Access to Courts and the Democratic Order

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Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers, 124 **Harv. L. Rev.** 78 (2011).

In this comment on the Supreme Court's October 2010 Term, Judith Resnik links together three cases – two of them among the Term's blockbusters and a third that traveled beneath the radar screen – to explore issues of access to courts in modern America. The blockbusters – *AT&T Mobility LLC v. Concepcion*, and *Wal-Mart Stores, Inc. v. Dukes*– have evident connections, as a host of commentators have already noted (and undoubtedly will continue to note in myriad forthcoming articles). *Concepcion* held that the Federal Arbitration Act preempts a court's ability to invalidate as unconscionable under state law consumer-contract clauses that required consumers to waive the right to obtain classwide arbitration. *Wal-Mart* held that a class composed of female employees (perhaps as many as three million in total) could not be certified under Federal Rule of Civil Procedure 23. In adopting constrictive views of Rule 23(a)'s "commonality" element and Rule 23(b)(2)'s injunctive-class-action element, *Wal-Mart* reduced the scope of federal class actions. But its holdings or dicta on a number of other points – requiring a "rigorous analysis" of Rule 23's elements, suggesting a need for opt-out rights whenever class members seek monetary relief, and crushing the use of sampling methods to prove individual class members' damages – have contributed equally to a sense that the Court has sounded the death knell for class actions.

Although too melodramatic a take-away from either *Concepcion* or *Wal-Mart*, the death-knell concern fits neatly into a storyline that has been building since the Class Action Fairness Act of 2005, as well as two cases in the October 2009 Term (*Shady Grove Orthopedic Assocs. v. Allstate Insurance Co.*, and *Stolt-Nielsen S. A. v. AnimalFeeds International Corp.*): federal courts are exercising increasing control over the availability of class actions, whether in court or in arbitration. And that storyline feeds into the larger storyline of an anti-consumer, anti-employee, pro-business Roberts Court.

The third case on which Professor Resnik focuses – *Turner v. Rogers* – does not fit this storyline, and requires a reframing of the issue. *Turner* involved a noncustodial father jailed for a year for civil contempt as a result of his failure to pay child support. The case was brought by the child's mother and Turner appeared at the hearing without a lawyer. Very quickly – the proceeding was short and pro forma – he was found in contempt and trundled off to prison, without any finding that Turner could pay child support. The Supreme Court rejected Turner's argument that he had a due process right to a lawyer – a "civil *Gideon*" claim – when the mother was also unrepresented. But it held that, before the judge confined Turner, the Due Process Clause required the judge to adopt a process that "assures a fundamentally fair determination" that Turner had the ability to pay. Such a process may include notice to Turner of the contempt hearing's central issue (his ability to pay) and the entry of a finding that Turner could pay. *Turner* does not focus on whether plaintiffs may have a day in court as an actual matter (as in *Concepcion*) or as a practical matter (as in *Wal-Mart*). Turner, a defendant, had his day (or at least his five minutes) in court, but he was poorly equipped for it.

In this regard, the three cases share a common concern. As a practical matter, left to their own devices, none of the aggrieved parties – the Concepcions, Dukes, and Turner – could afford a lawyer to handle their individual claims. For the Concepcions and Dukes, it was a simple matter of economics; their

individual claims lacked sufficient value to attract a lawyer. For Turner, it was a matter of even simpler economics; he didn't have the money to pay a lawyer. The solution for the Concepcions and Dukes was to bundle their claims with those who were similarly situated in a class action – a solution that left them with something less than the ideal of an individually attentive lawyer, but with more than a completely unvindicated right. The solution for Turner was to demand that the State of South Carolina provide him with a lawyer free of charge. In all three cases, the Court rejected the solution, and all three sets of parties found their access to the courts constrained in ways harmful to their claimed rights. But is this a problem about which the legal system should worry?

Resnik's layered and nuanced analysis examines this question through numerous lenses. The first is the meaning (or rather, as she discusses, the many meanings) of the Due Process Clause. She demonstrates that, as a constitutional ideal, "procedural due process" has sprung up during the past century and now encompasses several dimensions: fair procedures, leveling of asymmetrical litigant resources, treating like litigants alike, easing access to courts, and (perhaps) public participation in adjudication. Complicating matters is the fact that, on each of these views of what process is due, there are different possible positions. And, to make matters even more complex, the competing positions are supported by different underlying theories of fair process, such as efficiency, accuracy, historical fidelity, and avoidance of arbitrary governmental action.

Second, she examines the issues from an institutional perspective. She demonstrates that overburdened courts have had difficulty providing the individualized access that due process demands as an ideal (even if not as a constitutional) matter. Moreover, high-quality legal talent is skewed toward high-profile courts such as the Supreme Court rather than toward the courts of first instance.

Third, she considers the matter historically. As she points out, each of the claims the parties asserted or defended against arose in the twentieth century, thus requiring courts to graft eighteenth-century ideals of open courts and fair process onto new expectations of human dignity and value.

Finally, she injects into the equation the relationship between the ancient institution of courts and the more recent rise of modern democracy. She suggests that courts' inability or unwillingness to enforce legislatively created rights threatens the democratic legitimacy of courts and simultaneously curtails courts' unique contribution to democracy, which she argues is "their structural insistence on participatory parity and their due process practices of according equality and dignity to those before them."

The access-to-courts question on which Professor Resnik focuses should be the central civil-justice issue of our day. It is no criticism of the comment that it offers less in the way of prescription than description. There are no easy answers. Professor Resnik correctly recognizes the problem of pat solutions; not allowing parties like the Concepcions or Dukes to aggregate their cases can create unfairness, but aggregating cases can create different issues of unfairness. Likewise, the benefits of open access to courts must be balanced against the risk that some parties will strategically exploit their opponents. At the same time, Professor Resnik's skepticism of the resolutions in all three cases comes through. The goals of providing access, affirming the dignity and equality of all, and situating the courts properly in the democratic order are badly served when the Court erects barriers around the adjudicatory system. What seems to be needed – and what the three cases lack – is the imagination to confront presently intractable problems of access with promising ideas that may show the way forward.

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