civil Liability*. This issue of the *Fordham Law Review* publishes the articles prepared for that Colloquium. Traversing tort reform, constitutional rights, federal courts, civil procedure, and legal ethics, the small Colloquium was cross-disciplinary with a vengeance. Happily, these contributions from scholars around the country have now coalesced into a coherent whole.

Although the Colloquium topic is not *part of* the access-to-justice movement as usually defined, it makes sense to say a few words in advance about access to justice because *contracting civil liability* is a complementary theme and, indeed, because the National Center for Access to Justice has recently joined Fordham Law School (and thus provided further impetus for exploring this critically important area).¹ For the most part, the access-to-justice movement identifies the formal and informal barriers ordinary people must surmount in order to enforce their rights effectively and to be duly protected from civil and criminal liability.² Lawyers, funding, information, evidence, physical access, legal aid asymmetries in representation—these are only the beginnings of the host of challenges most individuals face, barriers that have an especially marked impact for the poorest in our society. As substantive legal rights, powers, and protections expanded in the 1960s and

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1. See *Relationship to Fordham Law School and Other Law Schools*, NAT'L CTR. FOR ACCESS TO JUST., <http://ncforaj.org/about-2/our-partnership-with-fordham/> [https://perma.cc/9RBV-VKUQ] (last visited Mar. 15, 2018).

2. David Udell, *The Civil Legal Aid Movement: 15 Initiatives That Are Increasing Access to Justice in the United States*, IMPACT, Apr. 2016, at 73, 73.

1970s, profound limitations in the means to access to those rights became even clearer. To its enormous credit, the access-to-justice movement has begun to mobilize lawyers and judges. There is an increasing recognition that our special privileges as members of the bar and bench come with a responsibility to see to it that the legal system is serving society's members tolerably well and to repair it where it is broken. It is therefore both appropriate and, now, unsurprising to see access-to-justice concerns as part of the academic field of professional responsibility and legal ethics.

As Professor David Marcus's superb history of the federal class action displays, the spirit of proactive litigation expansion in the 1950s through the 1970s³ was largely supplanted in the 1980s and 1990s (and into the present day) by an opposite set of forces—forces of contraction.⁴ Professor Marcus's account of the transition from the period of expansion to the period of contraction was part of this Colloquium and was published as a freestanding article in the March 2018 issue of the *Fordham Law Review*.⁵

The contraction of civil liability is connected with, but in at least one respect more disturbing than, the diminution in access to justice; it arguably marks a decline in our enthusiasm for justice itself. It would be one thing if our legal system's proclivity to restrain and punish individuals were cut back. Alas, that is not the case. Our Colloquium participants here suggest an asymmetry in the direction of legal change; there is a marked diminution of legal powers of the relatively powerless to hold the powerful accountable for violations of the law. While academic literature on access-to-justice contains much that relates to professional responsibility and legal ethics, professional responsibility and legal ethics have not figured prominently in the academic literature on contracting civil liability. Yet the fact that civil liability is contracting is surely a proper topic of concern for the bench and the bar, just like access to justice more conventionally understood. We are not talking about substantive rights and protections—we are talking about whether those who would wish to exercise and vindicate those rights will, as a practical matter, be able to do so.

Professor Maria Glover's "Encroachments and Oppressions": The Corporatization of Procedure and the Decline of Rule of Law" begins our issue with a devastating overview of the procedural changes in federal law that have dramatically strengthened the hand of corporate America in civil litigation—heightening of pleading standards, restrictions on class actions, and shearing away of personal jurisdiction are principal examples of a much broader phenomenon.⁶

If Professor Glover's article provides the grand overview at a federal level, Professor Nora Freeman Engstrom's "The Diminished Trial" brings us right

3. David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587 (2013).

4. See David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981–1994*, 86 FORDHAM L. REV. 1785, 1797–1801 (2018).

5. See *id.* at 1785.

6. J. Maria Glover, "Encroachments and Oppressions": *The Corporatization of Procedure and the Decline of Rule of Law*, 86 FORDHAM L. REV. 2113, 2113 (2018).

down to earth at the level of the particular case and the particular trial. While several scholars in recent years have documented the extraordinary diminution in the number of civil trials that occur, both in federal and state courts, Professor Engstrom shows that the trials themselves have become much shorter and heavily constricted.⁷ The point is that today's judiciary employs more than great pressure to settle, which creates grounds for worry that a civil plaintiff will effectively be shut down in his or her effort to hold a defendant accountable. Even if there is a trial, it will be very possibly structured in a manner that squeezes out the plaintiff's power and diminishes the procedures set forth to ensure a fair trial.⁸

Three of those participating in the Colloquium—Professor Jules Lobel, Professor Alexander Reinert, and I—took the U.S. Supreme Court's June 2017 decision in *Ziglar v. Abbasi*⁹ as a (regrettable) occasion to mark the atrophy of federal civil rights actions flowing from *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.¹⁰ Fordham Law School was fortunate to have, in Professors Lobel and Reinert, two of the lawyers intimately involved in the post-9/11 *Bivens* litigation, including *Ziglar* and *Ashcroft v. Iqbal*.¹¹ The plaintiffs in *Ziglar* were (primarily) Muslim men wrongfully imprisoned pursuant to explicit religious and ethnic profiling after 9/11.¹² Professor Lobel explains in "*Ziglar v. Abbasi* and the Demise of Accountability" how anomalous the Supreme Court's denial of a *Bivens* claim was in *Ziglar*.¹³ This is so especially in light of the Court's quite activist stance in the post-9/11 case *Boumediene v. Bush*.¹⁴ While Professor Lobel's article emphasizes the role *Bivens* actions have played in public accountability, my own short contribution—"Ziglar v. Abbasi and the Decline of the Right to Redress"—ties Justice Kennedy's constricted view of *Bivens* to a range of other developments that display our legal system's diminishing respect for the principle *ubi jus, ibi remedium*: where there's a right there's a remedy.¹⁵

In a remarkably thoughtful article also stemming in part from *Ziglar*—"The Influence of Government Defenders on Affirmative Civil Rights Enforcement"—Professor Reinert discusses the twin roles of the federal government in civil rights litigation (sometimes plaintiff/civil rights enforcer,

7. Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2134–37 (2018).

8. *Id.* at 2146–47 (noting that reforms such as the "increased granting of motions for partial summary judgment, increased pretrial activity, reduction in the size of the civil jury, increased bifurcation, imposition of time restrictions on opening statements and closing arguments, and imposition of across-the-board trial time limits" can shrink trials).

9. 137 S. Ct. 1843 (2017).

10. 403 U.S. 388 (1999).

11. 556 U.S. 662 (2009).

12. *Ziglar*, 137 S. Ct. at 1853.

13. Jules Lobel, *Ziglar v. Abbasi and the Demise of Accountability*, 86 FORDHAM L. REV. 2149, 2151 (2018).

14. 553 U.S. 723 (2008).

15. Benjamin C. Zipursky, *Ziglar v. Abbasi and the Decline of the Right to Redress*, 86 FORDHAM L. REV. 2167, 2168 (2018).

sometimes defendant/government-actor protector).¹⁶ Notwithstanding the common assumption of a left/right divide on civil rights at the Supreme Court, Professor Reinert notes that the Obama administration's lawyers at the Supreme Court were even more aggressive in rejecting accountability than their Bush administration predecessors.¹⁷

In a welcome turn, several of our participants painted a more mixed picture, or at least suggested strategies for protecting the powerless in an era of contracting liability. Professor Michael L. Wells's "Wrongful Convictions, Constitutional Remedies, and *Nelson v. Colorado*" focuses on a case in which a majority of the Justices held unconstitutional a Colorado law concerning funds that a criminal defendant had been required to pay the state after being convicted.¹⁸ Colorado law permitted the state to retain these funds even after a defendant's conviction was overturned and the defendant was exonerated. Although Professor Wells's own central point was to indicate today's unfortunately muddled "property" jurisprudence under the Fourteenth Amendment, he saw another path to the same decision, and in any event showed that the 2017 Court was still willing to enforce fundamental rule-of-law values in a case involving an especially vulnerable litigant.¹⁹

In "The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans," Professor Myriam Gilles explores the politics of regaining citizens' rights to aggregate litigation in the wake of the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*,²⁰ which broadly endorsed class-ban provisions.²¹ Once class actions are off the table for violations of state consumer rights statutes, liability is unlikely because of the low stakes. In a sweeping yet incisive survey, Professor Gilles suggests that state *parens patriae*, private attorney general *qui tam* statutes, and state attorney general proceedings with collateral estoppel effect would leverage the standing of public officials to escape the harmful effects of *Concepcion*.²²

The integrity of the trial process has ardent defenders in Professors Suja Thomas and Jeffrey Stempel. Professor Thomas's "Reforming the Summary Judgment Problem: The Consensus Requirement" provides a powerful critique of judicial trends to circumvent the jury trial, including the aggressive granting of summary judgment motions.²³ Constructively commenting on what has been a controversial issue since the Supreme Court's *Celotex* trilogy decades ago, Professor Thomas provocatively

16. Alexander A. Reinert, *The Influence of Government Defenders on Affirmative Civil Rights Enforcement*, 86 FORDHAM L. REV. 2181, 2187–88 (2018).

17. *Id.* at 2185.

18. Michael L. Wells, *Wrongful Convictions, Constitutional Remedies, and Nelson v. Colorado*, 86 FORDHAM L. REV. 2199, 2200 (2018).

19. *Id.* at 2200–01, 2218–19.

20. 563 U.S. 333 (2011).

21. Myriam Gilles, *The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans*, 86 FORDHAM L. REV. 2223, 2231 (2018).

22. *Id.* at 2239.

23. Suja A. Thomas, *Reforming the Summary Judgment Problem: The Consensus Requirement*, 86 FORDHAM L. REV. 2241, 2242 (2018).

proposes that federal appellate panels not permit summary judgment without panel unanimity.²⁴

A similarly constructive proposal is presented by Professor Stempel in his article “Judicial Peremptory Challenges as Access Enhancers.”²⁵ Alert to the possibility of trial judges whom litigants would plausibly view as shutting down their prospects at the outset of litigation, Professor Stempel suggests that each litigant be permitted one peremptory challenge of an assigned trial judge.²⁶ Far from being a novelty, judicial peremptory challenges have been in place in seventeen states for the past several decades, he notes.²⁷ Professor Stempel provides an array of reasons for thinking that a much broader range of states would benefit by introduction of this procedure.

Finally, and by way of acknowledging the necessity of challenging our own dogmas, the Colloquium concludes with Professor Rebecca Aviel’s fine article acknowledging the real *benefits* of litigation reform to those seeking access to some important parts of our legal system.²⁸ In “Family Law and the New Access to Justice,” Professor Aviel documents the substantial value that litigation reform has provided in the family law context. It is not just that cost, time, and judicial resources have often been spared—justice, access, and desirable outcomes for litigants’ lives have often benefited from relaxation of some traditional aspects of the legal process.²⁹ Her article reminds us that the fact of legal reform itself is hardly the problem. The question—a question this Colloquium addresses in a time of much legal turmoil—is how to engage in legal reform that enhances rather than constricts litigants’ access to justice.

24. *Id.* at 2260–63.

25. Jeffrey W. Stempel, *Judicial Peremptory Challenges as Access Enhancers*, 86 *FORDHAM L. REV.* 2263, 2265 (2018).

26. *Id.*

27. *Id.*

28. Rebecca Aviel, *Family Law and the New Access to Justice*, 86 *FORDHAM L. REV.* 2279, 2279–80 (2018).

29. *Id.* at 2295–98.