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THE INDIGNITIES OF CIVIL LITIGATION

MATTHEW A. SHAPIRO*

ABSTRACT

Dispute resolution has become increasingly shrouded in secrecy, with the proliferation of protective orders in discovery, confidential settlement agreements, and private arbitration. While many civil procedure scholars have criticized this trend for undermining the systemic benefits of public adjudication, the desirability of secrecy in civil litigation proves to be a much more complicated question.

On the one hand, some of those same scholars have recently sought to justify civil litigation in terms that, ironically, highlight the benefits of secrecy. Although this new justification remains somewhat inchoate, it is best understood as a claim that the procedures of civil litigation allow individual plaintiffs to realize one aspect of their dignity—which this Article labels “dignity-as-status”—by empowering them to call those who have allegedly wronged them to account and to thereby reassert their standing as equals. The problem is that civil litigation can also undermine another aspect of plaintiffs’ dignity—which this Article labels “dignity-as-image”—by requiring them to divulge sensitive personal information and thus to cede control over their public self-presentation. Secrecy can help to preserve this second aspect of plaintiffs’ dignity.

On the other hand, secrecy can also deprive plaintiffs of a potentially powerful expressive weapon in their quest to hold wrongdoers accountable. In

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conditions of socioeconomic inequality, weaker plaintiffs can sometimes turn the humiliating aspects of civil litigation to their advantage, intentionally revealing sensitive personal information that emphasizes their lower social status in order to shame their more powerful adversaries. It turns out that civil litigation can indeed promote plaintiffs' dignity-as-status, but by affording them a venue in which to deliberately compromise their dignity-as-image—to humiliate, as much as ennoble, themselves.

Given the complex nature of dignity and the complex trade-off between secrecy's dignitarian benefits and costs, plaintiffs should be given more control over how much of their personal information is disseminated beyond the immediate parties to a lawsuit—a prescription with implications not only for secrecy in civil litigation, but also potentially for several other prominent procedural issues.

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INTRODUCTION

In recent decades, dispute resolution has become increasingly shrouded in secrecy.¹ Many court filings are made under seal. Information is frequently produced during discovery subject to protective orders that forbid disclosure to the public. With the demise of the civil trial, few cases are adjudicated in open court anymore; rather, most lawsuits now settle, with an increasing number of settlement agreements requiring the parties to keep both the settlement terms and the details of the dispute confidential. And an ever-greater share of civil disputes never make it into court in the first place but are instead shunted to private arbitration, where strict confidentiality rules can obscure both the proceedings and the outcomes from public view.

One camp of civil procedure scholars has been especially vociferous in decrying these trends. The scholars I have in mind are those who approach civil litigation and dispute resolution more broadly from the perspective of “access to justice.” In general, proponents of access to justice seek to make it easier for victims of wrongdoing to pursue redress through the civil justice system.² Broad access to courts, these scholars contend, not only helps victims themselves, but also yields a host of systemic benefits, including development of legal doctrine,³ deterrence of violations of substantive law,⁴ private enforcement of public

¹ See Judith Resnik, *Lawyers' Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 *FORDHAM L. REV.* 1899, 1941 (2017) (“[A]lmost all court- and non-court-based dispute resolution proceedings now occur behind closed doors.”). See generally Joseph W. Doherty, Robert T. Reville & Laura Zakaras, *Introduction to CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM*, at xiii-xx (Joseph W. Doherty et al. eds., 2012) (identifying social costs of decreased transparency in civil dispute resolution).

² See generally STEVEN P. CROLEY, *CIVIL JUSTICE RECONSIDERED* (2017) (criticizing unequal access to legal remedies and proposing reforms); DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004) (making similar arguments for broader access to civil justice). For representative statements of the orthodox access-to-justice positions on current issues in civil procedure—including criticisms of recent developments in pleading, discovery, summary judgment, class actions, and arbitration—see generally, for example, Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Supreme Court*, 100 *CORNELL L. REV.* 193 (2014); Brooke D. Coleman, *The Vanishing Plaintiff*, 42 *SETON HALL L. REV.* 501 (2012); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 *N.Y.U. L. REV.* 286 (2013); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 *GEO. WASH. L. REV.* 353 (2010); and Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 *U. PA. L. REV.* 1839 (2014).

³ See, e.g., ALEXANDRA LAHAV, *IN PRAISE OF LITIGATION* 63-64, 81-82 (2017) [hereinafter LAHAV, *IN PRAISE OF LITIGATION*]; Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1, 2 (1979).

⁴ See, e.g., SEAN FARHANG, *THE LITIGATION STATE* 9 (2010).

regulatory regimes,⁵ and transparency about the activities of governmental institutions and private businesses.⁶ Because these benefits largely depend on the public nature of our civil justice system, access-to-justice scholars view increased secrecy in civil litigation as a significant threat. They have, in particular, opposed each of the developments noted above. Touting the transparency benefits of discovery,⁷ access-to-justice scholars have criticized practices that exclude information exchanged during discovery from the public record,⁸ particularly protective orders.⁹ They have similarly faulted confidential settlement agreements for suppressing information about wrongdoing.¹⁰ And they have objected to arbitration and other forms of alternative dispute resolution (“ADR”) on the ground that those practices are largely insulated from public scrutiny.¹¹

In this Article, I argue that we should question this almost categorical resistance to greater secrecy in civil litigation in light of a nascent normative

⁵ See, e.g., LAHAV, IN PRAISE OF LITIGATION, *supra* note 3, at 38-41; Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 645-46 (2013).

⁶ See, e.g., LAHAV, IN PRAISE OF LITIGATION, *supra* note 3, at 58-63.

⁷ See *id.*; Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1683-86, 1689-90 (2016) [hereinafter Lahav, *Roles of Litigation*].

⁸ See Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 657-58 (2005) [hereinafter Resnik, *Contract*]; Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 555-60 (2006) [hereinafter Resnik, *Uncovering*].

⁹ See Lahav, *Roles of Litigation*, *supra* note 7, at 1686-88. To be sure, other scholars who might embrace the access-to-justice label have been less skeptical of protective orders and other privacy-protecting measures in civil litigation. See, e.g., Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.-KENT L. REV. 357, 360 (2006); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 470; Richard L. Marcus, *A Modest Proposal: Recognizing (at Last) that the Federal Rules Do Not Declare that Discovery Is Presumptively Public*, 81 CHI.-KENT L. REV. 331, 332 (2006) [hereinafter Marcus, *Modest Proposal*]; Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 432 (1991). But over the last decade or so, their position has been eclipsed by that of the secrecy skeptics.

¹⁰ See LAHAV, IN PRAISE OF LITIGATION, *supra* note 3, at 75-79; Lahav, *Roles of Litigation*, *supra* note 7, at 1688-89; David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2650 (1995); Resnik, *Contract*, *supra* note 8, at 653-57.

¹¹ See Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 610, 640-46 (2018) [hereinafter Resnik, *Access*]; Resnik, *Contract*, *supra* note 8, at 658-59; see also *infra* notes 194-97 and accompanying text (analyzing criticisms of the secrecy of arbitration). For an argument connecting the trend toward greater secrecy in dispute resolution with changes in courthouse architecture, see generally Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 YALE J.L. & HUMAN. 311 (2012).

development within access-to-justice scholarship itself. Even as many access-to-justice scholars advocate greater *publicity* in the civil justice system, some of those same scholars have also begun to gesture toward a justification for civil litigation that, ironically, should prompt us to reconsider the benefits of greater *secrecy*. This Article shows how that new justification only highlights the many difficult trade-offs between publicity and secrecy in civil litigation that confront the individual plaintiffs whose interests access-to-justice theory seeks to defend. The upshot, I contend, is that publicity in civil litigation may well be worth promoting, but for very different kinds of reasons from those that access-to-justice scholars have traditionally adduced—and at much greater personal cost to individual plaintiffs than they have previously acknowledged.¹²

Access-to-justice scholarship has recently taken what this Article calls a *dignitarian turn*. Rather than justify broad access to courts exclusively as a way for victims to obtain remedies for their injuries, an increasing number of access-to-justice scholars cite certain benefits inherent in the litigation process itself.¹³ This intrinsic defense of civil litigation remains undertheorized, with scholars invoking myriad different values, including “democracy” and “equality.”¹⁴ But whatever the specific labels, these scholars are best understood to be coalescing around the same basic claim: that the procedures of civil litigation—from pleading to discovery to adjudication—allow victims of wrongdoing to hold those who have (allegedly)¹⁵ wronged them accountable by demanding explanations for their injuries and, in doing so, to reassert their standing as full and equal members of society. This Article’s first contribution is to identify and

¹² This Article follows most access-to-justice scholarship in taking as the paradigmatic lawsuit one in which a weaker plaintiff (usually an individual or group of individuals) is suing a more powerful defendant (often a corporation or other entity). *See, e.g.*, sources cited *supra* note 2 (collecting representative statements of access-to-justice scholars). That assumption is, of course, somewhat artificial, given the possibility of manipulating the party alignment through the joinder rules and declaratory-judgment remedy. Moreover, many civil procedure scholars have rightly called attention to lawsuits, such as debt-collection actions, in which the weaker party typically appears as the *defendant*. *See, e.g.*, ACLU, *A Pound of Flesh: The Criminalization of Private Debt*, in *ABILITY TO PAY* 112, 113 (Judith Resnik et al. eds., 2019) (“Once a [debt-collection] lawsuit is filed, the process is stacked against defendants, the overwhelming majority of whom are not represented by an attorney.”). While I don’t mean to deny the normative significance of those other kinds of lawsuits, access-to-justice theory has developed around the weak-plaintiff/powerful-defendant paradigm, and so this Article, too, assumes that admittedly simplified lineup as it seeks to complicate the anti-secrecy arguments of many access-to-justice scholars.

¹³ *See infra* Section I.A.1.

¹⁴ *See, e.g., infra* notes 61-63 and accompanying text (describing one scholar’s invocation of these values).

¹⁵ I’ll assume this caveat in the rest of the Article.

more fully develop this new defense of civil litigation, which I argue is best understood as resting on a particular conception of *dignity*.¹⁶

The dignitarian turn embodies what strikes me as a normatively appealing (if somewhat idealized) vision of the role civil litigation can play in our society. And while access-to-justice scholars defend publicity in civil litigation primarily on various consequentialist grounds, the dignitarian turn does seem to bolster their case. The problem, though, is that dignity is a multifaceted concept, comprising several different values and concerns.¹⁷ Some access-to-justice scholars have implicitly latched on to one particular facet—what I’ll call *dignity-as-status*—to justify certain features of our civil justice system.¹⁸ But there are other facets of dignity, some of which can cut in different directions than dignity-as-status. Dignity’s variegated nature, in other words, necessitates making trade-offs not only *between* dignity and other values, but also *within* the concept of dignity itself.¹⁹ And indeed, this Article shows that a status-based dignitarian defense of civil litigation runs up against certain central features of lawsuits that seem equally to implicate dignitarian interests, but in less attractive ways.²⁰ If we’re going to follow recent access-to-justice scholarship in trying to understand civil litigation in dignitarian terms, as I think we should, then we must be willing to recognize the *undignified* aspects of prosecuting a lawsuit along with the dignified ones. The role of dignity in civil litigation, this Article reveals, turns out to be much more complicated than the recent rhetoric of access-to-justice scholars seems to suggest.

After expounding the dignitarian turn in access-to-justice scholarship, this Article focuses on one particularly thorny complication. Another prominent notion of dignity—what I’ll call *dignity-as-image*—associates the concept with privacy.²¹ Of course, privacy, like dignity, is a notoriously heterogeneous idea.²² But according to one of its core meanings, privacy includes a degree of control over how much of one’s personal information is revealed to others.²³ This sense

¹⁶ See *infra* Section I.A.2. I explain the relationship between this new development and Professor Jerry Mashaw’s earlier dignitarian theory of procedure *infra* note 39 and accompanying text.

¹⁷ To recognize this variegation isn’t to concede that the concept is “vacuous.” *Contra* Mirko Bagaric & James Allan, *The Vacuous Concept of Dignity*, 5 J. HUM. RTS. 257, 260 (2006); Ruth Macklin, *Dignity Is a Useless Concept*, 327 BRIT. MED. J. 1419, 1419 (2003); Stephen Pinker, *The Stupidity of Dignity*, NEW REPUBLIC, May 28, 2008, at 28, 30. A concept is neither meaningless nor “useless” simply because it’s multivocal.

¹⁸ See *infra* Section I.A.

¹⁹ Cf. David E. Pozen, *Privacy-Privacy Tradeoffs*, 83 U. CHI. L. REV. 221, 227 (2016) (making similar point about privacy).

²⁰ See *infra* Part II.

²¹ See *infra* Section II.A.

²² See Pozen, *supra* note 19, at 225-27 (discussing various conflicting understandings of “privacy”).

²³ See *infra* note 90 and accompanying text.

of privacy relates back to dignity, which is commonly thought to involve the ability to shape one's public image or self-presentation. Secrecy might actually *safeguard* this aspect of plaintiffs' dignity, by allowing them to withhold personal information they'd rather not share and thus to avoid *humiliation*—understood specifically as the revelation of personal information that is inconsistent with the public image one wishes to project.²⁴

Civil litigation can, in this sense, be a humiliating affair for plaintiffs.²⁵ Indeed, the very same procedures that allow plaintiffs to assert their dignity-as-status can also compromise their dignity-as-image. To prosecute a lawsuit, plaintiffs must publicly proclaim themselves to be victims, recount every minute detail of their injuries in court filings, disclose a wealth of personal information (much of it only tangentially related to the issues in the case) during discovery, and put much of that information on public display at summary judgment or trial. At nearly every turn, civil litigation requires plaintiffs to reveal personal information that potentially undermines their public image. Not all plaintiffs, of course, will experience this public exposure as humiliating; some will consider it unobjectionable or even empowering. But many plaintiffs will recoil from the scrutiny, especially once defendants begin to use the tools of discovery to pry into parts of their lives that have little bearing on their legal claims. Civil litigation presents such plaintiffs with a trade-off between their dignity-as-status and dignity-as-image. Given these *indignities of civil litigation*, plaintiffs may ultimately be able to reclaim their dignity through civil litigation, as some access-to-justice scholars now suggest, but often only at the cost of being humiliated in the process.

Civil litigation's humiliating potential unsettles both the dignitarian turn and access-to-justice scholars' nearly absolute opposition to secrecy in civil procedure. Any dignitarian defense of civil litigation must also account for its substantial dignitarian costs, which render the prospect of prosecuting a lawsuit much less appealing than the dignitarian turn implies. And in light of those costs, procedural secrecy begins to look more attractive: because protective orders, confidential settlement agreements, and secret arbitral proceedings can all protect privacy and thereby prevent humiliation, dignitarian theory would seem to *strengthen* the case for each of those controversial procedural practices. At the very least, if we're to take access-to-justice scholars' dignitarian claims seriously, then we can no longer reject secrecy in civil litigation based on the systemic benefits of publicity alone, without considering the significant dignitarian costs of publicity for the individual plaintiffs whom access-to-justice theory purports to champion.

²⁴ See *infra* notes 104-06 and accompanying text.

²⁵ Civil litigation can, of course, also be humiliating for defendants. But because the dignitarian turn in access-to-justice scholarship emphasizes civil litigation's dignitarian benefits for plaintiffs, this Article correspondingly focuses on the dignitarian costs for plaintiffs and, except for a brief discussion in Part III, brackets the (potentially significant) dignitarian effects of civil litigation for defendants.

Dignity's equivocal quality also potentially complicates standard access-to-justice positions on issues that, at first glance, seem to have little to do with dignity. Across several prominent areas of civil procedure, access-to-justice scholars broadly agree about which policies empower plaintiffs and which ones don't. It would thus seem to be relatively straightforward to determine which of those policies promote plaintiffs' dignity and which ones don't. But given dignity's multifaceted nature, the dignitarian valence of those issues becomes more ambiguous, with any given policy having the potential to simultaneously realize one aspect of plaintiffs' dignity and undermine another. This isn't to suggest that access-to-justice scholars are necessarily wrong to suppose that certain policies benefit or harm plaintiffs, all things considered; a complete normative analysis may well reveal a policy's consequences for other values to outweigh its dignitarian effects. Rather, before we can characterize a particular procedural policy as dignity enhancing or dignity compromising, we must account for the image-based aspect of dignity as well as the status-based aspect recently emphasized by proponents of the dignitarian turn.

In short, the dignitarian turn ends up putting pressure on the anti-secrecy consensus among access-to-justice scholars, while revealing a neglected, if ambiguous, dignitarian dimension to several prominent procedural debates.

But there's a twist. It might at first seem obvious that plaintiffs should try to shield themselves from humiliation during civil litigation—all the more so according to the dignitarian premises recently embraced by access-to-justice scholars.²⁶ Implicit in the dignitarian turn is the idea that, by enabling plaintiffs to reassert their dignity against anyone who has wronged them, the procedures of civil litigation help to maintain legal *equality* amid socioeconomic *inequality*. Just by filing a complaint, even the weakest members of society can demand answers from the most powerful. Or so the dignitarian turn suggests.²⁷ On this view, humiliation seems to have no place in a lawsuit: if plaintiffs maintain legal equality by reasserting their dignity, and if humiliation undermines dignity, then

²⁶ See *infra* note 156 and accompanying text (identifying various dignitarian costs of prosecuting a lawsuit).

²⁷ See, e.g., Lahav, *Roles of Litigation*, *supra* note 7, at 1667 (“[L]itigation allows individuals, even the most downtrodden, to obtain recognition from a governmental officer (a judge) of their claims.”); Judith Resnik, *Courts: In and Out of Sight, Site, and Cite—The Norman Shachoy Lecture*, 53 VILL. L. REV. 771, 807 (2008) [hereinafter Resnik, *Courts*] (dubbing courts the “great levelers”); see also *infra* note 46 and accompanying text (collecting sources making similar claims); cf. Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 101 (2010) (“We are not long past the days when society was stratified, such that people in superior classes had no obligation to answer to those inferior[, but n]ow we allow plaintiffs to demand answers of virtually anyone, merely upon notice pleading.”); Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 279, 295 (“From Nixon to Enron, the court of law is the great equalizer in a democracy.”).

plaintiffs should, to the extent possible, spare themselves from the indignities of civil litigation.

Against this intuitive logic, I defend the counterintuitive conclusion that there is often good (though by no means decisive) reason for plaintiffs *not* to protect themselves from humiliation—even (or especially) if we think that civil litigation plays an important role in maintaining legal equality. It turns out that humiliation can, paradoxically, help to promote legal equality, rather than undermine it, in nonideal social conditions. Drawing on the literature on the expressive effects of social practices, this Article shows that plaintiffs can turn the humiliating aspects of civil litigation to their advantage.²⁸ By choosing to humiliate themselves—by revealing personal information that emphasizes their lower social status and thus undermines their preferred self-presentation—weaker plaintiffs can *shame* their more powerful adversaries, countering a defendant's social superiority with a form of moral superiority. Such shaming cannot, of course, guarantee that weaker plaintiffs will win their lawsuits; it won't necessarily move defendants or sway judges or juries. But it can take defendants down a peg on the moral hierarchy, making it socially untenable for them to simply brush aside plaintiffs' demands for answers. In an unequal society such as ours, that kind of moral leveling can help to offset some of the advantages enjoyed by socially stronger parties. Civil litigation, I suggest, promotes legal equality in the face of social inequality by affording plaintiffs a venue in which not only to ennoble, but also to humiliate, themselves—and to drag more powerful defendants down with them.

Appreciating this expressive dimension of civil litigation has important doctrinal implications. Most significantly, it offers a new justification for publicity in civil litigation that turns the standard access-to-justice justification on its head. Access-to-justice scholars oppose protective orders, confidential settlement agreements, and private arbitration primarily because such secrecy stymies various systemic benefits associated with transparency, benefits that sometimes require plaintiffs to sacrifice their privacy and dignity for the greater good.²⁹ This Article, by contrast, shows that secrecy has a potential downside for plaintiffs, too: by shielding themselves from humiliation, plaintiffs may actually make it even harder to reclaim their dignity, forgoing the chance to shame defendants and to thereby raise the moral stakes of their disputes.

This isn't to say that plaintiffs should be *forced* to humiliate themselves during civil litigation. Self-humiliation may help plaintiffs to reassert their dignity-as-status, but often only at considerable cost to their dignity-as-image. Given this delicate trade-off, plaintiffs should be afforded more latitude to decide how best to weigh one aspect of their dignity against the other. One possibility for institutionalizing this choice would be a qualified *humiliation privilege*. Such a privilege would allow plaintiffs (subject to judicial review) to withhold from the public record sensitive personal information that would be

²⁸ See *infra* Section III.B.

²⁹ See *supra* notes 7-9 and accompanying text.

humiliating if publicly disclosed; such information would be disseminated beyond the immediate parties to a lawsuit only if the plaintiff either assented to public disclosure or opted to make the underlying events to which the information pertained part of his or her affirmative case. Plaintiffs could thus choose between keeping the information private, thereby preserving their dignity-as-image but potentially hindering their attempt to reassert their dignity-as-status, and publicizing it, thereby amplifying their claim to dignity-as-status but potentially compromising their dignity-as-image.

If civil litigation can have significant expressive effects, then we should also reconsider procedural rules that, even if not directly concerned with publicity and secrecy, still have the potential to shape the social meaning of a lawsuit. A given rule may turn out to either facilitate or stymie plaintiffs' self-humiliation and thus to either augment or dampen defendants' shame. To be sure, any procedural rule will have material as well as expressive effects, and we shouldn't focus on one set of effects to the exclusion of the other. But we may be able to adjust a rule in ways that bolster its expressive force without sacrificing its material benefits. This Article tentatively considers some possible adjustments along those lines in several procedural contexts.³⁰

Finally, recognizing the complex role of dignity in civil litigation yields an important theoretical insight. The conventional view in political and legal theory has long been that the ideal of equality before the law requires judicial blindness to differences of social status—just think of the ubiquitous image of a blindfolded Lady Justice. But it may well be that, in conditions of socioeconomic inequality, attending to, and even highlighting, differences of social status can *promote* legal equality, by helping to level the playing field between socially weaker and more powerful parties.³¹

³⁰ See *infra* Section III.B.

³¹ This insight links this Article's concerns with the burgeoning literature on the implications of socioeconomic inequality for civil procedure and for public law.

For recent scholarship considering the implications of socioeconomic inequality for civil procedure, see, for example, Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1015-29 (2016) (arguing that civil procedure is constructed by and for those in top one percent of income distribution); Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1539-50 (2016) (arguing that restrictions on aggregate litigation disproportionately harm low-income individuals); and Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1497-505 (2019) (identifying efficiency and privacy concerns associated with current *in forma pauperis* practice).

For recent scholarship considering the implications of socioeconomic inequality for public law, see, for example, K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 85 (2017) ("[T]he [modern] collection of background laws . . . give[s] rise to aggregate effects of economic unfreedom."); GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION* 237 (2017) (drawing connections between political and economic inequality); Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18

The Article proceeds in three Parts. Part I reconstructs the dignitarian turn in access-to-justice scholarship. Part II identifies some of the ways in which civil litigation can prove humiliating for plaintiffs and considers the cross-cutting dignitarian effects of several aspects of civil procedure. Part III then further complicates the normative valence of the various procedural practices considered in Part II, revealing how humiliating oneself can shame one's adversary and contemplating how certain procedural rules might be modified to better account for the expressive dimension of civil litigation.

I. ACCESS TO JUSTICE AND THE DIGNITARIAN TURN

One of the most pressing challenges currently facing civil procedure scholars is to defend the distinctive value of civil litigation in the era of the “vanishing civil trial.”³² If a lawsuit is typically a mere prelude to settlement, then what role do the procedures of civil litigation serve that could not be equally fulfilled by various types of ADR? The imperative to justify the continued relevance of civil litigation is especially urgent for those scholars who subscribe to access-to-justice theory, which tends to valorize public, court-based adjudication and to resist attempts to channel private disputes into private forms of dispute resolution, particularly arbitration.³³

A possible response to this challenge would be to reemphasize the various systemic benefits associated with public adjudication—private enforcement, law

U. PA. J. CONST. L. 419, 438 (2015) (“As economic inequality has soared, so too has political inequality.”); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 671 (2014) (“The constitutional problem of oligarchy is the danger that concentrations of economic power and political power may be mutually reinforcing.”); Joseph Fishkin & William Forbath, *Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Equality*, 94 TEX. L. REV. 1287, 1290-92 (2016) (evaluating what kind of political economy accords with U.S. Constitution); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 195, 198-202 (criticizing recent First Amendment decisions for prioritizing economic liberty over economic equality); and Bertrall L. Ross, II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 343-47 (2016) (arguing that the poor enjoy limited political power).

³² Stephen C. Yeazell, *Getting What We Asked for, Getting What We Paid for, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943, 954 (2004); see also, e.g., John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012) (“[I]n American civil justice, we have gone from a world in which trials . . . were routine, to a world in which trials have become ‘vanishingly rare.’” (quoting Samuel R. Gross & Kent D. Syverud, *Don’t Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 51 (1996))).

³³ See, e.g., Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1821-22 (2014) (criticizing opacity of private dispute resolution).

declaration, transparency, and so on³⁴—and to argue that those benefits are substantially realized even by the intermediate stages of a lawsuit preceding a final merits decision but are largely forgone by ADR. Several scholars have indeed taken this tack.³⁵ Alongside that instrumentalist defense, however, some access-to-justice scholars have also begun to ascribe intrinsic value to civil litigation—value apart from its contribution to broader systemic goals. These scholars seem to contend that the procedures of civil litigation, whatever their further consequences, help to constitute certain kinds of valuable social relations among the members of the political community.³⁶ This Part will argue that this new defense of civil litigation is best understood as resting on a particular conception of *dignity*.

Drawing on recent work in moral and political philosophy on the concept of dignity, Section I.A sympathetically reconstructs the dignitarian turn in access-to-justice scholarship. Section I.B then attempts to delimit the scope—in terms of claims and parties—of this new dignitarian defense of civil litigation.

A. *Dignity in Civil Litigation*

The connection between dignity and civil litigation could, of course, itself be purely instrumental. Just as many civil procedure scholars contend that civil litigation yields various systemic benefits, so one might think that dignity is yet another good that a lawsuit can promote. On this view, dignity is achieved *through* civil litigation, when courts recognize the validity of plaintiffs' legal claims and vindicate their rights by granting them their requested relief.³⁷ Such

³⁴ See *supra* notes 3-6 and accompanying text.

³⁵ See, e.g., Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 541-54 (2011) (arguing that civil litigation generally realizes various instrumental benefits); Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1180-84, 1201-02 (2009) (identifying instrumental benefits of aggregate settlement); Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1061 (2015) (showing how discovery can call organizations' attention to internal problems). Another response would be to curb settlement, see, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984), or to revive the civil jury trial, see, e.g., SUJA A. THOMAS, *THE MISSING AMERICAN JURY* 5 (2016). Such proposals, however, face significant, if not insurmountable, practical hurdles.

³⁶ See *infra* Section I.A.

³⁷ Scott Hershovitz's "expressivist" account of tort law can be understood in these terms. Hershovitz contends that "tort law is an expressive institution" in the sense that a tort judgment "public[ly] vindicat[es]" the plaintiff by "reassert[ing] that [she] had a right not to be treated the way she was." Scott Hershovitz, *The Search for a Grand Unified Theory of Tort Law*, 130 HARV. L. REV. 942, 967 (2017) (book review); see also Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 1, 10 (2018) [hereinafter Hershovitz, *Wrongs*] (arguing that tort damages awards communicate message that defendant's conduct was wrong); cf. Avihay Dorfman, *What Is the Point of the Tort Remedy?*, 55 AM. J. JURIS. 105, 131-33 (2010) (ascribing similar expressive value to tort

an account, however, confronts the same problem as any other instrumentalist defense of civil litigation: as ever fewer cases are fully adjudicated on the merits, it becomes increasingly difficult to justify civil litigation according to its capacity to remedy plaintiffs' injuries and to deliver any concomitant benefits.

The dignitarian turn in access-to-justice scholarship can be understood partly as a response to this problem. If plaintiffs often can't depend on civil litigation to provide meaningful relief—not even the dignitarian relief implicit in the award of a remedy for one's injuries—then what's the point of filing a lawsuit? The answer recently given by several civil procedure scholars, this Section shows, is to see the procedures of civil litigation as partially *constitutive of* dignity, rather than as merely *instrumental to* it.³⁸ Dignity, an increasing number of scholars suggest, is realized not only *through* civil litigation, but also *in* civil litigation. And if that's so, then civil litigation has value independent of the specific outcome of any given lawsuit, let alone any broader systemic benefits that might attend it.

To be sure, the general idea of an intrinsic connection between dignity and procedure isn't new. More than three decades ago, Professor Jerry Mashaw argued that respect for individuals' dignity requires certain procedural protections, such as notice and an opportunity to be heard, in the context of administrative adjudication—quite apart from any tendency of such procedures to increase the accuracy of governmental decision-making.³⁹ But the dignitarian turn in recent access-to-justice scholarship differs from this earlier dignitarian theory of procedure in both object and substance. In terms of object, whereas Mashaw saw procedure as an aspect of *the state's* duty to respect its citizens' dignity, the dignitarian turn sees procedure as one important venue in which

judgments); Stephen Smith, *Why Courts Make Orders (and What This Tells Us About Damages)*, 64 CURRENT LEGAL PROBS. 51, 77, 84 (2011) (identifying communicative content of damages awards). On this view, civil litigation is instrumental to the dignitarian value implicit in tort judgments.

³⁸ Cf. John Gardner, *What Is Tort Law for? Part I. The Place of Corrective Justice*, 30 LAW & PHIL. 1, 2 (2011) (distinguishing instrumental from intrinsic, or "teleological," accounts of tort law).

³⁹ See JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 158-253 (1985); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 894 (1981) [hereinafter Mashaw, *Administrative*]; Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49-52 (1976); see also, e.g., Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1173-75 (arguing that dignity requires effective court access). For a trenchant critique of Mashaw's attempt to ascribe intrinsic, dignitarian value to procedures independent of the outcomes they yield, see Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 509 (2003).

citizens maintain their dignity vis-à-vis one another.⁴⁰ As for substance, Mashaw espoused a conception of dignity as inherent moral worth, rooted in persons' rational capacities; hence his emphasis on the value of being able to participate in governmental decisions that affect one's interests.⁴¹ We'll see that the dignitarian turn, by contrast, reflects a more political conception of dignity as high social status, an essential component of which is the standing to call others to account for the wrongs one has suffered.⁴²

In this Section, I'll first examine the connection that some access-to-justice scholars have begun to draw between the various procedures of civil litigation and the ability of individuals to call others to account, in the sense of demanding answers from those who have wronged them. I'll then situate this notion of accountability in recent philosophical scholarship on dignity, particularly Professor Jeremy Waldron's work developing a status-based conception.⁴³

⁴⁰ See *infra* notes 47-54 and accompanying text.

⁴¹ See Mashaw, *Administrative*, *supra* note 39, at 902-04.

⁴² See *infra* notes 76-79 and accompanying text.

⁴³ At both steps of the argument, I'll also draw, in the footnotes, on a parallel development in torts scholarship known as "civil recourse theory." Civil recourse theory's core claim is "that a person who is wronged, but deprived by law of the ability to respond directly, is entitled to an avenue of civil recourse against the wrongdoer." John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette*, 88 IND. L.J. 569, 573 (2013). Several civil recourse theorists have explicitly grounded this principle in values closely related to dignity. See, e.g., Nathan B. Oman, *The Honor of Private Law*, 80 FORDHAM L. REV. 31, 59-60 (2011) [hereinafter Oman, *Honor*] (defending civil recourse as way of vindicating one's honor); Jason M. Solomon, *Civil Recourse as Social Equality*, 39 FLA. ST. U. L. REV. 243, 259-61 (2011) (defending civil recourse as way of maintaining social equality); Benjamin C. Zipursky, *Substantive Standing, Civil Recourse, and Corrective Justice*, 39 FLA. ST. U. L. REV. 299, 323-40 (2011) [hereinafter Zipursky, *Substantive Standing*] (defending civil recourse as means of self-restoration).

Although civil recourse was originally developed as a theory of tort law, its main tenets apply equally to other areas of private law, as both its critics and proponents have acknowledged. See ARTHUR RIPSTEIN, *PRIVATE WRONGS* 271-72 (2016) (analyzing property and contract in terms of civil recourse); John Gardner, *Torts and Other Wrongs*, 39 FLA. ST. U. L. REV. 43, 50-52 (2011) (analyzing law of equitable wrongs in terms of civil recourse); Ori J. Herstein, *How Tort Law Empowers*, 65 U. TORONTO L.J. 99, 109 (2015) ("Th[e] power to expose others to the power of courts is, of course, a general feature of civil litigation, which is not restrictive to the context of tort victims and tortfeasors, but mostly available to all would-be plaintiffs."); Nathan B. Oman, *Consent to Retaliation: A Civil Recourse Theory of Contractual Liability*, 96 IOWA L. REV. 529, 533 (2011) [hereinafter Oman, *Consent*] (applying civil recourse theory to contract law); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 734 (2003) ("Private rights of action are, of course, found in innumerable areas of the law—not only in torts, but in contracts, property, and throughout statutory schemes that implicitly or explicitly recognize private rights of action.").

That's unsurprising, for the "avenue of civil recourse" to which victims of wrongdoing are entitled is as much a creature of trans-substantive rules of civil procedure as it is one of

1. Civil Litigation and Accountability

The core claim of what I'm calling the "dignitarian turn" might at first seem trivial but proves to be quite profound. As Professor Alexandra Lahav recently put it, civil litigation empowers people "to call others who they believe have wronged them to account."⁴⁴ Or, expressing the same point from the defendant's perspective, civil litigation "requir[es] wrongdoers to answer for their conduct."⁴⁵ Civil litigation, in short, provides a forum in which we can hold

substance-specific doctrines of private law. *See generally* Matthew A. Shapiro, *Civil Wrongs and Civil Procedure*, in *CIVIL WRONGS AND JUSTICE IN PRIVATE LAW* 87 (Paul B. Miller & John Oberdiek eds., 2020). Insofar as civil recourse theory defends the right of victims to sue wrongdoers in dignitarian terms, it resonates with the dignitarian turn in access-to-justice scholarship.

⁴⁴ Lahav, *Roles of Litigation*, *supra* note 7, at 1690; *see also* LAHAV, IN PRAISE OF LITIGATION, *supra* note 3, at 32 ("Answerability allows a person to call someone they think has done them wrong into court to answer for what they did."); Gillian K. Hadfield & Dan Ryan, *Democracy, Courts and the Information Order*, 54 EUR. J. SOC. 67, 83-84 (2013) ("It is . . . no small thing to be recognized by the community as holding an entitlement—as an equal—to demand at least an initial accounting and to have available a public institution that is required to recognize and enforce this entitlement."); *cf.* Leslie Bender, *Tort Law's Role as a Tool for Social Justice Struggle*, 37 WASHBURN L.J. 249, 259 (1998) [hereinafter Bender, *Tort Law's Role*] (arguing that tort law is especially empowering for victims of "social injustice and dignitary harms," whether or not they secure monetary remedies); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 607 (2005) (claiming that tort law involves literal empowerment of victims by conferring standing to demand response); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 981 (2010) (emphasizing fact that tort law empowers victims to hale others into court as matter of right); Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1797 (2009) (arguing that tort law promotes mutual accountability).

⁴⁵ Lahav, *Roles of Litigation*, *supra* note 7, at 1667; *see also* LAHAV, IN PRAISE OF LITIGATION, *supra* note 3, at 8 ("Requiring that alleged wrongdoers publicly defend themselves and answer for their conduct is also crucial to a system of laws."); Hadfield & Ryan, *supra* note 44, at 90 (describing civil litigation as "an arena in which those [whom] plaintiffs perceive as responsible for their harms are required to treat them as an equal other, entitled to disclosure of information that is relevant to their legal claim"); *cf.* Stephen Darwall & Julian Darwall, *Civil Recourse as Mutual Accountability*, 39 FLA. ST. U. L. REV. 17, 18 (2011); Hershovitz, *supra* note 27, at 99; Solomon, *supra* note 44, at 1798-811. Each of the latter three articles draws on pure moral theory, particularly Professor Stephen Darwall's work on the interpersonal nature of moral obligation. *Cf.* MARGARET GILBERT, RIGHTS AND DEMANDS: A FOUNDATIONAL INQUIRY 4 (2018) (developing similar account of rights as involving standing to make demands). *See generally* STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY (2006). As the next Section shows, however, the kind of accountability realized in civil litigation is better understood as being grounded in a principle of political morality. *Cf.* Jeremy Waldron, *All Kings in the Kingdom of Ends? Republic and Dignity in Kant's Practical Philosophy* 13 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 18-39, 2018),

others accountable, by demanding answers from those we think have wronged us. Although we tend to take this feature of civil litigation for granted, it reflects the fact that we all possess a remarkable legal power: simply by filing a lawsuit, anyone, however weak, can accuse anyone else, however powerful, and compel at least some kind of response.⁴⁶

Of course, if this notion of accountability is understood to require an actual remedy for a plaintiff's injuries, our civil justice system fails to realize it in a substantial number of cases. Many injured parties, after all, come away from their lawsuits with no relief of any kind, much less a formal remedy. And even when plaintiffs do manage to obtain some relief, that doesn't always translate into meaningful accountability on the part of the defendant, given widespread practices that attenuate the connection between the relief and any recognition of the defendant's responsibility for the plaintiff's injuries, such as disclaimers of wrongdoing in settlements⁴⁷ and liability insurance.⁴⁸

Short of remedying plaintiffs' injuries, however, the procedures of civil litigation provide numerous opportunities for plaintiffs to hold defendants accountable in the sense recently used by access-to-justice scholars.⁴⁹ Indeed,

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3207754 [https://perma.cc/BV4R-77ZZ] (distinguishing two notions of dignity in Kant's moral thought and pronouncing one "more of a political idea"). See generally BENNETT W. HELM, COMMUNITIES OF RESPECT: GROUNDING RESPONSIBILITY, AUTHORITY, AND DIGNITY (2017) (developing "social" understanding of mutual accountability).

⁴⁶ See, e.g., Hadfield & Ryan, *supra* note 44, at 90 (noting "obligation of even the powerful corporate officer to account to anyone who perceives him or herself to have been harmed by that entity or against anyone whom the corporation seeks to enforce its claims, no matter how poor or powerless"); Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1521 (2013) [hereinafter Lahav, *Symmetry*] ("Whatever their relative power outside the courtroom, parties are entitled to equal treatment before the court, to equal use of procedural devices that permit them to obtain hidden information, to call their opponent to account for wrongdoing, and to assert their legal rights in public."); Alexander A. Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767, 1785 (2014) (arguing that civil litigation "reinforc[es] a democratic norm of equal accountability"); Resnik, *Courts*, *supra* note 27, at 806 ("[A]djudication is itself a democratic practice—an odd moment in which individuals can oblige others to treat them as equals as they argue—in public—about alleged misbehavior and wrongdoing. Litigation forces dialogue upon the unwilling . . . , and momentarily alters configurations of authority."); cf. Hershovitz, *supra* note 27, at 102 (arguing that the institution of tort "gives ordinary folks the right to hale virtually anyone into court").

⁴⁷ See R.A. Duff, *Repairing Harms and Answering for Wrongs*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 212, 222-23 (John Oberdiek ed., 2014).

⁴⁸ See *id.* at 226. But see Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1414-15 (2013) (arguing that insurance companies indirectly regulate, and thereby promote greater accountability on part of insured parties).

⁴⁹ Cf. R.A. Duff, *Moral and Criminal Responsibility: Answering and Refusing to Answer*, in 5 OXFORD STUDIES IN AGENCY AND RESPONSIBILITY 165, 165-73 (D. Justin Coates & Neal

the Federal Rules of Civil Procedure are replete with formal mechanisms for exercising the power to call others to account. Anyone can file a complaint, which not only commences the lawsuit⁵⁰ but also formally accuses the named defendant and “demand[s] . . . relief.”⁵¹ The plaintiff can then compel the defendant to respond: upon filing the complaint, the plaintiff can obtain a summons commanding the defendant to appear in court, on pain of default.⁵² After being served with the summons, the defendant must file either an answer denying the allegations in the complaint⁵³ or a pre-answer motion to dismiss the complaint altogether.⁵⁴ But either way, the defendant must acknowledge the plaintiff’s claims and offer an initial response. If the plaintiff’s complaint survives the defendant’s motion to dismiss, then the case proceeds to discovery, where the plaintiff can elicit even more extensive answers from the defendant through compulsory oral depositions, written interrogatories, and document requests.⁵⁵ And in those rare cases that make it past summary judgment, the plaintiff can directly confront the defendant in open court at trial.⁵⁶ The Rules thus repeatedly empower plaintiffs to demand an explanation from the defendant—and to compel a response if the defendant proves recalcitrant.

To be sure, it will often be plaintiffs’ lawyers, rather than plaintiffs themselves, demanding answers at each of these procedural stages (though many plaintiffs proceed *pro se*, and so exercise the power to call others to account directly). But the mediated nature of that demand doesn’t necessarily diminish—and may even amplify—its force. For one thing, powerful defendants will take a complaint or discovery request more seriously if it’s drafted by a lawyer rather than a *pro se* litigant. For another, notwithstanding the Federal Rules’ abolition of the common law “forms of action,”⁵⁷ plaintiffs still must articulate their demands for answers in legally cognizable terms, which requires a degree of sophistication that many plaintiffs lack.⁵⁸ It is ultimately still the plaintiffs

A. Tognazzini eds., 2019) (distinguishing concepts of “answerability” and “liability” in criminal law).

⁵⁰ See FED. R. CIV. P. 3.

⁵¹ FED. R. CIV. P. 8(a)(3).

⁵² FED. R. CIV. P. 4, 55.

⁵³ FED. R. CIV. P. 8(b)-(c), 12(a).

⁵⁴ FED. R. CIV. P. 12(b).

⁵⁵ FED. R. CIV. P. 26-37; *cf.* Hershovitz, *supra* note 27, at 72 (noting that some individuals pursue tort litigation merely to obtain discovery); Solomon, *supra* note 43, at 260.

⁵⁶ FED. R. CIV. P. 43.

⁵⁷ FED. R. CIV. P. 2.

⁵⁸ See LAHAV, IN PRAISE OF LITIGATION, *supra* note 3, at 88-90; David Luban, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 819; Kathryn A. Sabbeth, *Towards an Understanding of Litigation as Expression: Lessons from Guantanamo*, 44 U.C. DAVIS L. REV. 1487, 1497 (2011). See generally DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY (2007).

calling their opponents to account, even if they're relying on lawyers to speak on their behalf.

In emphasizing the ways in which civil litigation empowers plaintiffs to demand answers from defendants, access-to-justice scholars ascribe intrinsic value to civil litigation, value apart from the ultimate outcome of a given case. For plaintiffs need not win their lawsuits in order to accuse a defendant and elicit a response. To again quote Lahav: "Even if a party loses his case, the fact that he can assert his claim and require both a government official and the person who has wronged him to respond is a significant form of recognition of his dignity."⁵⁹ On this view, civil litigation doesn't simply promote some value external to it, such as justice or efficiency; it also partially *constitutes* valuable relations between the members of the political community by empowering everyone to call anyone else to account.⁶⁰ Because plaintiffs can substantially exercise that power without obtaining a formal remedy from the court, it provides a strong reason for broad access to civil justice even in the era of the disappearing civil trial.

2. Accountability and Dignity

Access-to-justice scholars associate the notion of accountability realized in civil litigation with several other, more fundamental values. For example, even as Lahav contends that empowering people to call others to account respects their "dignity,"⁶¹ she also invokes "equality,"⁶² and subsumes both under the broader heading of "democracy."⁶³ Notwithstanding the shifting terminology,

⁵⁹ Lahav, *Roles of Litigation*, *supra* note 7, at 1667-68; *see also* Hadfield & Ryan, *supra* note 44, at 84 ("Even the dismissal of a complaint that fails to state a claim requires the defendant to respond, if only to explain why the complaint fails."); *cf.* Hershovitz, *supra* note 27, at 110 ("In the end, we may be held liable, but before that, we are held answerable.").

⁶⁰ *See* Hadfield & Ryan, *supra* note 44, at 82 (arguing that civil litigation has "non-instrumental value" because of its "role in the constitution and maintenance of the experience of equality in a democratic society").

⁶¹ *See supra* note 59 and accompanying text; *see also* LAHAV, IN PRAISE OF LITIGATION, *supra* note 3, at 32 ("[L]itigation affirms the values of autonomy and human dignity."); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2808, 2825 (2015) [hereinafter Resnik, *Diffusing Disputes*] (describing courts as "venues obliged to recognize the juridical personhood of all persons and to accord them equal dignity").

⁶² *See* LAHAV, IN PRAISE OF LITIGATION, *supra* note 3, at 140 ("The idea that people should receive equal treatment in the court system is well established and long recognized. It is based in a deeper ideal that characterizes modern democracy: the ideal of status equality.").

⁶³ *See, e.g., id.* at 1; Lahav, *Roles of Litigation*, *supra* note 7, at 1683-90 (arguing that civil litigation contributes to well-functioning democracy by promoting transparency); *see also* Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 938 (2012) [hereinafter Resnik, *Constitutional Entitlements*] (describing adjudication as a "democratic process");

however, I believe that the new accountability-based defense of civil litigation is indeed best understood as a *dignitarian* claim.⁶⁴

To be able to hold others accountable is to enjoy a certain kind of status in society, a status that political philosophers have recently cashed out in terms of dignity. As some access-to-justice scholars have emphasized, because our various substantive rights wouldn't amount to much if we couldn't call one another to account for violating them, being able to hold others accountable is an essential part of what it means to be a full, rights-bearing member of society; the right to call others to account is a foundational "right to have rights."⁶⁵ This claim has a certain egalitarian resonance—sounding not in *distributive* equality, which concerns the distribution of benefits and burdens among the members of society, but in *social* equality, the vision of a "society of equals."⁶⁶ And indeed, access-to-justice scholars have invoked the ideal of equal social status to justify affording everyone the power to call others to account.⁶⁷ But to say we all enjoy equal status isn't to say much about the actual content of that status, which is where the value of dignity comes in.

In suggesting that equal social status includes the power to call others to account, access-to-justice scholars echo the status-based account of dignity recently developed by Waldron. Although dignity is used in many different

Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 168 (2011) [hereinafter Resnik, *Fairness in Numbers*] (arguing that adjudication instantiates "democratic norms").

⁶⁴ Other elements of Lahav's defense of civil litigation, such as her claim that it promotes political "deliberation," are more directly connected to democratic self-government. LAHAV, IN PRAISE OF LITIGATION, *supra* note 3, at 84-111; *see also, e.g.*, David Marcus, *Finding the Civil Trial's Democratic Future After Its Demise*, 15 NEV. L.J. 1523, 1550-58 (2015) (identifying various "democratic benefits" of trials in structural-reform litigation); Resnik, *Constitutional Entitlements*, *supra* note 63, at 947 ("[T]he iterative participatory practices in courts are one method of giving practical expression to democratic values.").

⁶⁵ *See* LAHAV, IN PRAISE OF LITIGATION, *supra* note 3, at 113; Lahav, *Roles of Litigation*, *supra* note 7, at 1668; Resnik, *Constitutional Entitlements*, *supra* note 63, at 992; Resnik, *Fairness in Numbers*, *supra* note 63, at 88.

⁶⁶ For various conceptions of social equality, *see generally* DAVID MILLER, PRINCIPLES OF SOCIAL JUSTICE 232 (1999); Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287 (1999); and Samuel Scheffler, *What Is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5, 21-34 (2003).

⁶⁷ *See* LAHAV, IN PRAISE OF LITIGATION, *supra* note 3, at 140 (identifying courts as venue for "equal standing" or "status equality"); Hadfield & Ryan, *supra* note 44, at 70 ("In the context of democratic citizenship . . . the symmetric and abstract obligation to account—to provide information in the context of a legal claim filed in a public court—is an important means by which the principle of abstract equality among citizens is made manifest."). As have civil recourse theorists. *See, e.g.*, JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 397 (2010); Goldberg, *supra* note 44, at 607; Goldberg & Zipursky, *supra* note 43, at 604; Goldberg & Zipursky, *supra* note 44, at 982; Solomon, *supra* note 43, at 245.

senses in both law and philosophy,⁶⁸ perhaps the most familiar one, typically associated with Immanuel Kant, defines dignity as the intrinsic moral worth that all human beings possess simply in virtue of being human.⁶⁹ Waldron contends that this modern, egalitarian notion of dignity actually emerged from an earlier, hierarchical notion—specifically, the ancient Roman concept of *dignitas*, which denoted the high social status enjoyed by the aristocracy.⁷⁰ During the Enlightenment, Waldron argues, this status-based understanding of dignity “was transvalued rather than superseded,” as the high status that had once been reserved to the aristocracy was extended to all human beings.⁷¹ On this account, “the modern notion of *human* dignity involves an upwards equalization of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility.”⁷² Dignity is now a kind of “nobility for the common man.”⁷³

⁶⁸ See generally, e.g., Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011); Michael Rosen, *Dignity: The Case Against*, in UNDERSTANDING HUMAN DIGNITY 143, 153-54 (Christopher McCrudden ed., 2013).

⁶⁹ See, e.g., AVISHAI MARGALIT, *THE DECENT SOCIETY* 42, 57-75 (Naomi Goldblum trans., 1996); Alan Gewirth, *Human Dignity as the Basis of Rights*, in THE CONSTITUTION OF RIGHTS 10, 12 (Michael J. Meyer & William A. Parent eds., 1992); Herbert Spiegelberg, *Human Dignity: A Challenge to Contemporary Philosophy*, in HUMAN DIGNITY: THIS CENTURY AND THE NEXT 39, 56 (Rubin Gotesky & Ervin Laszlo eds., 1970).

⁷⁰ See JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* 31-33 (Meir Dan-Cohen ed., 2012); see also Henry, *supra* note 68, at 190-92. For a competing account of this history, see MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* 11-19 (2012) (acknowledging historical connection between dignity and aristocratic status but contending that many historical thinkers also conceptualized dignity as intrinsic property of all human beings).

⁷¹ WALDRON, *supra* note 70, at 31.

⁷² *Id.* at 33. Professor James Whitman has described a similar process of “leveling up”—that is, “an extension of formerly high-status treatment to all sectors of the population.” James Q. Whitman, *Human Dignity in Europe and the United States: The Social Foundations*, in EUROPE AND U.S. CONSTITUTIONALISM 108, 110 (G. Nolte ed., 2005) [hereinafter Whitman, *Dignity*]. To be sure, Whitman contends that this leveling up was primarily a Continental European phenomenon, whereas the United States experienced a leveling *down*—that is, “an extension of formerly [low-]status treatment to all sectors of the population.” *Id.*; see also James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1384-90 (2000) [hereinafter Whitman, *Enforcing*] (comparing “leveling up” and “leveling down” conceptions of dignity); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1164-71 (2004) [hereinafter Whitman, *Privacy*] (analyzing “leveling up” conception of dignity in the European tradition). But Whitman acknowledges that this is only a relative claim and that the high-status notion of dignity persists in certain areas of American legal practice. See Whitman, *Enforcing*, *supra*, at 1372; Whitman, *Privacy*, *supra*, at 1162-63.

⁷³ WALDRON, *supra* note 70, at 22.

As dignity has been universally distributed, the concept has become bound up with equality; “dignity and equality,” Waldron acknowledges, “are interdependent.”⁷⁴ But that doesn’t mean that his status-based account of dignity is conceptually confused. Dignity can take on valences associated with other values without reducing to them. Something like this has occurred in constitutional law, where recent substantive due process cases have employed the concept of dignity to characterize claims that implicate both liberty and equality values but reduce to neither.⁷⁵ Similarly, on Waldron’s status-based account, dignity evokes the egalitarian vision of a “society of equals,” while infusing that somewhat vague vision with more specific content. Though it has assumed egalitarian resonances, dignity calls attention to normative considerations that remain obscure if we focus on equality alone.

If dignity attaches to a particular (high) social status, then in a modern, egalitarian society “legal citizenship” is the analogue of aristocracy.⁷⁶ Every ordinary citizen must now be treated with the same dignity that was once the prerogative of members of the nobility. As with Mashaw’s account of dignity,⁷⁷ this means that the state must follow certain legal procedures before taking actions that affect a particular individual’s interests.⁷⁸ Dignity demands due process. But dignity also concerns how we stand in relation to one another. In particular, Waldron contends that we enjoy dignity only insofar as we possess certain rights and can hold others accountable for violating those rights.⁷⁹ To possess dignity is to be a rights-bearer, and rights-bearers “stand up for themselves; they make unapologetic claims on their own behalf; they control the pursuit and prosecution of their own grievances.”⁸⁰ It is this vision of the

⁷⁴ *Id.* at 55.

⁷⁵ See generally, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147 (2015); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

⁷⁶ WALDRON, *supra* note 70, at 61; see also Jeremy Waldron, *Citizenship and Dignity*, in UNDERSTANDING HUMAN DIGNITY, *supra* note 68, at 327, 327-32 (discussing Kant’s views on dignity, status, and citizenship).

⁷⁷ See *supra* note 39 and accompanying text.

⁷⁸ See WALDRON, *supra* note 70, at 54-55; Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200, 208-10 (2012); Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in NOMOS 50: GETTING TO THE RULE OF LAW 3, 5-7 (James E. Fleming ed., 2011).

⁷⁹ See WALDRON, *supra* note 70, at 49-50.

⁸⁰ *Id.*; cf. Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 897-917 (1988) (defending right of confrontation in criminal trials in similar terms). But see Stephen Darwall, *Equal Dignity and Rights*, in DIGNITY: A HISTORY 181, 190-98 (Remy Debes ed., 2017) (arguing that Waldron’s status-based conception of dignity cannot ground this “second-personal” authority to make claims against others and hold them accountable).

assertive rights-bearer that access-to-justice scholars conjure in extolling the power to call others to account.

Our legal system institutionalizes that power through civil litigation. Indeed, Waldron himself associates possessing dignity with being able to initiate and prosecute a lawsuit: among law's many dignity-respecting features, he argues, is the fact that it "will recognize potential plaintiffs and defer to their dignity in allowing *them* to make the decision whether some norm-violator is to be taken to task or not."⁸¹ In empowering each of us to hale others into court and call them to account by demanding answers from them, civil litigation accords us something of the high status that was once the exclusive province of the aristocracy. This is why the accountability-based defense of civil litigation recently espoused by some access-to-justice scholars is best conceptualized as a dignitarian turn.

Understood in status-based terms, dignity is at least in part an expressive value,⁸² and the accountability benefits that access-to-justice scholars ascribe to civil litigation are likewise partly expressive. Expressivism is the idea that acts can convey social meanings in addition to having material effects.⁸³ So to say that a particular value, such as dignity, is an expressive value is to say that whether a given act accords with or contravenes that value depends on the act's social meaning. On a status-based account, dignity requires us to perform acts that express the kind of respect befitting the high status we all now enjoy⁸⁴ (and, conversely, to eschew acts that explicitly or implicitly deny that status, which would perpetrate an "expressive harm").⁸⁵

Civil litigation accords plaintiffs such respect by giving them opportunities to demand answers from those who have wronged them. The rules require defendants to offer some kind of response to those demands, and to thereby

⁸¹ WALDRON, *supra* note 70, at 51.

⁸² Cf. Tarunabh Khaitan, *Dignity as an Expressive Norm: Neither Vacuous nor a Panacea*, 32 OXFORD J. LEGAL STUD. 1, 4-5 (2012) (arguing that dignity cannot aid legal analysis unless it's understood as an expressive value).

⁸³ On the ability of laws to convey social meanings, see generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); and Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996). For a critique, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1462-93 (2000).

⁸⁴ See Michael Rosen, *Dignity Past and Present*, in DIGNITY, RANK, AND RIGHTS, *supra* note 70, at 79, 96 ("[T]o treat someone with dignity is to treat them in a way that expressively attributes to them the highest status."). In particular, dignity demands a form of what Stephen Darwall has called "recognition respect." See Stephen L. Darwall, *Two Kinds of Respect*, 88 ETHICS 36, 38-39 (1977) (distinguishing between respect for people as human beings—"recognition respect"—and respect accorded people on account of their accomplishments).

⁸⁵ Anderson & Pildes, *supra* note 83, at 1527; see also Rosen, *supra* note 84, at 95 ("What degradation, insult, and contempt have in common is that they are expressive or symbolic harms, ones in which the elevated status of human beings *fails to be acknowledged*.").

tacitly acknowledge plaintiffs' equal (high) status—their dignity.⁸⁶ And because defendants must respond in a *public* forum, plaintiffs' dignity is recognized and reaffirmed by the political community as well. Civil litigation provides that recognition whether or not the defendant is ultimately found liable. The dignitarian benefits of civil litigation can thus be substantially realized through procedures short of full-blown adjudication.

B. *Dignity's Domain*

I've argued that, in defending civil litigation as a forum in which we can hold one another accountable, several access-to-justice scholars can be understood as implicitly relying on a particular status-based conception of dignity. But how broadly does this dignitarian defense of civil litigation sweep? Within civil litigation, what is dignity's domain?

The scope of the dignitarian turn can be delineated along at least two dimensions. The first is the nature of the substantive legal claims involved in a lawsuit. One might initially think that dignity is as much a matter of substance as procedure, and that civil litigation can therefore realize dignity only in cases involving claims that allege some specifically dignitarian harm, such as defamation or sexual assault.⁸⁷ Civil litigation may indeed have the strongest dignitarian effects in such cases, as plaintiffs' demands for answers would seem to pack the biggest expressive punch when a defendant has not only wronged but also insulted them. But it doesn't follow that civil litigation enables plaintiffs to reassert their dignity only when they're avenging some kind of personal affront. On the contrary, because having dignity means having the standing to possess and vindicate rights, plaintiffs can reassert their dignity in civil litigation whenever it's reasonable to view them as entitled to an explanation from the defendant. And that will be so as long as they reasonably believe they've been mistreated in some way, which will be the case whenever they reasonably believe they've suffered some legal wrong.⁸⁸ When an employee believes her employer discriminated against her, or when a consumer believes a manufacturer's defective product harmed her, or even when one business partner believes another breached their contract, the plaintiff has an interest in eliciting

⁸⁶ Cf. Solomon, *supra* note 43, at 257 (“[I]n exercising the right to recourse . . . the one empowered is able to remind the wrongdoer that she is worth respect and attention, and thus her status is that of an equal.”).

⁸⁷ Cf., e.g., Teresa Stanton Collett, Essay, *Understanding Freedman's Ethics*, 33 ARIZ. L. REV. 455, 465 (1991) (“Individual dignity is not directly at issue in most civil litigation.”).

⁸⁸ See Goldberg & Zipursky, *supra* note 44, at 930-31, 943, 947-53 (identifying legal wronging as form of “mistreatment”); Anthony J. Sebok, *What Is Wrong About Wrongdoing?*, 39 FLA. ST. U. L. REV. 209, 224 (2011) (developing similar account). This might be true even of a breach of contract. See Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. 1, 13-15 (2009); Oman, *Consent*, *supra* note 43, at 544-51. But see Curtis Bridgeman, *Civil Recourse or Civil Powers?*, 39 FLA. ST. U. L. REV. 1, 2 (2011) (arguing that contract law isn't concerned with wrongs).

an explanation from the defendant for her perceived injury, and civil litigation provides her with a powerful way of vindicating that interest. Every legal claim, regardless of its particular content, potentially implicates the plaintiff's dignity, even if civil litigation's dignitarian valence is stronger for some kinds of claims than for others.

A second dimension for determining the scope of the dignitarian turn is the identity of the parties to a lawsuit. Proponents of the dignitarian turn focus on the dignitarian benefits of civil litigation for individual, natural-person plaintiffs. This focus accords with Waldron's status-based conception of dignity, for whether or not corporations and other artificial persons can have rights, they certainly don't enjoy the same high social standing as individual citizens. So whatever the reasons for allowing artificial persons to sue may be, respecting dignity isn't among them. The defendant, by contrast, can be either a natural or an artificial person. So long as defendants can respond to plaintiffs' demands for an explanation (even if only through a lawyer or other human agent), plaintiffs can reassert their dignity by suing them.

Much contemporary civil litigation thus provides a sufficiently hospitable expressive environment for access-to-justice theory to take a dignitarian turn.⁸⁹

II. THE INDIGNITIES OF ACCESSING JUSTICE

The dignitarian turn in access-to-justice scholarship offers what strikes me as an attractive normative vision of the role civil litigation can play in our society. There's something appealing in the notion that we all equally enjoy the standing to call one another to account by demanding explanations for perceived legal wrongs. To be sure, the dignitarian turn's defense of civil litigation is in large measure aspirational. Our civil justice system falls short of the ideal of mutual accountability in many respects, erecting numerous hurdles, both formal and practical, along the path to demanding explanations from others. Formally, the

⁸⁹ Other facets of contemporary civil practice, by contrast, seem less amenable to the kind of accountability-based defense offered by the dignitarian turn. For example, many mass settlements that occur in the shadow—but outside the formal mechanisms—of civil litigation don't even purport to provide victims with answers, but instead attempt only to compensate them for their injuries, often according to highly regimented rubrics. See, e.g., Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1529-30 (2009) (finding that "settlement mills" use formulaic settlement rates rather than evaluating legitimacy of each client's claims); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 838-39 (2011) (finding that "settlement mills" incentivize employees to reach settlements quickly and to avoid filing suit); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1618-31 (2004) (attributing decline in civil trials to increase in aggregate settlements); Christopher J. Robinette, *Two Roads Diverge for Civil Recourse Theory*, 88 IND. L.J. 543, 552-64 (2013) (examining standardization of settlement of auto-accident claims).

law immunizes certain categories of defendants from suit altogether⁹⁰ and bars certain categories of plaintiffs from seeking any redress.⁹¹ As a practical matter, many plaintiffs lack the resources necessary to make full use of the procedures for demanding answers from defendants, much less to retain a lawyer to help them to navigate those procedures.⁹² And yet, notwithstanding all of these impediments, it remains the case that civil litigation substantially honors our standing as equals—indeed, at least as much as any of our other political institutions.

The dignitarian turn, moreover, appears, if anything, to bolster the standard access-to-justice case against greater secrecy in civil litigation. Although access-to-justice scholars oppose secrecy primarily on various consequentialist grounds,⁹³ a status-based conception of dignity would seem to demand greater publicity, too. One can, I suppose, demand answers from others even in private—so long as they’re obligated to respond. But because dignity, according to a status-based conception, is partly an expressive value,⁹⁴ and thus requires others to demonstrate proper respect for one’s high status, it is most fully realized through institutions that *publicly* recognize one’s standing to call others to account.⁹⁵ Asserting one’s dignity by holding others accountable is a kind of performance, and like any performance, it can succeed completely only when it has an appropriate audience.

⁹⁰ Indeed, in the case of sovereign immunity, the concept of dignity may have actually contributed to this lack of accountability. See Don Herzog, *Aristocratic Dignity?*, in DIGNITY, RANK, AND RIGHTS, *supra* note 70, at 99, 101, 104-06 (arguing that aristocratic notion of dignity originally meant *unanswerability*—that is, *not* having to give answers in court—and that this idea persists in modern doctrine of sovereign immunity); Judith Resnik & Julie Chihye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1922-27 (2003) (criticizing Supreme Court’s invocation of concept of dignity to justify state sovereign immunity).

⁹¹ E.g., Prison Litigation Reform Act, 28 U.S.C. § 1915(g) (2018) (barring prisoners who have had three or more lawsuits dismissed as “frivolous” from bringing additional lawsuits).

⁹² See generally BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA (Samuel Estreicher & Joy Radice eds., 2016) (compiling statistics on “civil justice gap” and proposing reforms).

⁹³ See *supra* notes 7-11 and accompanying text.

⁹⁴ See *supra* notes 82-86 and accompanying text.

⁹⁵ Cf. THOMAS CHRISTIANO, THE CONSTITUTION OF EQUALITY 47-72 (2008) (arguing that one must be publicly treated as an equal in order to be fully treated as an equal); R.A. DUFF, TRIALS AND PUNISHMENTS 115 (1991) (arguing that criminal punishment can communicate condemnation of offender’s conduct only if it’s public); Gerald J. Postema, Fidelity, Accountability and Trust: Tensions at the Heart of the Rule of Law 12, 23-24 (Mar. 1, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126397 [<https://perma.cc/RX3G-UQVF>] (arguing that practices of mutual accountability generally must be public).

Were that all there was to dignity, the case against secrecy in civil litigation would be fairly straightforward. But any dignitarian account of civil procedure will prove to be much more complicated than the dignitarian turn implies. For like many other values, dignity is a multifaceted concept, and when it comes to the desirability of secrecy in civil litigation, there's another facet of dignity that cuts the other way than the status-based conception of dignity (hereinafter referred to as "*dignity-as-status*"). As Section II.A shows, nonhumiliation—understood as the ability to control one's self-presentation or public image—is also an aspect of dignity. Section II.B then contends that civil litigation can subject plaintiffs to a significant amount of humiliation in that sense, requiring them to divulge a wealth of sensitive personal information that undermines their preferred public image. Finally, Section II.C shows how civil litigation's capacity to humiliate complicates access-to-justice scholars' categorical opposition to secrecy in civil procedure, with the potential to also unsettle standard access-to-justice positions on other prominent procedural issues that initially seem to have little to do with dignity.

A. *Dignity and Humiliation*

Humiliation is commonly presented as the antithesis of dignity.⁹⁶ To be humiliated in this sense typically means to have one's dignity directly assaulted—where dignity refers to the inherent moral worth that all human beings possess simply in virtue of being human⁹⁷ and humiliation to the denial of one's humanity.⁹⁸ It is the humiliation perpetrated by such moral outrages as torture.⁹⁹

I want to argue that civil litigation implicates a different notion of humiliation, which corresponds to a different notion of dignity. Especially in Continental European legal and moral thought, dignity can also refer to one's control over one's public image or self-presentation—the way one appears to other members of society.¹⁰⁰ This understanding of dignity (hereinafter referred to as "*dignity-*

⁹⁶ See, e.g., Martha Nussbaum, *Human Dignity and Political Entitlements*, in HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT'S COUNCIL ON BIOETHICS 351, 378 (2008) (identifying "self-respect and non-humiliation" as "necessary conditions of a life worthy of human dignity").

⁹⁷ See *supra* note 69 and accompanying text.

⁹⁸ See MARGALIT, *supra* note 69, at 122-26 (portraying humiliation as injury to one's self-respect, understood as one's sense of oneself as a member of humanity); MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 204 (2004) ("Humiliation typically makes the statement that the person in question is low, not on a par with others in terms of human dignity.").

⁹⁹ Professor Bruce Ackerman has argued that racial discrimination similarly humiliates its victims, in the sense of violating their dignity. See 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 137-41 (2014).

¹⁰⁰ See Whitman, *Dignity*, *supra* note 72, at 121 ("[T]he European right of privacy is, at its base, a right to the control over one's image . . ."); see also Michael J. Meyer, *Dignity*,

as-image”) obviously overlaps with privacy, which on one of its many meanings refers to “the interest in having a reasonable measure of control over ways in which we present ourselves to others and the ability to present different aspects of ourselves, and what is ours, to different people.”¹⁰¹ To enjoy privacy in this sense is to be able to decide whether to reveal our personal information in different contexts, and to thereby construct different public images for different audiences.¹⁰² It is in this sense that privacy constitutes another aspect of dignity.¹⁰³

“Humiliation” can also refer to the violation of the privacy aspect of one’s dignity, one’s dignity-as-image. On one prominent account, humiliation involves “the deflation of pretension”¹⁰⁴—in particular, “the pretension of vanity,” a “consciously intended style of self-presentation.”¹⁰⁵ You are therefore humiliated when your self-presentation is exposed as false, as mere

Rights, and Self-Control, 99 ETHICS 520, 529-34 (1989) (“[T]he capacity to exercise self-control is necessary if one is to be said to have dignity.”). The notion of a person’s self-presentation comes from ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 2 (1959).

¹⁰¹ Andrei Marmour, *What Is the Right to Privacy?*, 43 PHIL. & PUB. AFF. 3, 7 (2015). See generally ALAN F. WESTIN, *PRIVACY AND FREEDOM* 5-63 (1967) (developing conception of privacy as ability to control one’s public image). To be sure, while such control is necessary for privacy, it is not sufficient. To be able to truly control our personal information, we must inhabit a social environment that offers “meaningful choices” between states of privacy and publicity. See Lisa M. Austin, *Re-reading Westin*, 20 THEORETICAL INQUIRIES L. 53, 68-77 (2019).

¹⁰² It strikes me that this formulation of the privacy aspect of dignity remains agnostic on the metaphysical question whether the self is autonomously or socially constructed; the ability to shape one’s public image remains important either way. *Contra* Julie E. Cohen, *What Privacy Is for*, 126 HARV. L. REV. 1904, 1906-11 (2013) (arguing that understanding privacy as control over one’s personal information presumes (erroneous) conception of the self as autonomously constructed).

¹⁰³ See, e.g., Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1002-03 (1964) (identifying invasion of privacy as “dignitary tort”). I see less of a sharp distinction between this dignitarian notion of privacy and “data privacy”—practices that regulate the processing of personal information—than does Professor Robert Post. See Robert C. Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right to Be Forgotten, and the Construction of the Public Sphere*, 67 DUKE L.J. 981, 983-95 (2018) (distinguishing data privacy rights that limit governmental use of data from dignitarian privacy rights that “enforce social norms of respectful expression”). It seems that, in our digital world, a degree of digital privacy is an essential means of preserving one’s dignity-as-image.

¹⁰⁴ WILLIAM IAN MILLER, *HUMILIATION: AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE* 137 (1993) [hereinafter MILLER, *HUMILIATION*].

¹⁰⁵ *Id.* at 142. Humiliation can also refer to the attendant “emotion we feel when our pretensions are discovered,” though one need not experience this emotion in order to be humiliated. *Id.* at 10.

“pretension.” And the most straightforward way for that to occur is through the revelation of personal information that is inconsistent with your self-presentation. By allowing people to prevent such public exposure, privacy can enable them to avoid humiliation and thus to preserve their dignity.¹⁰⁶

This use of the term “humiliation” might seem to imply that the interest in avoiding public exposure of one’s personal information reduces to an interest in hiding aspects of one’s identity of which one is ashamed or embarrassed. This Article, however, uses “humiliation” in a broader sense. True, people sometimes seek to keep information private because they scorn the aspects of their identity to which it pertains. But even when they embrace those characteristics, they still might desire secrecy in order to more easily conform to prevailing social norms and to thereby avoid any social stigma or other, more practical adverse consequences attaching to the traits.¹⁰⁷ It nevertheless makes sense to describe the revelation of their personal information as “humiliating” so long as they’re being compelled to disclose aspects of their identity that, for whatever reason, they don’t want others to see. Although it may be more intensely humiliating to have your most embarrassing traits publicly revealed, it’s still always at least somewhat humiliating to be exposed as something other than what you had purported to be.

One might question whether the notion of humiliation as the violation of dignity-as-image still has much purchase in our society. After all, humiliation, understood as the “deflation of pretension,” presupposes a social group whose members are concerned about commanding one another’s respect and, conversely, not losing face in front of one another—in short, an “honor group.”¹⁰⁸ And yet, the objection runs, we no longer inhabit a strong honor

¹⁰⁶ See Lisa M. Austin, *Privacy, Shame, and the Anxieties of Identity* 11-12 (Jan. 1, 2012) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2061748 [<https://perma.cc/ZKX5-HB9S>] (“[P]rivacy protects important conditions of self-presentation, or our ability to be seen by others in the way that we want to be seen.”); see also James David Velleman, *The Genesis of Shame*, 30 PHIL. & PUB. AFF. 27, 42-43 (2001) (“Once we acquire the idea of privacy . . . we can think about excluding other, non-motivational facts from our self-presentation.”). Although Professors Lisa Austin and James Velleman use the term “shame,” I’ll follow Professor William Miller in using the term “humiliation” in order to preserve the distinction between (1) the reaction one has when one’s self-presentation is exposed as false (humiliation) and (2) the reaction one has when one is caught violating serious social norms associated with public morality (shame). See MILLER, HUMILIATION, *supra* note 104, at 10; *infra* Part III (analyzing Miller’s account of shame).

¹⁰⁷ See, e.g., Alison Frankel, *In New Fraud Class Action v. Trump Organization, Plaintiffs Lobby Hard for Anonymity*, REUTERS (Oct. 30, 2018, 6:27 PM), <https://www.reuters.com/article/legal-us-otc-pseudo/in-new-fraud-class-action-v-trump-organization-plaintiffs-lobby-hard-for-anonymity-idUSKCN1N42W0> [<https://perma.cc/6HHC-LAZD>] (describing lawsuit in which plaintiffs sought to sue pseudonymously in order to avoid “harassment and retaliation”).

¹⁰⁸ MILLER, HUMILIATION, *supra* note 104, at 116.

culture;¹⁰⁹ today we think you should be able to command the respect of others regardless of their personal impressions of you, simply in virtue of your humanity. One might thus see my invocation of humiliation and dignity-as-image as anachronistic, a throwback to premodern honor societies and their violent cycles of revenge. Indeed, dignity-as-image might seem *inconsistent* with dignity-as-status, insofar as the latter insists that we all occupy the same high status and thus are entitled to the same respect.¹¹⁰

There may well be good reasons to seek to minimize the role that notions of honor, humiliation, and dignity-as-image play in our society. But however laudable that aspiration might be, as a purely descriptive matter, we haven't put such notions completely behind us.¹¹¹ Notwithstanding our collective commitment to respecting everyone as an equal, most people still very much care about how they appear to others, and thus how much of their personal information is made public.¹¹² And as long as that's the case, the privacy aspect of dignity will remain an important value. This suggests that a concern with avoiding humiliation and preserving dignity-as-image can actually coexist with a commitment to dignity-as-status: even as we recognize one another as moral equals, we'll inevitably keep sizing one another up and striving to be seen as we'd like to be seen, even if not as we really are, and will therefore continue to value the privacy aspect of our dignity.¹¹³

¹⁰⁹ See Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 702-26 (1986) (arguing that contemporary Americans are less concerned with their reputations for the sake of their "honor" and more concerned about the effects of their reputations on their ability to acquire property).

¹¹⁰ Cf. Darwall & Darwall, *supra* note 45, at 20, 30-37 (criticizing honor for engendering disrespect, revenge, and retaliation and contrasting it with moral respect involved in mutual accountability).

¹¹¹ See MILLER, HUMILIATION, *supra* note 104, at 9 ("Honor is not our official ideology, but its ethic survives in pockets of most all our lives."). See generally KWAME ANTHONY APPIAH, *THE HONOR CODE: HOW MORAL REVOLUTIONS HAPPEN* (2010) (defending centrality of honor to moral theory).

¹¹² See CHARLES TAYLOR, *SOURCES OF THE SELF* 15 (1989) (arguing that regard of others is integral to "our sense of ourselves as commanding (attitudinal) respect"); Jeffrie G. Murphy, *Forgiveness and Resentment*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 25 (1st paperback ed. 1990) ("Most of us tend to care what others (at least *some* others, some significant group whose good opinion we value) think about us Our self-respect is *social* in at least this sense, and it is simply part of the human condition that we are weak and vulnerable in these ways."). Individuals' privacy concerns persist even in an age of digital "exposure": even as people willingly share some of their most intimate information online, they sense that it's being disseminated even more broadly than they wish. See BERNARD E. HARCOURT, *EXPOSED: DESIRE AND DISOBEDIENCE IN THE DIGITAL AGE* 2-3 (2015).

¹¹³ See also *infra* Section III.A.3 and accompanying text (discussing compatibility of social hierarchy and legal equality). By contrast, Professor Scott Hershovitz contends that what I'm calling dignity-as-status has largely superseded notions of honor. See Hershovitz, *Wrongs*,

While granting that a concern with dignity-as-image is in principle compatible with a commitment to dignity-as-status, one might nevertheless deny that the two are equally important. One might, in particular, acknowledge the continued significance of dignity-as-image but strictly prioritize maintaining dignity-as-status in any conflict between the two. This view is not without force, and I can't fully address it here, but I do think that it faces at least two significant difficulties.

First, the two aspects of dignity were inextricably linked historically. Recall that, according to Waldron, dignity originally denoted the high status of the nobility, a status that was subsequently extended to all human beings.¹¹⁴ Privacy, understood as an interest in controlling one's self-presentation and thus avoiding humiliation, appears to have been one important privilege associated with that high status.¹¹⁵ As in ancient Rome, the two may continue to go hand-in-hand.

Second, dignity-as-image seems to be an essential precondition for garnering proper respect for one's dignity-as-status. As Waldron observes, dignity-as-status has "resonances of something like noble bearing."¹¹⁶ It connotes "having a certain sort of presence; uprightness of bearing; self-possession and self-control; self-presentation as someone to be reckoned with; not being abject, pitiable, distressed, or overly submissive in circumstances of adversity."¹¹⁷ One seems to require a significant amount of control over the dissemination of one's personal information in order to construct and maintain the kind of public image befitting a person of high status.

Just as dignity-as-status and dignity-as-image are intertwined as a conceptual matter, so, too, are they linked as a practical matter, through the notion of

supra note 37, at 12-14. I think things are a bit more complicated. Rather than "car[ing] more about dignity than honor," *id.* at 16, I think most people care about both in roughly equal measure. Yet we generally fail to appreciate the extent to which these two concerns can come into conflict. One could attempt to reconcile dignity-as-status and dignity-as-image by defining a polity's citizenry as the relevant "honor group." See Oman, *Honor*, *supra* note 43, at 53-55 (conceptualizing dignity-as-status as form of "horizontal" honor established among peers). The problem with this strategy is that, in seeking to reconcile the two notions of dignity, it risks conflating them.

¹¹⁴ See *supra* notes 70-73 and accompanying text.

¹¹⁵ See Whitman, *Privacy*, *supra* note 72, at 1169 ("[T]he conception of privacy as control over one's public image is a conception originally and primarily concerned with the doings of very high-status persons.").

¹¹⁶ WALDRON, *supra* note 70, at 21.

¹¹⁷ *Id.* at 22; see also TAYLOR, *supra* note 112, at 15-16 ("Our 'dignity' . . . is our sense of ourselves as commanding (attitudinal) respect."); Henry, *supra* note 68, at 215 (arguing that dignity requires degree of both "internal and external respect"); Rosen, *supra* note 70, at 96; Jeremy Waldron, *The Dignity of Old Age* 18-19 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 17-41, 2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3048041 [<https://perma.cc/3WV8-M5Y6>] (identifying as one aspect of dignity having an "honorable self-image").

publicity. As explained earlier, dignity-as-status presupposes a degree of publicity; as an expressive value, it depends on public recognition of, and appropriate respect for, one's high status.¹¹⁸ Yet publicity also risks humiliation, for upon entering the public square, one opens oneself up to the potential revelation of personal information that undercuts one's preferred public image.¹¹⁹ While it's of course true that one constructs one's self-presentation for public consumption, dignity-as-image requires that one be able to keep certain personal information private from certain audiences, which is hardly a guarantee in the kinds of public fora in which one vindicates one's dignity-as-status.¹²⁰ The same conditions that are necessary for the recognition of our dignity-as-status thus make it more difficult to maintain our dignity-as-image.

B. *Humiliation in Civil Litigation*

This last, pragmatic connection between dignity-as-image and dignity-as-status sets the stage for a particularly acute conflict between the two in the context of civil litigation. Even as civil litigation affords plaintiffs numerous opportunities to assert their dignity-as-status by publicly demanding answers from defendants, it can also repeatedly compromise their dignity-as-image by compelling them to reveal personal information that is potentially inconsistent with their self-presentation.¹²¹ A complete dignitarian account of civil procedure

¹¹⁸ See *supra* notes 82-86 and accompanying text; see also Katherine Franke, Response, *Dignifying Rights: A Comment on Jeremy Waldron's Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1177, 1182 (2011) (arguing that dignity "is an intersubjective enterprise," in that "dignity is no dignity at all if it is not respected by others"); cf. Hadfield & Ryan, *supra* note 44, at 87 ("Only in a public forum can one not only see oneself, but also be seen by others, as a person to whom even the powerful must respond.").

¹¹⁹ See *supra* notes 100-06 and accompanying text.

¹²⁰ See *supra* notes 100-06 and accompanying text.

¹²¹ I want to enter a methodological caveat before proceeding further. Although my approach in this Article is primarily theoretical and normative, my argument—particularly in this Section—involves numerous empirical premises regarding plaintiffs' subjective understandings of the litigation process and motivations for engaging in it. There's an extensive social-science literature establishing the *fact* that many individuals with viable legal claims fail to escalate those claims up the "dispute pyramid" to the more formal stages of dispute resolution. For foundational contributions to that literature, see generally William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980); and Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983). And yet, we unfortunately know very little about *how often* individuals choose to "lump" their legally cognizable injuries rather than sue, much less *why* they forbear. See Theodore Eisenberg, *The Need for a National Civil Justice Survey of Incidence and Claiming Behavior*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA, *supra* note 92, at 53. While I cite the available empirical research where relevant, it tends to be only suggestive and impressionistic.

must go beyond the rosy picture painted by the dignitarian turn and take stock of the indignities of civil litigation.¹²²

Notwithstanding the dearth of scholarship on the dignitarian costs of prosecuting a lawsuit,¹²³ we all intuitively appreciate that civil litigation can be profoundly humiliating for plaintiffs. Professor Nora Freeman Engstrom has given particularly eloquent expression to this reality with respect to the prosecution of tort suits:

[T]he process of claim initiation and litigation—with its probing, and sometimes humiliating, discovery into the most private facets of one’s life; its prolonged uncertainty; and its insistent demand that a claimant relive, repeatedly, publicly, and under oath, what she saw, thought, heard, and felt, on what may have been the most searing day of her life—is brutal. The act of claiming, for some, may be cathartic and empowering. But for at least some others, it stands to be positively dreadful—effectively inflicting a second serious injury.¹²⁴

Engstrom identifies two different ways in which civil litigation can be humiliating for plaintiffs, and it’s worth pausing to distinguish them. First, plaintiffs must publicly proclaim themselves to have suffered a legal wrong—to

And insofar as they rest on empirical presuppositions, my theoretical and normative conclusions must be as well.

¹²² Although my focus remains on individual plaintiffs, scholars have noted reasons for business-entity plaintiffs to avoid the publicity associated with prosecuting a lawsuit, especially the potential revelation of trade secrets. *See generally, e.g.*, Omri Ben-Shahar & Lisa Bernstein, Essay, *The Secrecy Interest in Contract Law*, 109 YALE L.J. 1885 (2000). On the other hand, business-entity plaintiffs sometimes pursue litigation precisely because of its publicity, as a way of *enhancing* their reputations. *See generally* Kishanthi Parella, *Public Relations Litigation*, 72 VAND. L. REV. 1285 (2019).

¹²³ There is an extensive literature on the myriad psychological costs of prosecuting certain kinds of lawsuits. For a recent overview, see generally Michaela Keet, Heather Heavin & Shawna Sparrow, *Anticipating and Managing the Psychological Cost of Civil Litigation*, 34 WINDSOR Y.B. ACCESS TO JUST., no. 2, 2017, at 73. Civil procedure scholars, however, have paid much less attention to the theoretical implications of these costs.

¹²⁴ Nora Freeman Engstrom, *ISO the Missing Plaintiff*, JOTWELL (Apr. 12, 2017), <https://torts.jotwell.com/iso-the-missing-plaintiff> [<https://perma.cc/HZ83-3WR4>]; *see also* Herstein, *supra* note 43, at 102 (“For many tort victims, the path that the law of tort charts for obtaining a remedy is long, discouraging, expensive, confusing, daunting, and emotionally and financially taxing. . . . [A]t times, private litigation may do more to debilitate, cripple, and deplete the energies and resources of victims than it does to empower them.”). For an especially candid acknowledgement by a federal judge of the many drawbacks of civil litigation for plaintiffs, see Benjamin Weiser, *Judge in 9/11 Suits Feels No Regret that None Ever Went to Trial*, N.Y. TIMES, Sept. 9, 2016, at A15 (interviewing U.S. District Judge Alvin K. Hellerstein, who has “long believed that courts [are] not the best venue for civil litigants to seek answers”).

be victims¹²⁵—and then repeatedly recount the details of their victimization in public filings, in deposition testimony, and (in rare cases) in open court.¹²⁶ Depending on the nature of their legal claims, plaintiffs may find the experience of having to publicly describe their legal injuries over and over again to be humiliating.¹²⁷ Second, defendants can use discovery to probe deep into plaintiffs' lives, with much of the uncovered information eventually becoming part of the public record.¹²⁸ Notwithstanding the differences between these two modes of humiliation in civil litigation, however, each involves the revelation of plaintiffs' personal information—whether facts about their victimization or details about other parts of their lives—that potentially conflicts with their preferred self-presentation.¹²⁹ Each thus threatens to compromise plaintiffs' dignity-as-image.

The specific procedures by which plaintiffs can be humiliated during civil litigation are familiar. But what's particularly noteworthy in light of the dignitarian turn is that they are the very same procedures that enable plaintiffs to demand answers from defendants—to call them to account. From a dignitarian perspective, each procedure of civil litigation proves to be a double-edged sword for plaintiffs, empowering them to assert their dignity-as-status while threatening to compromise their dignity-as-image.¹³⁰

This duality is present from the very first filing in any lawsuit, and indeed from the top of its very first page. To initiate a lawsuit and make an initial demand for an explanation from a defendant, plaintiffs must file a complaint with the court.¹³¹ Like any other pleading, the complaint must include a caption

¹²⁵ See Resnik, *Access*, *supra* note 11, at 645 (“Taking steps to identify oneself as harmed . . . [is] requisite to seeking redress . . .”).

¹²⁶ There is some empirical evidence suggesting that the “victim” label implicit in filing a lawsuit deters certain individuals from asserting their legal rights through civil litigation. See, e.g., Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421, 433-35 (1987) (describing reluctance of victims of discrimination to see themselves, and be seen by others, as such).

¹²⁷ See RIPSTEIN, *supra* note 43, at 15 (“Perhaps you are too embarrassed to come forward with your grievance—you don’t want to admit you were *there*, or that you fell for *that* . . .”).

¹²⁸ See *infra* notes 134-35.

¹²⁹ In both of these ways, civil litigation forces plaintiffs into a form of what Professor Jonathan Wolff has called “shameful revelation,” which occurs when “people are required, for whatever reason, to do things, or reveal things about themselves, that they find shameful” (or, in this Article’s terminology, humiliating). Jonathan Wolff, *Fairness, Respect, and the Egalitarian Ethos*, 27 PHIL. & PUB. AFF. 97, 109 (1998); see *id.* at 113-14 (showing how claimants of public welfare benefits must engage in shameful revelation).

¹³⁰ Cf. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 25-34 (1979) (arguing that due process protections can protract adjudication processes that criminal defendants charged with misdemeanors and low-level felonies fear even more than formal punishment).

¹³¹ FED. R. CIV. P. 3.

naming all of the parties, including the plaintiff.¹³² So plaintiffs must begin their lawsuits by putting their names to the left of the “v,” publicly proclaiming themselves to have been the victims of a legal wrong. In the body of the complaint, they must recount the facts of their victimization in sufficient detail to satisfy the general pleading standard.¹³³ The entire complaint, from caption to prayer for relief, must be filed with the court and entered on its docket, thereby becoming part of the public record.¹³⁴ Some of a plaintiff’s personal information will be automatically redacted from the publicly available version of the complaint, though generally only information that could facilitate identity theft, such as birthdates and social security numbers;¹³⁵ plaintiffs typically can’t expurgate other kinds of sensitive information, such as embarrassing details of their injuries. And while members of the public once had to scour physical court records in order to uncover the details of a lawsuit, many courts now post complaints on their public websites for all to see.¹³⁶ Simply by filing a complaint, then, plaintiffs expose themselves to a significant amount of public scrutiny. Assuming that many plaintiffs don’t wish to be seen as victims or to have all the facts underlying their legal claims revealed to perfect strangers, such scrutiny will inevitably undermine their preferred public image.

If their complaint withstands the defendant’s motion to dismiss, plaintiffs will then be able to use the tools of discovery to uncover information about the defendant—but only to have the defendant use those same tools to uncover information about them. And the discovery process can be very intrusive indeed. As a prominent federal judge once observed, the federal discovery rules confer

¹³² FED. R. CIV. P. 10(a).

¹³³ FED. R. CIV. P. 8(a).

¹³⁴ FED. R. CIV. P. 5(d), 79(a).

¹³⁵ FED. R. CIV. P. 5.2.

¹³⁶ See David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385, 1397 [hereinafter Ardia, *Privacy*] (noting that federal and many state courts provide online access to public that provides “party names, case type, keywords, and other information and typically also provides case-by-case browsing”); Karen Eltis, *The Judicial System in the Digital Age: Revisiting the Relationship Between Privacy and Accessibility in the Cyber Context*, 56 MCGILL L.J. 289, 311-15 (2011) (highlighting issues of technology and privacy in judicial system); Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 484-86 (2009) (considering implications of Public Access to Court Electronic Records (“PACER”) for public access to court system); Jodi Kantor, *Lawsuits’ Lurid Details Draw an Online Crowd*, N.Y. TIMES, Feb. 23, 2015, at A1 (“Lawsuit papers are generally public, but before the advent of electronic filing, most of them remained stuffed inside folders and filing cabinets at courthouses.”). See generally Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CALIF. L. REV. 1 (2013) (advocating some mandated obscurity in public court filings to protect litigant privacy); Helen Nissenbaum, *Protecting Privacy in an Information Age: The Problem of Privacy in Public*, 17 LAW & PHIL. 559 (1998) (arguing “that privacy in public . . . is a genuine privacy interest that is worthy of study as well as protection”).

on litigants “the power for the most massive invasion into private papers and private information.”¹³⁷ Just how “massive” that “invasion” of privacy will be is largely in the hands of the parties themselves: within very wide limits, the parties get to decide which documents to demand from each other,¹³⁸ as well as which questions to ask each other in depositions¹³⁹ and written interrogatories.¹⁴⁰ All of these tools for eliciting information are governed by a capacious “relevant” and “proportional” standard,¹⁴¹ with the result that the parties can end up being compelled to disclose information well beyond what can ultimately be admitted as evidence at trial.¹⁴² Even as plaintiffs can use this broad discovery to force defendants to provide explanations for their injuries, so, too, can defendants use it to uncover sensitive details of plaintiffs’ personal lives.¹⁴³ Plaintiffs can seek a protective order to either withhold a particular piece of information or at least limit the number of people who can view it,¹⁴⁴ but judges enjoy broad discretion in deciding whether to grant protective orders, and many plaintiffs will end up having to reveal at least some information they’d rather not share. Plaintiffs will thus find it difficult to preserve their dignity-as-image during the discovery process—to maintain unscathed the public image they had constructed before filing their lawsuit.

Finally, plaintiffs can make public much of the information they manage to extract during discovery from defendants. The corollary to this, of course, is that defendants can likewise make public much of the information they manage to extract from plaintiffs. Some courts hold that all information exchanged during discovery is presumptively available to the public, though that position is controversial.¹⁴⁵ At the very least, when parties move for summary judgment,

¹³⁷ Simon H. Rifkind, *Are We Asking Too Much of Our Courts?*, 15 JUDGES J. 43, 49 (1976); cf. KUO-CHANG HUANG, INTRODUCING DISCOVERY INTO CIVIL LAW 40-42 (2003) (contrasting expansive discovery permitted by American civil procedure with privacy concerns that limit discovery in Continental European legal systems); Whitman, *Privacy*, *supra* note 72, at 1157 & n.27 (drawing similar contrast).

¹³⁸ See FED. R. CIV. P. 26(b), 34.

¹³⁹ See FED. R. CIV. P. 30-31.

¹⁴⁰ See FED. R. CIV. P. 33.

¹⁴¹ FED. R. CIV. P. 26(b)(1).

¹⁴² *Id.* (“Information within this scope of discovery need not be admissible in evidence to be discoverable.”).

¹⁴³ And with a court order, they can go even further, obtaining physical and mental examinations of the plaintiff. FED. R. CIV. P. 35.

¹⁴⁴ FED. R. CIV. P. 26(c) (“The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”); see also *infra* Section II.C.1 (analyzing various privacy-protecting devices in civil litigation, including protective orders).

¹⁴⁵ Compare Marcus, *Modest Proposal*, *supra* note 9, at 331 (criticizing courts that take this position), with Resnik, *Access*, *supra* note 11, at 631 (lamenting that “[d]iscovery materials are no longer routinely filed in courts unless appended to motions”).

they must cite the relevant discovery materials in support of their motion,¹⁴⁶ and any discovery that is so “used in the proceeding” must be filed with the court.¹⁴⁷ If the case proceeds to trial, deposition testimony can sometimes be introduced as evidence, consistent with the Federal Rules of Evidence,¹⁴⁸ and the trial proceedings themselves are generally on the record and open to the public.¹⁴⁹ In proceeding with their lawsuits beyond the discovery stage, plaintiffs gain a forum in which to publicize the answers defendants have already given and potentially to elicit additional ones in open court. But they thereby cede to defendants a significant amount of control over how much of their personal information becomes public, and thus over the content of their self-presentation.

One might deny that any of the foregoing aspects of civil litigation can actually compromise plaintiffs’ dignity-as-image. The objection runs as follows: On the account given in the previous Section, one enjoys dignity-as-image insofar as one has enough control over one’s personal information to be able to shape one’s self-presentation. Although plaintiffs may not be able to control how much of their personal information is exposed during civil litigation, they deliberately *choose* to file and proceed with a lawsuit and thus willingly relinquish that control. Put another way, plaintiffs exercise a kind of second-order control over their personal information during civil litigation, deciding not whether any specific piece of information will be shared with the defendant or made public, but whether they’ll accept civil procedure’s liberal terms for the exchange of information during a lawsuit. Because plaintiffs, unlike defendants, accede to the public scrutiny that attends the prosecution of a lawsuit, they can’t be said to suffer any injury to their dignity-as-image when they’re required to turn over and make public personal information they’d rather not share.

This objection ultimately rests on an empirical premise regarding plaintiffs’ subjective understandings of the civil litigation process. Only if plaintiffs fully appreciate the extent to which they’ll be subject to scrutiny during civil litigation can they really be said to have *chosen* to relinquish control over their personal information by filing suit, and thus to have maintained their dignity-as-image notwithstanding any subsequent intrusions into their privacy.¹⁵⁰ At least some plaintiffs appear to make that deliberate calculus—or so we can infer from

¹⁴⁶ FED. R. CIV. P. 56(c).

¹⁴⁷ FED. R. CIV. P. 5(d)(1).

¹⁴⁸ FED. R. CIV. P. 32.

¹⁴⁹ FED. R. CIV. P. 43(a) (requiring witness testimony to be taken in “open court” except in limited circumstances); *see infra* note 178 and accompanying text (discussing constitutional right of public access to criminal and civil trials).

¹⁵⁰ *Cf.* Benedict Rumbold & James Wilson, *Privacy Rights and Public Information*, 27 J. POL. PHIL. 3, 6 (2019) (arguing that individuals cannot waive their right to privacy unintentionally and that personal information can therefore remain protected by that right even after it becomes public).

anecdotal evidence that many victims of rights violations generally,¹⁵¹ and of dignitarian harms particularly,¹⁵² forgo litigation precisely because they're acutely aware of the scrutiny they'll receive if they sue.¹⁵³ Given such "underclaiming," it seems likely that some of the victims who *do* decide to sue grasp litigation's dignitarian downsides.¹⁵⁴ We might also expect lawyers, in discharging their ethical duty of communication,¹⁵⁵ to apprise their clients of the various risks associated with litigation, including the dignitarian risks.¹⁵⁶

And yet, while the question merits empirical study, it seems unlikely that most plaintiffs know exactly what they're getting into when they file a lawsuit.¹⁵⁷ Few probably realize that their complaint, with all of its factual allegations, will be made available to the public on the court's docket and perhaps even its website. Even fewer probably appreciate the full breadth of the federal discovery rules, with their potential to license investigation into matters that have little to do with the case at hand.¹⁵⁸ In this respect, civil litigation likely resembles other contexts commonly thought to raise privacy concerns. Consumers "choose," for example, to buy products from websites, but few grasp the extent to which their purchase

¹⁵¹ See sources cited *supra* note 121 (citing literature establishing that many individuals with viable legal claims fail to escalate those claims to more formal stages of dispute resolution).

¹⁵² See Bumiller, *supra* note 126, at 433-35 (describing discrimination victims' reluctance to formally invoke protection of antidiscrimination laws and be labeled as victims).

¹⁵³ See, e.g., Cleve R. Wootson, Jr., "Broken" Parents Won't Sue Disney over the Alligator Attack that Left Their Toddler Dead, WASH. POST (July 20, 2016, 12:10 PM), <https://www.washingtonpost.com/news/post-nation/wp/2016/07/20/broken-parents-wont-sue-disney-over-the-alligator-attack-that-left-their-toddler-dead/>. See generally Engstrom, *supra* note 124 (speculating that public nature of civil litigation prompts many victims of legal wrongs not to sue).

¹⁵⁴ It is, however, difficult to disentangle privacy concerns from the many other disincentives to filing a lawsuit.

¹⁵⁵ See MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2016) (requiring lawyers to keep their clients "reasonably informed about the status of the matter").

¹⁵⁶ Of course, many plaintiffs proceed pro se. And even when a plaintiff does have counsel, her relationship with her lawyer may be so plagued by mistrust as to prevent a candid discussion of the realities of litigation. See, e.g., AUSTIN SARAT & WILLIAM L.F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS 50-52 (1995) (detailing such dynamics in divorce context).

¹⁵⁷ Cf. Patricia A. Norberg, Daniel R. Horne & David A. Horne, *The Privacy Paradox: Personal Information Disclosure Intentions Versus Behaviors*, 41 J. CONSUMER AFF. 100, 100, 102 (2007) (describing "privacy paradox," whereby individuals end up revealing more personal information in various public contexts than they intended).

¹⁵⁸ These suppositions accord with more general empirical findings suggesting that litigants tend to adapt their procedural preferences as they "become more knowledgeable about the legal system as their cases progress." Donna Shestowsky, *Inside the Mind of the Client: An Analysis of Litigants' Decision Criteria for Choosing Procedures*, 36 CONFLICT RESOL. Q. 69, 81 (2018).

histories will be shared with other entities, and it would take a thin conception of consent indeed to maintain that they nonetheless acquiesce to the dissemination of that information simply by opting to shop online.¹⁵⁹ We likewise shouldn't presume that plaintiffs consent to probing discovery and broad publicity absent compelling evidence that they're cognizant of the potential indignities of civil litigation when they decide to file suit.

Another objection insists that at least some plaintiffs don't merely tolerate the public exposure that comes with prosecuting a lawsuit but eagerly embrace it. On this view, at least some victims of legal wrongs seek to use civil litigation to call attention to their injuries and to thereby *reclaim* control over their self-presentation.¹⁶⁰ Rather than risk being perceived as passive bystanders subject to the whims of others, they want to be seen as full agents who stand up for themselves and their rights. Suing those who have wronged them is one of the most significant (legal) ways of projecting such an image. And whereas some people might find the public scrutiny during civil litigation humiliating, such plaintiffs find it empowering. Far from undermining plaintiffs' dignity-as-image, this objection suggests, civil litigation can promote it.¹⁶¹

Some plaintiffs may indeed approach their lawsuits with this mindset, but for many, it seems more aspirational than descriptive. While plaintiffs perhaps should be encouraged to view all the public exposure during civil litigation as empowering, many will nevertheless experience it as humiliating. That will be especially true once they find themselves in the midst of discovery—however sanguine they may have been when filing their complaints. For one thing, psychological research suggests that having to repeatedly recount one's injuries (physical or emotional) can actually prove discouraging, by preventing one from “hedonically” adapting to one's new circumstances.¹⁶² For another, though

¹⁵⁹ See generally OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* 5-11 (2014) (arguing that, notwithstanding their seeming allure, mandated disclosures are difficult for individuals to understand).

¹⁶⁰ See, e.g., Bender, *Tort Law's Role*, *supra* note 44, at 259.

¹⁶¹ See, e.g., Leslie Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 862 [hereinafter Bender, *Feminist (Re)Torts*] (“Only in the courtroom do we acknowledge and reinstate the dignity, respect, and autonomy of the injured victims in a public way.”); Bender, *Tort Law's Role*, *supra* note 44, at 259 (“Tort law is potentially an empowering medium for those injured, and it will be especially empowering for victims of social injustice and dignitary harms.”); cf. Ronen Perry, *Empowerment and Tort Law*, 76 TENN. L. REV. 959, 964 (2009) (offering more general empowerment-based defense of tort law); Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076, 3092-102 (2014) (describing ways in which civil-rights trials allow victims to call attention to humiliation they experience in society).

¹⁶² See Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 785 (2007) (explaining that personal injury plaintiff's testimony regarding her negative feelings can “delay or derail [her] ultimate ability to adapt to [her] new condition”); Benedict Carey, *In Tension of Testimony About Doctor's Abuses, a*

plaintiffs may feel empowered when initiating an action, they will quickly come to realize that they enjoy significantly less control over the course of their lawsuits than they might have supposed. Defendants, after all, have at least as much say as plaintiffs themselves over how much of plaintiffs' personal information comes out during discovery and becomes part of the public record in the case. So even if some plaintiffs turn to civil litigation as a public forum in which to overcome their injuries and construct a new self-presentation, there's good reason to think that they'll still be compelled to reveal at least some personal information they'd rather not share and thus suffer at least some harm to their dignity-as-image.

Some might also object that the privacy interests comprehended by dignity-as-image are a concern of only the wealthy and other powerful members of society and not of socioeconomically disadvantaged individuals.¹⁶³ Although empirical research does tend to suggest that socioeconomically disadvantaged individuals are less concerned about their privacy, that could have less to do with their true preferences than with the fact that the state systematically erodes their expectations of privacy by intrusively regulating their lives and denigrating their privacy rights when they try to assert them.¹⁶⁴ It seems we should hesitate before dismissing the privacy interests of entire social groups when the groups' members have formed their expectations of privacy in unjust circumstances.

Notwithstanding my responses to the foregoing objections, it remains the case that, as with the dignity-affirming effects of civil litigation,¹⁶⁵ the strength of the dignity-compromising ones will vary from lawsuit to lawsuit, depending on the nature of the legal claims and various other factors. Civil litigation will, for instance, prove most humiliating for plaintiffs prosecuting dignitarian claims, such as sexual assault and defamation, since such claims require the revelation of especially sensitive personal information. But of course, those are the very same kinds of cases that are likely to prove the most empowering, since they most obviously implicate the plaintiff's standing in society and thus convey the strongest dignitarian social meaning. It's precisely when weaker parties are

Potential for Catharsis, N.Y. TIMES, Jan. 26, 2018, at A14 (reviewing conflicting evidence on psychological effects of narrative).

¹⁶³ Cf., e.g., Michele Gilman & Rebecca Green, *The Surveillance Gap: The Harms of Extreme Privacy and Data Marginalization*, 42 N.Y.U. REV. L. & SOC. CHANGE 253, 281-82 (2018) (arguing that privacy law originally developed to benefit the wealthy).

¹⁶⁴ See, e.g., KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 34 (2017) (criticizing public welfare programs for intruding into lives of poor mothers and violating their privacy rights, which were never respected in the first place); Gilman & Green, *supra* note 163, at 255 (arguing that members of marginalized communities simultaneously are subjected to increased governmental surveillance yet also fall into "surveillance gap"); Scott Skinner-Thompson, *Privacy's Double Standards*, 93 WASH. L. REV. 2051, 2056 (2018) (arguing that privacy tort plaintiffs from marginalized communities face higher burdens than privileged plaintiffs such as celebrities).

¹⁶⁵ See *supra* Section I.B.

calling stronger parties to account that the weaker parties run the greatest risk of having their lower status emphasized, and thus their self-presentation undermined.

What's more, given the breadth of discovery, plaintiffs' dignity-as-image will likely be compromised even in cases without an obvious dignitarian valence. Consider employment-discrimination and products-liability cases. When an employee sues her employer for discrimination, the employer's response will be predictable: the employer will contend that it fired the employee not because of some protected trait, but because she did her job poorly. And to substantiate that latter claim, the employer will use the discovery process to uncover information that portrays the employee unfavorably—from her job performance to her computer use to her activities during breaks and even to aspects of her personal life.¹⁶⁶ Similarly, when a consumer sues a manufacturer for making a defective product, the manufacturer will attempt to show that the consumer failed to use the product properly or that some other conduct or preexisting condition contributed to her injuries—defenses that will tend to damage the consumer's public image.¹⁶⁷ The indignities of civil litigation thus loom over many kinds of lawsuits.

C. *Dignity-Dignity Conflicts in Civil Procedure*

Appreciating the indignities of civil litigation complicates the dignitarian turn in recent access-to-justice scholarship. We can now see that the dignitarian turn presents an incomplete dignitarian account of civil litigation, focusing myopically on only one aspect of plaintiffs' dignity: dignity-as-status. In fact, dignity is a multifaceted concept, and another important facet—dignity-as-image—can directly conflict with dignity-as-status at nearly every stage of civil litigation. This isn't to say that we should stop invoking dignity to defend the value of civil litigation; a concept with conflicting elements isn't necessarily incoherent. But it is to suggest that any such defense will end up being much more complex than proponents of the dignitarian turn seem to think.¹⁶⁸

¹⁶⁶ See, e.g., Patrick Dorrian, *MGM Grand Worker Must Fork Over Facebook, Other Social Media*, BLOOMBERG LAW (Jan. 18, 2019, 10:38 AM), <https://www.bloomberglaw.com/product/blaw/document/X37S0TQ0000000> (discussing employee suit under Family and Medical Leave Act and Americans with Disabilities Act).

¹⁶⁷ The same goes for fraud cases: to prove that one was defrauded, one will typically have to present oneself as a dupe, hardly one's desired self-presentation. See, e.g., John Gapper, *The Ship Tycoon, the Con Men and a €100m Scam*, FIN. TIMES (June 28, 2018), <https://www.ft.com/content/d4bc5a02-7995-11e8-bc55-50daf1b720d> ("He was not alone in being made to look stupid. The judge in the civil case he brought against Sultana called two Allseas executives who dealt with the fraudsters 'unbelievably inept and naïve.' Yet Heerema defied humiliation and set out to get his money back and to trap those who fooled him.").

¹⁶⁸ Indeed, the complexity exists even before considering dignity-as-image, for civil litigation can compromise plaintiffs' dignity-as-status as well as affirm it. For one thing, the kinds of formalized procedures that plaintiffs must invoke to demand answers from

That complexity extends from the level of normative foundations to the level of doctrinal prescriptions. Most obviously, the indignities of civil litigation should prompt us to question access-to-justice scholars' nearly unqualified support for greater publicity, and unqualified opposition to greater secrecy, in civil procedure.¹⁶⁹ To be sure, access-to-justice scholars, including proponents of the dignitarian turn, occasionally acknowledge the dignitarian costs of prosecuting a lawsuit, albeit only in passing.¹⁷⁰ Rather than temper their criticisms of procedural secrecy, however, they tend to argue that plaintiffs simply must bear those costs for the sake of various systemic benefits associated with publicity in civil litigation.¹⁷¹ This response basically elides the conflict

defendants can themselves prove alienating and even humiliating, particularly for the members of marginalized and subordinated social groups. *Cf., e.g.,* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 5 (1990) (exploring similar concerns in context of administrative hearings regarding government benefits). For another, courts can make mistakes, which creates the risk that plaintiffs' demands for answers will be wrongly rebuffed, and even that their accounts of their injuries will be erroneously discounted or discredited. It might be its own kind of indignity, distinct from the humiliation considered in the previous two Sections, to be told (let alone in a public forum) that you were not in fact wronged, and even that you yourself are to blame for your injuries. *Cf.* EMILY M. CALHOUN, *LOSING TWICE: HARMS OF INDIFFERENCE IN THE SUPREME COURT* 8 (2011) (arguing that Supreme Court has obligation to avoid harming "constitutional losers" and duty to mitigate unavoidable harms inflicted by defeat).

These are serious concerns, but they strike me as to some extent inevitable costs of a system that balances plaintiffs' interests in holding defendants accountable with defendants' interests in not being subjected to specious allegations. In any event, because this Article seeks to ground the dignitarian turn in policy debates about procedural publicity and secrecy, I focus on the conflict between dignity-as-status and dignity-as-image, though I do also consider the potential for recent developments in pleading doctrine to undermine plaintiffs' dignity-as-status. *See infra* Section II.C.2.

¹⁶⁹ *See, e.g.,* Resnik, *Access*, *supra* note 11, at 611 (seeking to "generat[e] practices and constitutional doctrine insistent on making dispute resolution processes and outcomes open to the public"); *see also supra* notes 7-11 and accompanying text (citing access-to-justice scholars who advocate greater transparency in litigation, arbitration, and settlement).

¹⁷⁰ *See, e.g.,* Lahav, *Roles of Litigation*, *supra* note 7, at 1659 (conceding, parenthetically, that "the process of litigation" is "often ugly, ungainly, messy, and expensive"); *id.* at 1664-67 (acknowledging "costs of litigation" but without mentioning any dignitarian costs); Resnik, *Courts*, *supra* note 27, at 808 ("The immediate participants in a dispute may find the exposure to the public disquieting. Even the disclosure of accurate information can be uncomfortable."). For similarly perfunctory statements by civil recourse theorists, *see, for example,* GOLDBERG & ZIPURSKY, *supra* note 67, at 53; Hershovitz, *Wrongs*, *supra* note 37, at 41; and Oman, *Honor*, *supra* note 43, at 70.

¹⁷¹ *See, e.g.,* LAHAV, *IN PRAISE OF LITIGATION*, *supra* note 3, at 20 ("Filing a lawsuit can impose a stigma on the plaintiff, who is exposed to extreme scrutiny in the course of the lawsuit. . . . This is an unavoidable cost . . . [T]he requirement that both parties prove their case requires that each of them be exposed, answer difficult questions, and reveal information

between plaintiffs' dignity-as-status and their dignity-as-image by giving the latter short shrift.

After demonstrating how that conflict plays out with respect to various procedural rules and doctrines that allow parties to protect their privacy during civil litigation, this Section considers several additional doctrinal issues in civil procedure that aren't directly concerned with privacy or secrecy but nonetheless might implicate plaintiffs' dignity-as-status and dignity-as-image. Exactly how each issue affects each aspect of plaintiffs' dignity isn't a straightforward question. I don't attempt a definitive analysis here but seek merely to illustrate how each issue may require plaintiffs to trade off one aspect of their dignity against another. The important point is that civil procedure scholars, by implicitly invoking the concept of dignity to defend broad access to justice, introduce a tension into their general account of civil procedure while at the very least complicating some of their positions on specific doctrinal questions.

1. Secrecy in Civil Litigation

The public nature of civil litigation creates a direct dignity-dignity conflict, which puts pressure on access-to-justice scholars' opposition to the widespread use of procedural devices that allow litigants to keep information secret. On the one hand, while access-to-justice scholars defend publicity primarily on various consequentialist grounds, plaintiffs also require a degree of publicity in order to assert their dignity-as-status by calling defendants to account. On the other hand, although access-to-justice scholars focus most of their criticism on the use of civil procedure's privacy protections by defendants, those protections are equally available to plaintiffs, and plaintiffs can use them to maintain control over their self-presentation and thus to preserve their dignity-as-image.

Though fairly straightforward, this conflict between plaintiffs' dignity-as-status and dignity-as-image plays out in slightly different ways with respect to different kinds of privacy protections in civil litigation. We can distinguish those protections along two dimensions: First, the protections differ in terms of the *audience* whose access to information they limit, allowing parties to withhold information from just the public or from the other party to the lawsuit as well. Second, they also differ in terms of the *method* they use to protect a party's

that they prefer to keep hidden.”). And that’s when these scholars even confront the problem of personal privacy, as opposed to bracketing it altogether. *See, e.g.,* Resnik, *Access*, *supra* note 11, at 606 (“My focus is on the problem of institutional privatization, as contrasted with questions of individuals’ personal privacy.”). To be sure, in more recent work, Professor Judith Resnik has nodded to widespread concerns about personal privacy, particularly as reflected in the decision of the Court of Justice of the European Union recognizing a “right to be forgotten.” *See* Judith Resnik, *The Functions of Publicity and of Privatization in Courts and Their Replacements (from Jeremy Bentham to #MeToo and Google Spain)*, in OPEN JUSTICE: THE ROLE OF COURTS IN A DEMOCRATIC SOCIETY 177 (Burkhard Hess & Ana Koprivica Harvey eds., 2019). But her work continues to evince an intense skepticism of secrecy in civil litigation, and to my knowledge, she has yet to endorse any policy proposal that would significantly compromise the publicity of adjudicative processes.

privacy, either suppressing the information at issue altogether or permitting the dissemination of the information but obscuring the party's connection to it. These distinctions yield four possible types of privacy protections in civil litigation—public/suppress, other party/suppress, public/obscure, and other party/obscure—which are represented in the following table:

Table 1. Privacy Protections in Civil Litigation.

Methods	Audience	
	Public	Other Party
Suppress	Sealed filings, qualified protective orders, confidential settlements, courtroom closures	Absolute protective orders, evidentiary privileges
Obscure	Pseudonymous filings	—

The southeast quadrant (other party/obscure) remains empty because here I'm considering only procedural devices that allow the *parties* to a lawsuit (and particularly plaintiffs) to protect their own privacy. Although it's possible to imagine procedural devices that allow *nonparties* to obscure their connection to particular information from the view of the parties to a lawsuit as well as the public (by, say, anonymizing data for which they've been subpoenaed),¹⁷² such a strategy is generally unavailable to the parties themselves, who must typically disclose their identities to each other, if not the public.

I'll now consider the three other kinds of privacy protections in civil litigation, showing how each implicates the conflict between plaintiffs' dignity-as-status and dignity-as-image.

Public/Suppress. Most privacy-protecting devices in civil litigation allow a party to a lawsuit to withhold some of his or her personal information from the public but not from the other party. Parties may, for instance, seek court permission to make a filing either completely under seal¹⁷³ or with some of the information in it redacted from the publicly available version.¹⁷⁴ During discovery, a party may request what I'll call a *qualified* protective order—that is, a protective order that permits the requested discovery but limits who may see the disclosed information.¹⁷⁵ The parties may, with the court's acquiescence,

¹⁷² For an argument that the current discovery rules inadequately protect the privacy of nonparties whose information is the subject of discovery, see Babette Boliek, *Prioritizing Privacy in the Courts and Beyond*, 103 CORNELL L. REV. 1101, 1101 (2018).

¹⁷³ FED. R. CIV. P. 5.2(d).

¹⁷⁴ FED. R. CIV. P. 5.2(e)(1).

¹⁷⁵ FED. R. CIV. P. 26(c)(1)(E) (“[D]esignating the persons who may be present while the discovery is conducted”); FED. R. CIV. P. 26(c)(1)(F) (“[R]equiring that a deposition be sealed and opened only on court order”); FED. R. CIV. P. 26(c)(1)(H) (“[R]equiring that

also agree to keep certain information exchanged during discovery confidential.¹⁷⁶ If the parties decide to settle their dispute, they may opt to keep the terms of their settlement—along with any details of the dispute that have not already become public—secret, by including a confidentiality clause in the agreement.¹⁷⁷ Finally, if the case proceeds to trial, the court may in certain circumstances close the courtroom to the public for portions of the proceedings.¹⁷⁸

Some access-to-justice scholars have recently criticized what they see as the overuse of these privacy-protecting mechanisms, particularly by defendants—but without fully acknowledging the benefits such mechanisms potentially hold for plaintiffs. These scholars worry that defendants too often use protective orders¹⁷⁹ and confidentiality clauses in settlement agreements¹⁸⁰ to withhold information about their wrongdoing from the public, thus hindering the public's ability to hold them fully accountable and to deter future misconduct.¹⁸¹ These

the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.”).

¹⁷⁶ See FED. R. CIV. P. 29(b); Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 WASH. & LEE L. REV. 2181, 2189-92 (2014).

¹⁷⁷ See generally Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999).

¹⁷⁸ FED. R. CIV. P. 43(a). The Supreme Court has held that the Constitution guarantees a right of public access to various *criminal* trial proceedings. See *Presley v. Georgia*, 558 U.S. 209, 209 (2010) (per curiam); *Press-Enter. Co. v. Superior Court (Press II)*, 478 U.S. 1, 2 (1986); *Waller v. Georgia*, 467 U.S. 39, 39 (1984); *Press-Enter. Co. v. Superior Court (Press I)*, 464 U.S. 501, 501-02 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 555 (1980). Every U.S. Court of Appeals to have considered the question has extended that right to *civil* trials. See *Del. Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 514 (3d Cir. 2013) (collecting cases). The right of public access may be abridged only to serve a compelling governmental interest. See *Press II*, 478 U.S. at 9.

¹⁷⁹ See *supra* note 9 and accompanying text. Compare FED. R. CIV. P. 26(c)(1) (requiring party to demonstrate only “good cause” to obtain protective order), with Lahav, *Roles of Litigation*, *supra* note 7, at 1688 (acknowledging that “embarrassing information may warrant protection” but insisting on “compelling” showing).

¹⁸⁰ See *supra* note 10 and accompanying text. For example, Lahav concedes that “[o]f course there are benefits to secret settlements, as well as costs,” but she then identifies as the possible benefits only the facts that (1) “[p]laintiffs may obtain a higher recovery in exchange for secrecy,” (2) “defendants may be able to protect themselves from further liability,” and (3) requiring publicity might “exacerbate” the tendency of cases involving sensitive information to “settle before filing . . . without all the information necessary to a fully informed decision.” Lahav, *Roles of Litigation*, *supra* note 7, at 1689. She then criticizes the current approach for “underestimating the importance of the process of litigation for forcing information.” *Id.*

¹⁸¹ For recent examples of questionable invocations of the privacy-protecting mechanisms by corporate defendants, see Michelle Conlin, Dan Levine & Lisa Girion, *Why Big Business Can Count on Courts to Keep Its Deadly Secrets*, REUTERS (Dec. 19, 2019, 12:00 PM),

scholars likewise support the strict constitutional standard for limiting public access to civil trial proceedings, largely on the ground that public court proceedings provide an important opportunity for ordinary citizens to monitor the workings of their government.¹⁸²

The dignitarian turn unsettles this general skepticism toward secrecy in civil litigation, inviting us to consider the various privacy-protecting mechanisms from the plaintiff's perspective. To be sure, plaintiffs who seek a qualified protective order, agree to a confidentiality provision in a settlement, or testify in a closed courtroom are potentially making it more difficult to reassert their dignity-as-status. The information they're attempting to withhold from the public is presumably germane to their legal claims; that's why the defendant still gets to see it. By limiting the public's access to that information, plaintiffs obscure some of the factual bases for demanding answers from the defendant, and thus somewhat dampen the expressive effects of their lawsuit.¹⁸³ At the same time, however, each of those mechanisms can allow plaintiffs to preserve their dignity-as-image. Plaintiffs can use qualified protective orders to suppress information they want to use to make their case against the defendant but fear might undermine their self-presentation if it became public. They similarly might accept a confidentiality clause in a settlement agreement because it keeps private some of the underlying facts in the dispute that might cast them in an unfavorable light.¹⁸⁴ For plaintiffs, each privacy-protecting mechanism presents a complex trade-off between two different aspects of their dignity.

Other Party/Suppress. The dignity-dignity conflict is less acute when it comes to the strongest kinds of privacy protections in civil procedure: those that allow a party to completely withhold certain information from both the public and the

<https://www.reuters.com/investigates/special-report/usa-courts-secrecy-lobbyist/>. Other scholars, approaching the issue from a law-and-economics perspective, have argued that confidential settlements can actually *promote* accountability and deterrence. *See, e.g.,* Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 314-21 (2018). *But see* David A. Hoffman & Erik Lampann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 171-89 (2019) (arguing that “public costs” of confidential settlements in sexual harassment cases often outweigh any benefits).

¹⁸² *See* Resnik, *Fairness in Numbers*, *supra* note 63, at 87, 91-92; *see also, e.g.,* David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 900 (2017) [hereinafter Ardia, *Court Transparency*] (“Public access to the courts is essential if the public is to understand the contours and operation of their government.”).

¹⁸³ *Cf.* Hershovitz, *Wrongs*, *supra* note 37, at 31 (conceding that confidential settlements “limit[] the role that tort can play in vindicating the victim’s social standing”).

¹⁸⁴ For a provocative (but, in my view, unconvincing) argument that victims of sexual harassment, by agreeing to confidential settlements, become “complicit” in the perpetrators’ wrongdoing, *see* Scott Altman, *Sexual Harassment NDAs: Privacy, Complicity, and the Paradox of Blackmail* 23 (Univ. of S. Cal. Legal Studies Research Paper Series, Paper No. 19-29, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3444638 [https://perma.cc/7CCJ-2R42].

other party. Such protections include what I'll call *absolute* protective orders—those that forbid outright certain requested discovery¹⁸⁵—as well as the provision of the discovery rules allowing a deponent to seek a court order terminating a deposition if the questioning becomes too “embarrass[ing].”¹⁸⁶ Because these mechanisms deny even the other party access to the information, plaintiffs may generally invoke them to withhold only information that is either immaterial or, at best, tangentially related to their legal claims. As long as the mechanisms are so limited, plaintiffs can use them to preserve their dignity-as-image without severely compromising their attempt to reassert their dignity-as-status. But the same dignity-dignity conflict that we saw with qualified protective orders and other similar devices will recur insofar as plaintiffs also seek to suppress relevant, if humiliating, information.

Certain evidentiary privileges allow plaintiffs to do exactly that, and so can present plaintiffs with a direct conflict between the two aspects of their dignity. Plaintiffs can invoke privileges such as the attorney-client and spousal privileges to shield some of their confidential communications from their opponents during discovery.¹⁸⁷ When those communications involve sensitive personal information, and when that information can't be gleaned from other, nonprivileged sources, plaintiffs can use the privileges to maintain some control over their self-presentation and thus to preserve their dignity-as-image. But when the information plaintiffs seek to suppress is also pertinent to their lawsuit, they risk dampening the expressive force of their demand for answers and thus hindering their attempt to reassert their dignity-as-status.

Public/Obscure. Finally, rather than suppress their personal information, plaintiffs can obscure their connection to it. The main way they can do this is by prosecuting their lawsuits under a pseudonym, so that their identities, but not the information they include in their filings or reveal during discovery, are withheld from the public.¹⁸⁸ Although proceeding pseudonymously can be an equally

¹⁸⁵ FED. R. CIV. P. 26(c)(1)(A) (“forbidding the disclosure or discovery”); FED. R. CIV. P. 26(c)(1)(D) (“forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters”).

¹⁸⁶ FED. R. CIV. P. 30(d)(3)(A).

¹⁸⁷ See FED. R. CIV. P. 26(b)(1) (limiting scope of discovery to “nonprivileged matter[s]”).

¹⁸⁸ See generally Lior Jacob Strahilevitz, *Pseudonymous Litigation*, 77 U. CHI. L. REV. 1239 (2010). For recent examples of pseudonymous litigation, see Anemona Hartocollis, *Universities Contest Granting of Anonymity in Sexual Assault Suits*, N.Y. TIMES, May 30, 2019, at A11; Perry Cooper, *Ex-Gymnasts May Stay Anonymous in Olympic Committee Abuse Suit*, BLOOMBERG LAW (July 10, 2019, 3:34 PM), <https://www.bloomberglaw.com/product/blaw/document/X9PLTFO4000000>; Patrick Dorrian, *Jones Day Women Can't Remain Anonymous During Bias Probe*, BLOOMBERG BNA (May 31, 2019), <https://news.bloomberglaw.com/daily-labor-report/jones-day-women-cant-remain-anonymous-during-firms-bias-probe>; and Erin Mulvaney & Hassan A. Kanu, *Anonymous Workplace Harassment Suits Double in #MeToo Era*, BLOOMBERG LAW (July 29, 2019, 6:30 AM), <https://www.bloomberglaw.com/product/blaw/document/X50BFH00000000>.

effective means of protecting their dignity-as-image,¹⁸⁹ it comes at a considerable cost to their dignity-as-status. After all, for civil litigation to vindicate a plaintiff's social status as an equal, we need to know *who* is calling the defendant to account.¹⁹⁰ The dignitarian turn once again ends up highlighting the benefits as well as the costs of secrecy (or anonymity) for plaintiffs in civil litigation, demanding a more nuanced account of the practice than access-to-justice scholars have thus far provided.

2. Other Potential Dignity-Dignity Conflicts

Although they might seem to lack a dignitarian dimension, several other procedural issues on which access-to-justice scholars have recently focused may also present a conflict between plaintiffs' dignity-as-status and dignity-as-image. The severity of any conflict will depend on various empirical facts about current civil practice, and a complete normative analysis of these issues would require consideration of other values besides dignity. But we should nevertheless appreciate the potential for the dignitarian turn to complicate standard access-to-justice positions on issues beyond secrecy in civil litigation.

Arbitration and Contracting for Dignity-as-Image. Arbitration implicates plaintiffs' dignity-as-status and dignity-as-image because it occurs largely in secret. Whereas much of a lawsuit unfolds in public view, with filings generally made available to the public and testimony generally taken in open court, arbitration proceedings are almost completely opaque. The model rules of the major arbitration organizations generally bar members of the public from attending arbitrations,¹⁹¹ and arbitration clauses can contain confidentiality

¹⁸⁹ Cf. Jeffrey M. Skopek, *Reasonable Expectations of Anonymity*, 101 VA. L. REV. 691, 692 (2015) (arguing that Fourth Amendment should be construed to protect individuals' anonymity as well as their privacy).

¹⁹⁰ Cf. Strahilevitz, *supra* note 188, at 1252 (noting that in pseudonymous cases, "the victim chooses to mask her identity, thereby substantially curtailing the ability of third-party adjudication to enhance her social status").

¹⁹¹ See, e.g., AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, at R-25 (2013), https://www.adr.org/sites/default/files/CommercialRules_Web_FINAL_1.pdf [<https://perma.cc/U9YA-VNTZ>] ("The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary."); AM. ARBITRATION ASS'N, CONSUMER ARBITRATION RULES, at R-30 (2014), https://www.adr.org/sites/default/files/Consumer_Rules_Web_0.pdf [<https://perma.cc/QY7N-43YB>] ("The arbitrator and the AAA will keep information about the arbitration private except to the extent that a law provides that such information shall be shared or made public."); JAMS, COMPREHENSIVE ARBITRATION RULES & PROCEDURES, at r. 26 (2014), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf [<https://perma.cc/3FL2-WY44>] ("JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision."). Arbitration proceedings

provisions restricting the participants' ability to publicly reveal what occurs during the proceedings.¹⁹² Many civil procedure scholars worry that such secrecy insulates arbitration from any kind of public scrutiny.¹⁹³ Most prominently, Professor Judith Resnik, drawing on the work of Jeremy Bentham, has argued that the secrecy of arbitration forgoes one of the main benefits of public adjudication: the chance for members of the public to "watch" their government "in action" so that they can hold it accountable.¹⁹⁴ "Unlike courts," Resnik laments, arbitration is typically structured so that "third parties can neither attend nor inspect records (if made) of proceedings, opinions are not published, and parties may be subject to admonitions of confidentiality."¹⁹⁵ Of course that is often one of the main reasons parties elect to resolve a dispute through arbitration rather than in a court—as Resnik herself recognizes.¹⁹⁶ But she nevertheless maintains that any benefits of secrecy for the parties are outweighed by the forgone benefits of publicity for the public, decrying arbitration as a "confidential dispute resolution service[] that obliterate[s] the chance for an audience to learn about what transpired."¹⁹⁷

were, however, more public earlier in American history. See Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 THEORETICAL INQUIRIES L. 423, 445-46 (2009).

¹⁹² Some empirical studies, however, have found that only a small minority of arbitration clauses contain such confidentiality provisions. See STEPHEN J. WARE & ARIANA R. LEVINSON, PRINCIPLES OF ARBITRATION LAW § 37(b), at 122 (1st ed. 2017) (citing study finding "confidentiality provisions in only 13.5% of arbitration agreements studied"). Although in theory some of the contents of an arbitration can become public if an action to confirm, vacate, or modify the arbitral award is filed, see 9 U.S.C. § 13 (2018), only a "small fraction" of all arbitrations end up being litigated in court. Resnik, *Diffusing Disputes*, *supra* note 61, at 2899; see also *infra* note 286 and accompanying text.

¹⁹³ According to some scholars, such criticisms overstate the secrecy of arbitration and understate the degree to which information revealed during an arbitration can eventually become public. See, e.g., Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1299 (2006); Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1219 (2006).

¹⁹⁴ See, e.g., Resnik, *Access*, *supra* note 11, at 616-18.

¹⁹⁵ Resnik, *Fairness in Numbers*, *supra* note 63, at 111; see also LAHAV, IN PRAISE OF LITIGATION, *supra* note 3, at 73; Resnik, *Diffusing Disputes*, *supra* note 61, at 2857-59, 2900.

¹⁹⁶ See Resnik, *Diffusing Disputes*, *supra* note 61, at 2811.

¹⁹⁷ Resnik, *Constitutional Entitlements*, *supra* note 63, at 994-95; see also Resnik, *Courts*, *supra* note 27, at 799-802; Resnik, *Fairness in Numbers*, *supra* note 63, at 132; Resnik, *Uncovering*, *supra* note 8, at 549-51. For similar arguments, see generally Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Light Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463 (2006); and Ramona L. Lampley, "Underdog" Arbitration: A Plan for Transparency, 90 WASH. L. REV. 1727 (2015). Resnik has leveled similar criticisms against "court-annexed" ADR. See Resnik, *Access*, *supra* note 11, at 637-40; Judith Resnik, *The Contingency of Openness in Courts: Changing the*

The dignitarian turn simultaneously buttresses and undercuts this Benthamite critique of arbitration. On the one hand, consistent with that critique, secrecy in arbitration hinders (would-be) plaintiffs in their attempts to reassert their dignity-as-status. While arbitration still enables plaintiffs to demand and compel answers from defendants,¹⁹⁸ they can't fully assert their standing as equals entitled to an explanation for their injuries in private; as an expressive value, dignity-as-status can't be fully vindicated without at least some *public* recognition of an individual's equal social standing.¹⁹⁹ On the other hand, given arbitration's relative secrecy and strict limits on discovery, plaintiffs can maintain almost complete control over how much of their personal information becomes public, and thus avoid compromising their dignity-as-image, as they seek redress for their injuries. One could thus understand the decision to sign a contract containing an arbitration clause as a decision to sacrifice the opportunity to fully vindicate one's dignity-as-status for the ability to preserve one's dignity-as-image—a trade-off I'll call *contracting for dignity-as-image*.²⁰⁰

Experiences and Logics of the Public's Role in Court-Based ADR, 15 NEV. L.J. 1631, 1656 (2015); Resnik, *Uncovering*, *supra* note 8, at 551-60.

¹⁹⁸ Hence my focus here on arbitration, as opposed to other forms of ADR. Rather than enable victims to hold wrongdoers accountable by demanding answers, other forms of ADR—particularly mediation—seek to “reconfigure” or “transform” disputes so the parties can reach a voluntary, collaborative resolution. See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (2d rev. ed. 2005). That aspiration can be understood as in a sense dignitarian, in that mediation purports to be less adversarial and thus more “dignified” than arbitration (let alone litigation), but that's a different notion of dignity from the status-based notion emphasized by the dignitarian turn in access-to-justice scholarship. And while mediation, like arbitration, occurs in private, it uses secrecy not to protect the parties' privacy per se, but to create an environment that restores trust and fosters communication between the parties.

¹⁹⁹ For a compelling recent argument along somewhat different lines, but also invoking Waldron's status-based conception of dignity, see Erik Encarnacion, *Boilerplate Indignity*, 94 IND. L.J. 1305, 1332-39 (2019). Professor Encarnacion's dignitarian critique of arbitration, however, is limited to arbitration clauses found in “boilerplate” contracts and doesn't directly address the secrecy of arbitral proceedings. More generally, unlike the dignitarian turn identified and developed in this Article, Encarnacion's dignitarian argument focuses primarily on courts' role in “vindicating” and recognizing victims' dignity (a function that has become less central in the era of the vanishing civil trial), *id.* at 1308, as opposed to those aspects of civil procedure that allow victims to publicly demand answers from wrongdoers. Nor does he consider dignity-as-image and the questions it raises for our understanding of both civil litigation and arbitration, not to mention the value of dignity itself.

²⁰⁰ Here, I bracket the longstanding debate over whether arbitration clauses that appear in consumer and employment contracts of adhesion constitute genuine contractual agreements. Whatever one's position on that question, the point still stands that the secrecy of arbitration proceedings can confer an important dignitarian benefit on parties subject to arbitration clauses.

It's difficult to say which of arbitration's dignitarian effects—the costs to plaintiffs' dignity-as-status or the benefits for their dignity-as-image—will prevail in any given case. Of course, the potential upside for plaintiffs' dignity-as-image, and thus the dignity-dignity conflict, is likely to be most significant in those disputes whose resolution turns on particularly sensitive personal information, such as disputes among family members.²⁰¹ The conflict will, by contrast, be less acute in disputes that can be resolved based on more routine information, such as many consumer disputes. Even in those seemingly anodyne cases, however, there's always a significant risk that plaintiffs will be forced to divulge personal information they'd rather not share if they bring their claims in court, given the potential breadth of discovery.²⁰² Plaintiffs will thus face the trade-off between their dignity-as-status and their dignity-as-image, and the temptation to contract for the latter by agreeing to private arbitration and forgoing public adjudication, in a wide range of disputes.

Plausibility Pleading and Procedural Paternalism. Because the privacy-protecting doctrines in ordinary civil litigation and the confidentiality rules governing arbitration are directly concerned with publicity and secrecy in dispute resolution, they obviously implicate both aspects of plaintiffs' dignity. But even procedural doctrines that ostensibly have nothing to do with secrecy can create a conflict between plaintiffs' dignity-as-status and their dignity-as-image and thereby complicate some of the policy positions espoused by access-to-justice scholars.

Pleading rules may be one such doctrine. In *Bell Atlantic Corp. v. Twombly*²⁰³ and *Ashcroft v. Iqbal*,²⁰⁴ the Supreme Court construed the general pleading standard in the Federal Rules of Civil Procedure²⁰⁵ to require a plaintiff's complaint to contain “enough facts to state a claim to relief that is plausible on its face.”²⁰⁶ Access-to-justice scholars have almost uniformly criticized this requirement, particularly for making it more difficult for plaintiffs with

²⁰¹ See, e.g., Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 3012 (2015) (“[A]rbitration can allow parties to select a process of dispute resolution that ensures sensitive decisions reflect personal family values and ideals.”).

²⁰² According to Resnik,

[W]hen a repeat player is in conflict with a one-shot actor (for example, when a wireless service provider is challenged on billing by a customer), the *only* privacy interest is a provider's desire not to have other similarly-situated consumers know of the harms alleged, the positions taken, or the remedies accorded.

Resnik, *Access*, *supra* note 11, at 643 (emphasis added). Not necessarily. To take Resnik's own example, the customer may want to avoid publicly disclosing the phone numbers (and thus the identities of those whom she was calling) that appear on the disputed bill.

²⁰³ 550 U.S. 544 (2007).

²⁰⁴ 556 U.S. 662 (2009).

²⁰⁵ FED. R. CIV. P. 8(a)(2).

²⁰⁶ *Twombly*, 550 U.S. at 570.

potentially meritorious claims to obtain the discovery they need to substantiate their allegations.²⁰⁷ According to this criticism, the plausibility requirement puts plaintiffs to a Catch-22: to survive a defendant's motion to dismiss and obtain discovery, they already need to know enough of the underlying facts to render their claims for relief "plausible," but to get those factual details, they often need access to the tools of discovery.

Such concerns dovetail with the dignitarian turn. Especially in the era of the vanishing civil trial, discovery provides plaintiffs with the most significant opportunity during civil litigation to demand answers from defendants and compel responses. Insofar as a heightened pleading standard deprives plaintiffs with potentially meritorious claims of that opportunity, it prevents them from fully asserting their dignity-as-status. Plaintiffs will, to be sure, still receive some kind of response from the defendant, in the form of a motion to dismiss. But such a motion must assume the truth of the plaintiff's factual allegations,²⁰⁸ and so it will necessarily fail to provide all the answers or the full accounting the plaintiff is seeking. A heightened pleading standard thus risks foreclosing a critical opportunity to assert one's dignity-as-status even in cases where the plaintiff has a legitimate demand for an explanation.

And yet, more subtly, a heightened pleading standard might also sometimes safeguard plaintiffs' dignity-as-image, sparing them from many of the indignities of civil litigation. It can do so by limiting the duration of any humiliation they must suffer at the hands of the defendant. If plaintiffs can't plead factual allegations sufficient to state a plausible claim for relief, then their lawsuits are cut short before discovery, where the defendant could compel them to disclose information that undermines their public image and that they'd rather keep private. Any humiliation is confined to the facts plaintiffs themselves choose to include in their complaint. One can understand this consequence of the plausibility standard as a kind of *procedural paternalism*: it protects (one aspect of) plaintiffs' dignity by insulating them from the travails of discovery when it judges that their claims are unlikely to succeed and thus unlikely to warrant the significant intrusions into their privacy that characterize pretrial procedure, yet it's arguably paternalistic because plaintiffs themselves

²⁰⁷ See, e.g., Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 876 (2009); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 56 (2010); Reinert, *supra* note 46, at 1769; Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1298 (2010). Professor Benjamin Spencer has elaborated this criticism at length. See A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 187 (2009); A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1713-14 (2013); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 4 (2009) [hereinafter Spencer, *Understanding*]. Here I bracket the extensive empirical debate over whether *Twombly* and *Iqbal* have in fact had these effects. See generally Jonah B. Gelbach, *Material Facts in the Debate over Twombly and Iqbal*, 68 STAN. L. REV. 369 (2016).

²⁰⁸ See *Twombly*, 550 U.S. at 555.

presumably would prefer to proceed to discovery, even if they may not fully appreciate what they're getting into by pressing on.

To be sure, as a means of safeguarding plaintiffs' dignity-as-image, a heightened pleading requirement that applies in all kinds of civil cases is wildly overbroad. The main problem is that it assesses plaintiffs' claims, and thus determines whether vindicating those claims is worth enduring the indignities of civil litigation, before all the facts of the dispute have been ascertained. Indeed, given typical information asymmetries, the defendant may possess facts that would ultimately corroborate the plaintiff's allegations, and that might even prove so humiliating for the *defendant* as to overshadow any humiliation suffered by the plaintiff, but that will never come to light if the lawsuit is precipitously terminated. The plausibility standard's procedural paternalism thus promises to protect plaintiffs' dignity-as-image based on an incomplete picture of both the strength of their claims and the magnitude of the dignitarian risks they would incur by proceeding with their lawsuits.

There are, however, other doctrinal mechanisms, short of a universal plausibility standard, that could protect plaintiffs' privacy and shield them from humiliation, but at less cost to their dignity-as-status. For example, Professor Richard Nagareda suggested that the plausibility standard should apply only to lawsuits raising claims based on publicly available information and that the more liberal pre-*Twombly/Iqbal* pleading standard should govern lawsuits in which plaintiffs need discovery to obtain privately held information in order to substantiate their claims.²⁰⁹ This more nuanced rule would limit the plausibility standard's paternalistic effects to those cases in which it could make the most difference for plaintiffs' dignity-as-image—namely, cases in which plaintiffs don't need significant discovery to substantiate their claims, and so probably shouldn't have to endure intrusive discovery if they can't even plead a plausible claim based on publicly available information. If, by contrast, a case turns on privately held information, then undergoing the ordeal of discovery is just an inevitable cost of demanding answers and seeking redress through civil litigation.

In a similar vein, others have proposed applying the plausibility standard in every case but allowing courts to order limited discovery before adjudicating a defendant's motion to dismiss.²¹⁰ This approach would enable plaintiffs to at least partly substantiate the allegations in their complaint, and thus to bolster their demand for answers, but without having to subject themselves to the most intrusive kinds of discovery and any attendant humiliation. Appreciating the trade-off between plaintiffs' dignity-as-status and dignity-as-image may thus provide additional support for proposals that seek to preserve some of the

²⁰⁹ See Richard A. Nagareda, *1938 All Over Again? Pretrial as Trial in Complex Litigation*, 60 DEPAUL L. REV. 647, 681-82 (2011).

²¹⁰ See Dodson, *supra* note 207, at 56; Samuel Issacharoff & Geoffrey Miller, *An Information-Forcing Approach to the Motion to Dismiss*, 5 J. LEGAL ANALYSIS 437, 448-52 (2013).

benefits of the plausibility pleading standard while minimizing its costs to access-to-justice values.

The Anonymity of Aggregate Litigation. Just as privacy-protecting doctrines in civil litigation, arbitration's confidentiality rules, and the plausibility pleading standard can all undermine plaintiffs' dignity-as-status while safeguarding their dignity-as-image, the class action—a procedural device that access-to-justice scholars champion—can have similar dignitarian effects. Ironically, the dignitarian case for class actions may be stronger when we attend to the facet of dignity that proponents of the dignitarian turn have tended to neglect—dignity-as-image—as opposed to the status-based aspect of dignity that implicitly underlies their advocacy of broad access to civil justice and their opposition to procedural secrecy.

On the one hand, class actions can undermine plaintiffs' dignity-as-status. To be sure, according to the standard access-to-justice justification, class actions *empower* plaintiffs, leveling the playing field with defendants by aggregating claims that aren't worth litigating on an individual basis but that do warrant a lawsuit when combined with other, similar claims.²¹¹ This pragmatic rationale resonates with the dignitarian turn, for in allowing plaintiffs to band together, class actions offset power disparities that would otherwise prevent plaintiffs from demanding answers from defendants, much less obtaining relief.²¹²

The problem with this argument as a dignitarian defense of the class action, however, is that it ignores the extent to which aggregate litigation deprives most class members of opportunities to participate directly in a lawsuit, and thus to *demand* answers from the defendant in any meaningful sense. Although plaintiffs' demands for answers are always mediated whenever plaintiffs are represented by a lawyer,²¹³ the demand is even more attenuated in a class action. The vast majority of the class members are "absent" from the litigation, represented by the class representative or named plaintiff and her lawyers rather than participating themselves.²¹⁴ If the class complaint seeks damages, a class member may, upon notice, enter an appearance through a lawyer or even opt out of the class litigation altogether—but only if he affirmatively takes those steps; the default is that a class member will remain a mere bystander to the litigation and yet be bound by its outcome without having ever set foot in court.²¹⁵ The

²¹¹ See Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 688 (1941).

²¹² See, e.g., LAHAV, IN PRAISE OF LITIGATION, *supra* note 3, at 121-22; Lahav, *Symmetry*, *supra* note 46, at 1499; Resnik, *Access*, *supra* note 11, at 677.

²¹³ See *supra* note 58 and accompanying text.

²¹⁴ FED. R. CIV. P. 23(a)(3), (4).

²¹⁵ FED. R. CIV. P. 23(b)(3), (c)(2)(B).

upshot is that “participation—much less control—is cursory, at best, in large-scale litigation.”²¹⁶

Given the nature of representation in a class action, absent class members miss out on all the opportunities for reasserting their dignity that access-to-justice scholars see in civil litigation. Absent class members cannot shape the allegations of the complaint, sit across the table from the defendant as he’s deposed, or confront the defendant at trial. If they can be understood to be demanding explanations and reasserting their equal standing at these various stages at all, it is only vicariously, through the named plaintiff prosecuting the lawsuit on their behalf. Such virtual participation is unlikely to be perceived by the defendant or members of the public as a calling to account by the absent class members themselves, and so is unlikely to convey the right kind of social meaning for the litigation to realize their dignity as well as that of the named plaintiff.

The alternative to virtual participation, of course, is often not direct participation, but no litigation at all, since class claims are frequently too small to warrant individual lawsuits. At the very least, though, the dignitarian turn offers additional support for proposals that would permit greater participation by absent class members in class litigation—not only because such participation promotes certain process-oriented conceptions of fairness by affording absent class members a greater say in the conduct of the lawsuit,²¹⁷ but also because it allows them to lend their voices to the named plaintiff’s demand for an explanation and to thereby put their equal social standing on the line in the litigation as well.

On the other hand, the very same features of class actions that undermine absent class members’ dignity-as-status also protect their dignity-as-image. Ordinary, nonaggregate litigation puts the focus on individual plaintiffs, inviting

²¹⁶ Elizabeth Chamblee Burch, *Calibrating Participation: Reflections on Procedure Versus Procedural Justice*, 65 DEPAUL L. REV. 323, 335 (2016); see also Alexandra D. Lahav, *The Political Justification for Group Litigation*, 81 FORDHAM L. REV. 3193, 3203-04 (2013); Lahav, *Symmetry*, *supra* note 46, at 1519; cf. Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 236-79 (1992) (arguing that class actions substitute representation for personal participation and consequently forgo dignitarian benefits of participation). But see LAHAV, IN PRAISE OF LITIGATION, *supra* note 3, at 90-98 (identifying other opportunities to participate in collective litigation); Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 847-52 (2017); Adam Klein, Olivia Quinto & Nantiya Ruan, *Individualized Justice in Class and Collective Actions*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA, *supra* note 92, at 326 (discussing importance of individual voices in class actions); Alexandra D. Lahav, *Participation and Procedure*, 64 DEPAUL L. REV. 513, 513-15 (2015).

²¹⁷ See, e.g., Burch, *supra* note 216, at 330-35 (discussing psychological research by Professor Tom Tyler on individuals’ perceptions of “procedural justice”); *supra* note 39 and accompanying text (discussing Jerry Mashaw’s dignitarian defense of participatory procedures).

members of the public to attend to the facts of their specific injuries.²¹⁸ As we've seen, such attention can be empowering, providing a public audience for plaintiffs' demands for answers, but it can also be humiliating, exposing to public view personal information that is inconsistent with their self-presentation. Class actions, by contrast, afford absent class members the *anonymity of aggregate litigation*.²¹⁹ Although, technically, each class member must have suffered her own injury to be entitled to any portion of the class-wide relief, the nature of class litigation abstracts from those individual injuries and aggregates them into a single (if multifaceted) injury to "the class"; the public's attention is diverted away from what the defendant did to any individual class member and toward what the defendant did to *all* the class members as a group.²²⁰ This aggregate focus permeates the specific procedures for litigating class claims—at least where absent class members are permitted to opt *out* of the litigation as opposed to being required to opt *in*.²²¹ If a class is certified as an opt-out class, absent class members need not take any affirmative steps to benefit from any finding of liability against the defendant or to be entitled to a remedy, each of which is generally determined on a class-wide basis. While they may have to submit a publicly available claim to collect their share of any class award or settlement, they won't have to recount the specific details of their injuries in a complaint or subject themselves to the full extent of discovery, as they would if they were proceeding individually. It's a very different story for the named plaintiffs, who must endure the indignities of civil litigation like any other plaintiff. If anything, the class action *augments* their humiliation, concentrating

²¹⁸ Cf. Catherine A. Rogers, *Proposals to Expel Palestinians from the Occupied Territories as Catalyst for a Civil Adjudication Campaign*, 7 J. GENDER RACE & JUST. 167, 183 (2003) ("By providing for the assertion of individual claims, civil litigation can shift the focus from . . . a group . . . to individuals who have suffered identifiable and particularized harms.").

²¹⁹ Cf. Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1547 (2016) ("[C]lass actions afford anonymity to individual workers who might fear retaliation [by their employers] should they pursue a claim individually.").

²²⁰ Cf. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1291 (1976) ("[T]he class action responds to the proliferation of more or less well-organized groups in our society and the tendency to perceive interests as group interests, at least in very important aspects."); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1681 (2001) (discussing analogous concept of "aggregate harm"); Lisset M. Pino, Comment, *Wal-Mart v. Dukes: The Feminist Case Against Individualized Adjudication*, 30 YALE J.L. & FEMINISM 401, 404-05 (2018) (arguing that class actions in sex-discrimination cases highlight "institutional dimension of discrimination").

²²¹ Cf. Scott Dodson, *An Opt-In Option for Class Actions*, 115 MICH. L. REV. 171, 202 (2016) (identifying preservation of class members' "anonymity" as reason to have opt-out, rather than opt-in, class).

the injuries of hundreds and sometimes even thousands of individuals on just a few. For the vast majority of the members of any given class, however, the class device allows them to band together to obtain at least some compensation for their injuries without having to emphasize their own circumstances or publicly reveal their personal information.²²²

One might doubt that the typical class action turns on the kind of personal information that most plaintiffs care about keeping secret and that consequently threatens to humiliate them if publicly exposed. Does a plaintiff really face a significant risk of humiliation by prosecuting an individual lawsuit against a company that, say, sold her a television on terms that violated various consumer-protection laws (precisely the kind of small claim that is the bread and butter of class action litigation)? Perhaps not. But even some small consumer claims can be fraught, such as when the claims concern drugs taken for some embarrassing condition.²²³ Most victims in such cases may well prefer to stand back and let the named plaintiffs represent their interests. In any event, pursuing any kind of claim can expose a plaintiff to significant public scrutiny, given the tendency of discovery to stray beyond the facts most immediately relevant to the lawsuit. The anonymity of aggregate litigation thus promises to safeguard plaintiffs' dignity-as-image in a wide range of cases.²²⁴

²²² The anonymity of aggregate litigation is, however, somewhat compromised by court decisions strictly applying the requirement that a proposed class's members be sufficiently "ascertainable" before the class can be certified. See Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates over Ascertainability and Cy Pres*, 65 U. KAN. L. REV. 913, 923-28 (2017). The Supreme Court's recent ratcheting up of the other class-certification requirements has had a similar effect, increasingly putting the focus on the individual members of a proposed class and the amenability of their claims to class treatment. See, e.g., *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011); Anne E. Ralph, *The Story of a Class: Use of Narrative in Public Interest Class Actions Before Certification*, 95 WASH. L. REV. (forthcoming 2020) (manuscript at 5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3447234 [<https://perma.cc/95FN-VC65>] (describing lawyers' increasing use of "narrative" to highlight circumstances of individual class members as way of satisfying heightened certification requirements imposed by decisions such as *Wal-Mart*).

²²³ See, e.g., *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 713 (2019) (considering appeal of certification of class action concerning dietary supplement used to increase "sexual energy").

²²⁴ Plaintiffs can confront a similar trade-off between the two aspects of their dignity when their lawsuits are consolidated with other cases involving similar issues for pretrial proceedings under the federal multidistrict litigation ("MDL") statute, 28 U.S.C. § 1407 (2018), an increasingly prevalent practice in mass-tort cases. While the informal aggregation of MDLs deprives most plaintiffs of the opportunity to directly call the defendant to account (which is even more disconcerting in the MDL context than the class action context, given that most MDLs include many claims that are individually viable), it affords much of the anonymity of an opt-out class action.

III. CIVIL PROCEDURE'S UNDIGNIFIED PATH TO DIGNITY

Even as proponents of the dignitarian turn in access-to-justice scholarship emphasize civil litigation's capacity to realize one important aspect of plaintiffs' dignity, they largely ignore its tendency to compromise another, along with the resulting complications for their positions on various procedural issues. Why does the dignitarian turn overlook the indignities of civil litigation? The neglect, I suspect, stems from the egalitarian commitments that underlie our legal order and likely motivate civil procedure scholars to defend civil litigation in dignitarian terms. The dignitarian turn obviously resonates with our society's broader commitment to legal equality, the principle that everyone is equal before the law regardless of her socioeconomic status.²²⁵ By allowing even the weakest members of society to call even the most powerful ones to account, civil litigation embodies that principle more fully than perhaps any of our other political institutions. To fully acknowledge the indignities of civil litigation, one might worry, would be to concede that the price of maintaining one's legal equality is quite steep indeed—that one must be willing to subject oneself to intense public scrutiny, and to sacrifice one's privacy and potentially undermine one's public image, in order to be recognized as an equal member of the political community with the standing to hold others accountable.

It turns out, however, that the indignities of civil litigation aren't just an inevitable cost of asserting one's dignity-as-status. This Part argues that the indignities of civil litigation can, paradoxically, have a dignitarian upside for weaker plaintiffs suing more powerful defendants. In conditions of socioeconomic inequality such as those that characterize our society, weaker plaintiffs can exploit the indignities of civil litigation to more effectively demand answers from more powerful defendants. They can, in particular, choose to humiliate themselves—deliberately revealing personal information that undermines their public image—and thereby *shame* the defendant into providing a less dismissive response than they otherwise might have received. By willingly compromising their dignity-as-image, weaker plaintiffs can more forcefully assert their dignity-as-status and, in doing so, better secure their legal equality.

Section III.A explains how plaintiffs can shame defendants by humiliating themselves during civil litigation, while Section III.B considers some implications for the doctrinal issues considered in the previous Part.

A. *Exploiting the Indignities of Civil Litigation*

This Section will show how weaker plaintiffs can shame more powerful defendants by humiliating themselves during civil litigation. After explaining the general structure of shaming practices, I'll apply those insights to civil litigation. I'll then argue that this expressive account of civil litigation can be reconciled with our commitment to legal equality.

²²⁵ Cf. WALDRON, *supra* note 70, at 55-61 (linking status-based conception of dignity to legal equality).

1. Shaming by Complaining

Certain social practices have the capacity to *shame*: they allow some members of a social group to express their opprobrium of other members who offend the group's norms.²²⁶ Consider the longstanding debate over the use of "shaming sanctions" in criminal law.²²⁷ On one influential account, all criminal punishment is at least partly expressive, in that it communicates the political community's condemnation of the offender for having violated the community's moral norms.²²⁸ Building on this insight, some scholars have argued that shaming sanctions are just an alternative way of expressing this condemnatory message, subjecting the offender to intense, formalized public ridicule rather than depriving him of his liberty.²²⁹

Criminal punishment, however, is far from the only social practice with this kind of expressive power. As Professor William Miller has shown, certain ritualized practices of complaining can be used to shame errant members of a social group²³⁰—an account with implications for civil procedure.²³¹ Miller focuses on "formalized complaints made in an attempt to get back what you are owed," and he is particularly concerned with the problem of how to "compel a person to repay a debt or to deliver on a promise he has made," especially when the debtor is more powerful—"a big man."²³² He develops his account by analyzing how a weaker creditor can use "penitential rituals of self-abnegation, like fasting, donning sackcloth, defacing oneself with dirt and ashes, [and] rending one's garments or flesh . . . to shame [a more powerful debtor] into fulfilling his promises or doing his duty by ostentatiously degrading oneself in his presence."²³³ According to Miller, such rituals all exhibit the same basic normative structure: "The complainant humiliates himself in order to shame the person he is pleading to."²³⁴ I'll consider each element in turn.

First, the complainant humiliates himself by publicly emphasizing his lower social status vis-à-vis the more powerful debtor. As discussed above, humiliation in this sense means the "deflation of pretension"—the exposure of

²²⁶ See NUSSBAUM, *supra* note 98, at 203-07 (discussing shaming sanctions).

²²⁷ See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631 (1996).

²²⁸ For a classic account, see JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 95-118 (1970).

²²⁹ See generally Kahan, *supra* note 227, at 630-51.

²³⁰ WILLIAM IAN MILLER, *Complaining Against the Most High*, in *LOSING IT* 107, 107 (2011) [hereinafter MILLER, *Complaining*]; see also MILLER, *HUMILIATION*, *supra* note 104, at 161-65 (examining humiliation and shaming rituals).

²³¹ Indeed, Miller himself likens the practices he considers to "filing a formal legal complaint." MILLER, *Complaining*, *supra* note 230, at 107.

²³² *Id.*

²³³ *Id.* at 108.

²³⁴ *Id.* at 117.

personal information that is inconsistent with your public image or self-presentation.²³⁵ When you're *humiliated*, you're caught in a kind of upward pretension: your personal information is publicly revealed against your will, showing you to occupy a lower social status than your public image would have suggested. When, by contrast, you *humiliate yourself*, you intentionally disclose such personal information, calling public attention to your lower status. The practices Miller considers involve particularly extreme forms of this kind of self-humiliation, as the complainant abases himself in order to proclaim his impotence, to make clear that he has no other recourse for the wrong he has suffered.²³⁶ This is the sense in which Miller classifies "rituals of self-abasement" as a kind of "humiliation ritual."²³⁷

Second, this self-humiliation has a point: the complainant seeks to use his self-humiliation to *shame* the more powerful debtor. Shame here refers not only to a subjective emotion on the part of the powerful individual, but also to an objective judgment by the other members of the relevant community that he failed to honor the community's norms.²³⁸ For the lower-status creditor to be able to shame the more powerful debtor, both must be members of a community governed by a set of shared norms, norms that go beyond mere social conventions and rise to the level of something like morality itself.²³⁹ So while the participants in a shaming ritual are profoundly unequal in the sense that they enjoy different degrees of social power, they are equal in the sense that they are both subject to the same set of important social norms.

The weaker complainant uses self-humiliation to reestablish this equality. By humiliating himself in order to highlight his *social* weakness, he seeks to claim a degree of *moral* strength—to declare that he has complied with the community's moral norms, whereas the more powerful debtor has flouted them. He does so by calling attention not simply to the powerful individual's original transgression—the failure to repay a debt or to keep a promise—but to the further wrong of driving a weaker individual to (potentially harmful) self-humiliation. He humiliates himself in order to show how the powerful individual has compounded the original transgression by obstinately spurning his legitimate demands for recompense. On Miller's account, a weaker party can use a shaming ritual to tap into society's moral hierarchy in order to transcend

²³⁵ MILLER, HUMILIATION, *supra* note 104, at 137; *see also supra* notes 104-05 and accompanying text.

²³⁶ MILLER, *Complaining*, *supra* note 230, at 114-15 (analyzing rituals of "sitting dharna" and "fasting against," which involve inflicting or threatening self-harm and may even result in death).

²³⁷ MILLER, HUMILIATION, *supra* note 104, at 161.

²³⁸ *See id.* at 101, 196; *see also* Austin, *supra* note 106, at 7 (distinguishing between "normative judgments involved in questions of shame—whether one *ought* to be ashamed of something—and the *feeling* of shame itself").

²³⁹ *See* MILLER, HUMILIATION, *supra* note 104, at 118-19.

his low position in the social hierarchy and vindicate his rights against a stronger party.

To be sure, the stronger party might prove “impervious to feeling much shame on account of such a lowly soul,” but the weaker party’s self-humiliation is also meant to be “embarrassing and painful for those witnessing it” and “hard for . . . [them] to endure,” so that they’ll pressure the superior to capitulate and end their “discomfort” at the spectacle.²⁴⁰ Shaming rituals are thus necessarily public: they presume an audience composed of other members of the relevant normative community who can either appeal, by their mere presence, to the more powerful individual’s sense of honor or, if that fails, force him to relent through more direct forms of social pressure.²⁴¹

2. Shaming Through Civil Litigation

Miller’s account of shaming practices seems far removed from contemporary civil litigation, and of course it is. I want to suggest, however, that it nevertheless holds important lessons for civil litigation—lessons that are made all the more relevant by the dignitarian turn in access-to-justice scholarship. The dignitarian turn helpfully calls attention to the dignitarian dimension of civil litigation but largely ignores its downside for plaintiffs; Miller’s account of shaming practices suggests a way in which plaintiffs can turn that downside to their advantage. In particular, without going to the lengths of the kinds of self-abnegation involved in the practices Miller considers, weaker plaintiffs can still exploit the indignities of civil litigation to humiliate themselves and thereby shame more powerful defendants into responding more fully to their demands for answers. By compromising their dignity-as-image, they can more effectively assert their dignity-as-status.

A degree of humiliation is often implicit in the very act of filing a lawsuit. When individual plaintiffs sue a more powerful defendant, such as a corporation, they tacitly concede their powerlessness. After all, litigation is a last resort for most people, an option to be pursued only after exhausting all other (formal and informal) avenues of redress. To have to sue someone is often to acknowledge that one lacks the social status necessary to obtain redress on one’s own, without the aid of a higher authority.²⁴² As in the practices analyzed by Miller, a civil

²⁴⁰ MILLER, *Complaining*, *supra* note 230, at 117.

²⁴¹ *Cf.* JILL LOCKE, DEMOCRACY AND THE DEATH OF SHAME: POLITICAL EQUALITY AND SOCIAL DISTURBANCE 19 (2016) (“I understand shame in this context as a felt ethic of obligation and regulation that involves an actual or internalized audience that judges one’s thoughts and acts in terms of their relationship to norms or standards that one shares (or is expected to share) with others.” (emphasis omitted)).

²⁴² See *supra* note 126 and accompanying text; *cf.* Hershovitz, *Wrongs*, *supra* note 37, at 16 (“[A] tort suit casts the plaintiff in the role of the kid, who needs to go to his teacher for help, and we all know there is no honor in that.”); Julian Pitt-Rivers, *Honour and Social Status*, in HONOUR AND SHAME: THE VALUES OF MEDITERRANEAN SOCIETY 21, 30 (J.G.

complaint implicitly accuses the defendant of exploiting his power advantage in order to avoid having to compensate, or at least explain himself to, the plaintiff. Such an accusation is, presumably, inconsistent with most plaintiffs' public image; most people don't seek to present themselves as powerless and subject to others' whims. The act of filing a lawsuit thus has a more ambiguous social meaning than the dignitarian turn suggests—an act of self-empowerment,²⁴³ yes, but also one of self-humiliation.²⁴⁴

Even more significant are the opportunities for self-humiliation during the litigation itself. As explained in Part II, many plaintiffs will *be humiliated* as the defendant uses the tools of discovery to uncover personal information that undermines their self-presentation and then exposes much of that information to public view. But plaintiffs can use that same process to *humiliate themselves* by deliberately revealing such information. Intentionally revealing your sensitive personal information can prove humiliating in two respects: First, like the act of filing a lawsuit, deliberately violating your own privacy emphasizes your relative powerlessness, your inability to vindicate your rights without subjecting yourself to public scrutiny. Second, the personal information you willingly reveal can compromise your dignity-as-image insofar as it emphasizes your lower status. That will often be true of information concerning the injuries plaintiffs have suffered at the hands of the defendant, as well as information that doesn't directly pertain to their legal claims but nonetheless casts them as socially weaker than the defendant and vulnerable to his superior social power. Discovery can thus provide an opportunity for its own kind of self-abnegation—not the denial of bodily goods, as in the practices Miller considers, but rather the denial of the dignitarian good of privacy.²⁴⁵

By humiliating themselves in these ways during civil litigation, weaker plaintiffs can shame more powerful defendants and increase their chances of eliciting an explanation for their injuries. At least where a plaintiff's allegations

Peristiany ed., 1966) (“[T]o go to law for redress is to confess publicly that you have been wronged[,] and the demonstration of your vulnerability places your honor in jeopardy, a jeopardy from which the ‘satisfaction’ of legal compensation at the hands of a secular authority hardly redeems it.”). *But cf.* Zipursky, *Substantive Standing*, *supra* note 43, at 340 (“A legal complaint is not, of course, just a whine . . .”).

²⁴³ See *supra* note 161 and accompanying text; *cf.* Zipursky, *Substantive Standing*, *supra* note 43, at 327-28 (depicting act of prosecuting tort action as “standing up for oneself” and contrasting that with too readily accepting an apology).

²⁴⁴ I think it goes too far, however, to conclude that “court procedure . . . can do *nothing* to restore your honour but *merely* advertises its plight.” Pitt-Rivers, *supra* note 242, at 30 (emphases added).

²⁴⁵ Intentional invasions of one's own privacy thus express a kind of *self-disrespect*. *Cf.* Craig Konnoth, *An Expressive Theory of Privacy Intrusions*, 102 IOWA L. REV. 1533, 1536 (2017) (arguing that invasions of privacy sometimes express disrespect for their victims, though focusing on social standing of groups rather than on individuals whose privacy is invaded).

are credible, the plaintiff's self-humiliation can shame the defendant by calling public attention both to the defendant's original wrong and to his abuse of his superior position to avoid having to provide the plaintiff compensation or at least an explanation.²⁴⁶ With a plaintiff essentially accusing him of a kind of exploitation, the defendant will likely feel compelled to address the gravamen of the plaintiff's allegations, rather than evade them or offer only a legalistic response. Plaintiffs, to be clear, won't necessarily win their cases simply by shaming the defendant. But consistent with the claims of the dignitarian turn, empirical research suggests that many plaintiffs file lawsuits to get explanations as well as compensation,²⁴⁷ and shame may force a defendant to respond to a demand for an explanation less dismissively.

To make all of this more concrete, consider a fairly run-of-the-mill products liability lawsuit. A thirteen-year-old boy was helping his uncle with some yardwork when the blade on the weed-trimming and brush-cutting device that the uncle was using "struck something near the ground[,] which caused the machine to swing violently around to [the uncle's] left, cutting off [the boy's] right arm above the elbow."²⁴⁸ Although doctors were able to reattach the boy's arm, he regained only "limited" use of his right hand and was left with a "noticeable claw deformity."²⁴⁹ The boy sought damages from the manufacturer not only for his "quantifiable" medical expenses, but also for "pain and suffering."²⁵⁰ And in proving the latter damages, he dwelled in his pleadings and deposition testimony on the fact that his "three operations ha[d] left noticeable scars on his body, and the claw deformity of his right hand cause[d] people to stare at him in public."²⁵¹ He sought to emphasize "the social problems which a boy who was thirteen at the time of the injury has experienced and is likely to experience as a result of such a disability."²⁵² The jury responded by awarding him \$1,000,000 in compensatory damages—well in excess of the roughly \$15,000 in medical expenses he had incurred—as well as another \$1,000,000 in punitive damages.²⁵³ Deliberately or not, the boy employed an expressive

²⁴⁶ Cf. Linda Radzik, *Tort Processes and Relational Repair*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS, *supra* note 47, at 231, 246-47 (arguing that, when tort defendant proves "recalcitrant," a damages award can "send [plaintiff] powerful messages that counteract (though they do not erase) the insults and threats that may be suggested both by [defendant's] negligence and [by] his subsequent refusal to make satisfactory amends to her").

²⁴⁷ See, e.g., Tamara Relis, "It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims, 68 U. PITT. L. REV. 701, 701-02 (2007).

²⁴⁸ *Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1454 (10th Cir. 1987). I am grateful to Ian Ayres for suggesting this example.

²⁴⁹ *Id.* at 1454 n.1.

²⁵⁰ *Id.* at 1461.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 1454, 1461 n.9.

strategy similar to that in Miller's shaming practices. Rather than simply recount his physical injuries and their financial costs, he called public attention to the ways in which those injuries had diminished his social status and, in doing so, highlighted his new public image as a vulnerable, and somewhat pitiable, victim. By using civil litigation to humiliate himself in this way, he could more powerfully censure—or shame—the manufacturer for its breach of social norms.²⁵⁴

One might doubt that, in modern circumstances, plaintiffs can typically shame defendants through this kind of self-humiliation. For one thing, many of the powerful parties from whom individual plaintiffs seek an explanation are corporations rather than natural persons, and it might seem as though corporations aren't the kinds of agents that can be shamed. Some corporate-law scholars, however, have argued that corporations, just like natural persons, have reputational interests,²⁵⁵ and so are amenable to being shamed.²⁵⁶ That makes sense given the preconditions for shaming. As explained above, in order to be shamed, a party need only purport to subscribe to the principles of a certain normative community and care about being perceived by the members of that community as conforming to those principles—in Miller's terms, the party must have a sense of honor. Whether for reasons of profit or altruism, most corporations do seek at least to appear to be honoring important social norms; hence their responsiveness to publicity campaigns designed to pressure them to

²⁵⁴ One sees a similar kind of expressive dynamic at work in the “#MeToo” movement. In explaining their decisions to come forward with their allegations of sexual harassment and assault, at least some female victims have candidly acknowledged the trade-off between the humiliation such publicity often entails and the potential for that humiliation to intensify public opprobrium of the perpetrators' conduct. *See, e.g.,* Rachael Denhollander, Opinion, *The Price of Raising an Army*, N.Y. TIMES, Jan. 27, 2018, at SR2; Susan Dominus, *Refusing Hush Money, and Calling Out Hollywood*, N.Y. TIMES, Oct. 29, 2017, at A1; Rebecca Hamilton, Opinion, *No, Naming Rapists Doesn't Always Help*, WASH. POST, Dec. 21, 2017, at B01; Ronan Farrow, *Weighing the Costs of Speaking Out About Harvey Weinstein*, NEW YORKER (Oct. 27, 2017), <https://www.newyorker.com/news/news-desk/weighing-the-costs-of-speaking-out-about-harvey-weinstein>. *But cf.* Jessica A. Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37, 45-46 (describing how #MeToo has encouraged women to make their accusations public); Resnik, *Access*, *supra* note 11, at 614 (offering, in contrast to some victims' more nuanced accounts, unambiguously celebratory interpretation of #MeToo as “rebellion against secrecy”).

²⁵⁵ *See, e.g.,* Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 J. LEGAL ANALYSIS 561, 606 (2015) (discussing how Apple is concerned with its reputation “for treating suppliers fairly”).

²⁵⁶ *See, e.g.,* David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1812 (2001); *cf.* Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 777-89 (2018) (arguing that contempt findings against federal agencies have powerful shaming effects because federal agency officials subscribe to strong norm of compliance with court orders). *But see* Parrillo, *supra*, at 789-94 (noting limits on shaming effects of contempt findings).

stop using exploitative labor practices, engaging in discrimination, associating with objectionable spokespersons, and so on.²⁵⁷ Weaker plaintiffs can employ a similar expressive strategy against corporations, albeit on a smaller scale, by publicly humiliating themselves during their lawsuits.²⁵⁸

For another thing, it might seem that many powerful actors, corporate or otherwise, enjoy a degree of impunity in our unequal society that renders them impervious to shame—shameless. This objection basically denies that powerful parties even purport to subscribe to many of our society’s professed norms, such that they could be shamed for flouting those norms.²⁵⁹ This impression gains force from the burgeoning public-law literature on the corrosive effects of increasing socioeconomic inequality on our political institutions.²⁶⁰ With powerful individuals and corporations exercising ever greater control over public life, one might think they inhabit their own distinct normative community, one that plays by a different set of rules. And yet, notwithstanding the undeniable power of the wealthiest individuals and corporations, I don’t think our society has yet reached the point where those actors are completely shameless. Even the most rigidly hierarchical societies have norms that restrict how the powerful treat the weak,²⁶¹ and our imperfectly egalitarian society is no different. Powerful parties can still be shamed for violating those norms—for taking advantage of their superior position to insulate themselves from all accountability for mistreating others. And civil litigation is one of the more prominent venues in which such shaming can occur.²⁶²

²⁵⁷ See, e.g., Sharon Yadin, *Saving Lives Through Shaming*, 9 HARV. BUS. L. REV. ONLINE 57, 58 (2019) (defending OSHA’s practice of publicly shaming companies that violate workplace-safety regulations); Joe Silver, *Shamed on Twitter, Corporations Do an About-Face*, ARS TECHNICA (Apr. 21, 2014, 3:21 PM), <https://arstechnica.com/information-technology/2014/04/shamed-on-twitter-corporations-do-an-about-face/> [https://perma.cc/2R6Q-QEEH] (explaining how corporations change their unsavory practices after being shamed on Twitter).

²⁵⁸ Cf. Scott Baker & Albert H. Choi, *Reputation and Litigation: Why Costly Legal Sanctions Can Work Better than Reputational Sanctions*, 47 J. LEGAL ANALYSIS 45, 46 (2018) (arguing that imposing legal sanctions on firms through litigation can spur imposition of informal reputational sanctions).

²⁵⁹ Cf. MILLER, HUMILIATION, *supra* note 104, at 134 (“One [must] be committed in a serious way to the values and standards of the community in which one claim[s] membership to feel shame (and to be shamed) for not measuring up to those standards or adhering to those values.”).

²⁶⁰ See *supra* note 31 and accompanying text.

²⁶¹ See Whitman, *Enforcing*, *supra* note 72, at 1291 (describing “rules that generally forbid us to glory in the social inferiority of particular classes of persons”).

²⁶² A related objection questions whether the members of liberal, pluralistic, egalitarian societies subscribe to a common set of norms, which is a prerequisite for shame. See LOCKE, *supra* note 241, at 128. It seems, however, that even modern “liberal-democratic societies possess values and commitments the persistent violation of which should properly cause

If self-humiliation can have these expressive effects, then perhaps plaintiffs should be more loath to insulate themselves from the indignities of civil litigation. Indeed, by avoiding humiliation and safeguarding their dignity-as-image, plaintiffs may actually make it *harder* to reclaim their dignity-as-status. Weaker plaintiffs are always at a material disadvantage vis-à-vis more powerful defendants. But when they decline to humiliate themselves, they also put themselves at an expressive disadvantage, forgoing the chance to shame the defendant and to thereby raise the moral stakes of their confrontation. Shielding oneself from humiliation thus comes with its own dignitarian cost, which must be weighed against the dignitarian benefit of being spared some of the indignities of civil litigation.

Not all humiliation, of course, is worth enduring, for not all humiliation has the capacity to shame. Certain personal information may be merely embarrassing, rather than highlighting the plaintiff's injuries or general powerlessness. While disclosing such information may end up humiliating the plaintiff, if for no other reason than it undermines the public persona he or she wishes to present, it won't shame the defendant and thus will have no offsetting dignitarian benefit. For many weaker plaintiffs, however, much of their personal information pertains to their disadvantage and so will have the capacity to shame the defendant if publicly disclosed.

To recognize that weaker plaintiffs can shame more powerful defendants by humiliating themselves is by no means to deny the significant costs attending that practice. Self-humiliation can, in fact, have profound, and in some cases even emotionally debilitating, consequences for those who engage in it. To humiliate oneself, one must present oneself as abject and in some sense weaker than one's target. As feminist scholars have explained, assuming that posture (willingly or not) in legal proceedings can inflict a second injury on the victims of wrongdoing—a "revictimization"—that prolongs and compounds the trauma stemming from their original injury.²⁶³ The risk of revictimization is especially acute for the members of systematically marginalized groups, such as racial minorities and women, whose legal injuries are themselves often best understood as affronts to dignity.²⁶⁴

shame for its members." Mark E. Button, *Shame, Political Accountability, and the Ethical Life of Politics*, 47 POL. THEORY 391, 394 (2019) (book review); cf. SHARON KRAUSE, LIBERALISM WITH HONOR 21-31 (2002) (attempting to reconcile concept of honor with liberalism).

²⁶³ See generally, e.g., SUSAN EHRLICH, REPRESENTING RAPE: LANGUAGE AND SEXUAL CONSENT 1 (2001) (analyzing how language used in sexual assault adjudication proceedings can cause revictimization). On the related concept of "vulnerability" in feminist legal theory, see generally MARTHA ALBERTSON FINEMAN, VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS (2013).

²⁶⁴ Nor do I mean to suggest that shaming through self-humiliation is the only expressive strategy available to the members of systematically marginalized groups. The Civil Rights Movement, for example, famously employed a kind of mirror-image expressive strategy, in

This all suggests that the potential expressive benefits of self-humiliation won't always justify the psychological and material costs. And the costs may outweigh the benefits in precisely those cases in which the dignitarian stakes seem to be the greatest. In this respect, the decision whether to engage in self-humiliation resembles the decision whether to file a lawsuit in the first place: the indignities of civil litigation may dissuade some victims of serious wrongdoing from demanding explanations for their injuries, while the prospect of revictimization (let alone *self*-revictimization) may prompt some of those victims who do file suit to stick to more orthodox, but less expressively potent, litigation strategies.

Turning to the other side of the “v,” one might object that shaming tactics can never be justified because they're inconsistent with *defendants'* dignity. Just as many scholars criticize shaming sanctions for violating criminal offenders' dignity,²⁶⁵ so one might argue that allowing plaintiffs to shame defendants fails to respect defendants' standing as equals—even when defendants have taken advantage of their superior position to avoid being held accountable. I can't definitively refute this objection without reconciling shame with dignity, which I only begin to do in the next Section. For now, I'll note that the dignitarian case against shaming sanctions is much stronger than the dignitarian case against the kind of shaming that occurs in the practices Miller discusses and their modern analogues in civil litigation. For in contrast to shaming sanctions, shaming rituals have their own built-in safeguard, since plaintiffs can shame defendants only by humiliating themselves. This provides plaintiffs with a strong incentive to attempt to shame defendants through self-humiliation only when their legal claims are really worth it and they're worried that more conventional legal tactics will prove insufficient.²⁶⁶

which leaders, donning suits and ties, sought to present themselves not as weak or vulnerable, but as *more* dignified than the white supremacists they were challenging. See Scott A. Sandage, *A Marble House Divided: The Lincoln Memorial, the Civil Rights Movement, and the Politics of Memory, 1939-1963*, 80 J. AM. HIST. 135, 136-37 (1993). That said, the movement does seem to have occasionally resorted to the self-humiliation strategy as well. See, e.g., Amia Srinivasan, *Genealogy, Epistemology, and Worldmaking*, 119 PROC. ARISTOTELIAN SOC'Y 127, 146-47 n.32 (2019) (describing “Mamie Till's decision to publicly display the dead body of her [murdered] son [Emmett]” as “a bid to reclassify black boys as vulnerable children rather than violent threats”). I am grateful to Professor Norm Spaulding for pressing me on these deep and important questions, which deserve a much more extensive treatment than I can offer here and which I look forward to exploring further in future work.

²⁶⁵ See, e.g., NUSSBAUM, *supra* note 98, at 230-33.

²⁶⁶ There are, by contrast, few meaningful *legal* checks on this kind of shaming strategy. Most notably, litigants and their lawyers enjoy absolute immunity from tort liability for any defamatory statements they make in court. See RESTATEMENT (SECOND) OF TORTS § 586 (AM. LAW INST. 1977). This rule forecloses perhaps the most significant legal sanction for attempting to spuriously shame a defendant. On the other hand, it also seems to presuppose

3. Humiliation, Shame, and Legal Equality

The suggestion that plaintiffs should humiliate themselves in order to shame defendants will no doubt have disconcerted many readers. Even assuming that such self-humiliation has certain expressive benefits, it seems morally problematic to expect, much less encourage, weaker plaintiffs to publicly emphasize their lower status. In particular, highlighting the inequality of the parties in a legal proceeding seems inconsistent with our society's professed commitment to legal equality, which requires that the law apply equally to everyone, regardless of his or her socioeconomic status. That commitment strongly resonates with the dignitarian turn in access-to-justice theory, for broad access to justice is arguably required by a commitment to legal equality,²⁶⁷ which, in turn, is a corollary of the status-based conception of dignity that underlies the dignitarian turn.²⁶⁸ To be sure, even as we subscribe to legal equality, we can acknowledge that the ideal is realized only imperfectly in practice.²⁶⁹ Civil procedure scholars have specifically noted the ways in which material inequality can infect civil litigation and subvert legal equality,²⁷⁰ and they have accordingly advocated reforms that would mitigate some of the resource disparities between parties.²⁷¹ Notwithstanding the persistence of those disparities, however, our legal system still aspires to treat all parties as equals, an aspiration that seems to preclude the kind of expressive tactics considered in the previous Section. There are at least two versions of this objection.

One version insists that the premises of shaming rituals are fundamentally incompatible with a commitment to legal equality. For whereas legal equality demands that everyone be treated as an equal, shame requires *differences* of social status; it's only insofar as a plaintiff is weaker than a defendant that humiliating himself or herself will highlight his or her vulnerability and thereby

the existence and legitimacy of shaming during litigation. I am indebted to Professor George Cohen for raising this issue.

²⁶⁷ See Margaret Jane Radin, *Boilerplate: A Threat to the Rule of Law?*, in PRIVATE LAW AND THE RULE OF LAW 288, 289 (Lisa M. Austin & Dennis Klimchuk eds., 2014) (“[A.V.] Dicey also held equality before the law as a first principle of the rule of law: the same law must apply to everyone, regardless of class or position. From this position we can infer that people must have equal access to the courts to settle their disputes”); cf. JOSEPH RAZ, THE AUTHORITY OF LAW 217 (2d ed. 2009) (arguing that the rule of law requires that “[t]he courts should be easily accessible”).

²⁶⁸ See WALDRON, *supra* note 70, at 57 (“We have adopted the idea of a single-status system, evolving a more or less universal status—a more or less universal legal dignity—that entitles everyone to something like the treatment before law that was previously confined to high-status individuals.” (footnote omitted)).

²⁶⁹ See *id.* at 61 (“Obviously the sense in which we stand equal before the law is somewhat fictitious.”).

²⁷⁰ See, e.g., William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1873-84 (2002).

²⁷¹ See, e.g., LAHAV, IN PRAISE OF LITIGATION, *supra* note 3, at 115-18, 130-32.

shame the defendant. And yet, these two propositions aren't as contradictory as they might initially seem. The ideal of legal equality requires legal institutions not to eliminate all socioeconomic inequalities but to transcend them. It's "the ideal that we are mutually answerable to one another, regardless of station,"²⁷² not that we all necessarily occupy the same "station." A legal system can honor the principle of legal equality while tolerating at least some disparities in socioeconomic status so long as it decides disputes based on the merits of the legal claims rather than the identities of the parties. A commitment to legal equality can thus coexist with the inequalities on which shaming rituals depend.²⁷³

But this gives rise to a second version of the objection: even if legal equality doesn't require the eradication of all socioeconomic inequality, legal institutions must ignore the latter in order to comply with the former. Legal equality requires blindness to differences of social rank,²⁷⁴ yet shaming rituals seek to highlight them. Indeed, humiliating oneself in the context of a legal dispute seems to offend one's own dignity, for one shouldn't have to degrade oneself to compel someone else to honor his or her obligations.²⁷⁵ That principle applies with special force to members of systematically marginalized social groups who have suffered and are seeking to redress some of the most egregious dignitary harms. Inviting such individuals to humiliate themselves in the legal process is not just unfair, but seems only to add insult to injury.

These concerns are serious, and they strike me as dispositive in ideal social conditions, where socioeconomic inequality has either been eliminated or at least rendered less salient. But in nonideal circumstances,²⁷⁶ where socioeconomic inequality too often translates into political power, it seems less objectionable to highlight differences of social status as a means of counteracting them. Legal equality may even *require* a legal system operating amid significant socioeconomic inequality to afford socially weaker individuals an opportunity to highlight their plight at the hands of the more powerful.

²⁷² Hershovitz, *supra* note 27, at 103.

²⁷³ But see Paul Gowder, *Equal Law in an Unequal World*, 99 IOWA L. REV. 1021, 1023 (2014) (arguing that principle of legal equality itself requires greater socioeconomic equality); Jonathan Wolff, *Equality and Hierarchy*, 119 PROC. ARISTOTELIAN SOC'Y 1, 17-19 (2019) (arguing that at least some social hierarchies are incompatible with social equality).

²⁷⁴ See, e.g., Herzog, *supra* note 90, at 112 ("Justice is blind. . . . [T]he law will resolutely ignore all kinds of facts that might in some other social setting be perfectly relevant.").

²⁷⁵ Cf. Anderson, *supra* note 66, at 313 ("To stand as an equal before others in discussion means that . . . no one need bow and scrape before others or represent themselves as inferior to others as a condition of having their claim heard."); Wolff, *supra* note 129, at 107 ("It is *insulting* to be treated as if one is of lower respect-standing than is due, and *demeaning* to do, or be required to do, anything that might reasonably be expected to lower your respect-standing.").

²⁷⁶ See JOHN RAWLS, A THEORY OF JUSTICE 245-46 (1971) (distinguishing between ideal and nonideal theory).

The contrary intuition conflates two distinct ways in which a legal system might attend to socioeconomic inequality: First, a legal system might formally or effectively immunize powerful actors from legal accountability. This obviously contravenes the principle of legal equality, in ideal and nonideal conditions alike. Second, a legal system might allow weaker parties to publicly emphasize their vulnerability in order to more effectively assert their entitlement to equal treatment under the law, including their right to call others to account for the legal wrongs committed against them. Although allowing such practices is by definition to concede society's failure to conform to ideal principles of justice, they seem to be an important way of mediating the gap between society's commitment to legal equality and the fact of socioeconomic inequality.²⁷⁷ That is the kind of attention to socioeconomic inequality involved in the shaming practices analyzed by Miller and their analogues in contemporary civil litigation.

B. *Embracing the Publicity of Civil Litigation*

This Section reconsiders the doctrinal issues explored in Part II in light of civil litigation's capacity to shame. The ability of weaker plaintiffs to shame more powerful defendants by humiliating themselves during a lawsuit only further complicates the dignitarian valence of each of those issues, along with standard tenets of access-to-justice theory. Insofar as we accept the dignitarian turn's invitation to consider the expressive dimension of civil litigation, we should be willing to revisit, if not necessarily repudiate, orthodox access-to-justice positions on a range of procedural questions.

1. The Humiliation Privilege

Most straightforwardly, the ability of weaker plaintiffs to shame more powerful defendants provides a new justification for publicity in civil litigation. As an expressive social practice, such shaming works only when plaintiffs humiliate themselves in public, since other members of the relevant normative community must be able to perceive a plaintiff's disadvantage vis-à-vis the defendant. Sealed filings, protective orders in discovery, confidential settlement agreements, and secret arbitration all thwart self-humiliation by shielding plaintiffs' personal information from public view; broad publicity in civil litigation facilitates self-humiliation and thus augments the shaming effects of weaker plaintiffs' lawsuits. This expressive justification for publicity in civil litigation differs from the more utilitarian justifications offered by access-to-justice scholars, who tend to emphasize publicity's systemic benefits and to insist that plaintiffs simply bear any concomitant dignitarian costs (insofar as

²⁷⁷ This argument echoes criticisms of purely "formal" conceptions of equality generally and of legal equality specifically. See generally ROBIN L. WEST, *RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW* (2003).

they even acknowledge such costs).²⁷⁸ An expressive defense, by contrast, emphasizes the potential benefits of publicity for plaintiffs themselves.

Of course, realizing those benefits isn't painless for plaintiffs. Weaker plaintiffs can shame more powerful defendants in order to more effectively assert their dignity-as-status, but only by humiliating themselves and compromising their dignity-as-image in the process.

Given this trade-off, plaintiffs should be able to choose whether to deliberately violate their own privacy in an effort to shame the defendant. The current rules governing publicity in civil litigation largely deny plaintiffs that choice, generally allowing defendants and courts to set the terms on which plaintiffs' personal information is publicly disclosed.²⁷⁹ Whereas many access-to-justice scholars now advocate nearly total publicity in civil litigation, a choice-based approach would afford plaintiffs greater control over how much of their personal information gets disseminated beyond the court and immediate parties to the lawsuit. Here I briefly consider one possible arrangement for institutionalizing such control.

The arrangement I envision would reverse the default rule of publicity in civil litigation, so that all of a plaintiff's personal information (or at least certain predefined categories of especially sensitive information) would be withheld from the public record unless the plaintiff affirmatively chose to disclose it or to make the underlying facts to which it pertained part of his or her public case.²⁸⁰ Although this would undermine plaintiffs' dignity-as-status somewhat by dampening the expressive effects of civil litigation, it would allow them to preserve their dignity-as-image. At the same time, plaintiffs could opt out of the privacy default, and thereby tap into civil litigation's expressive potential, by publicly revealing some of their personal information when they judged that doing so might shame the defendant. This proposal would thus function in a manner similar to the federal rape-shield law. As applied in civil cases, that rule generally prohibits the introduction of evidence of a sex-offense victim's

²⁷⁸ See *supra* note 171 and accompanying text.

²⁷⁹ For recent examples, see generally *Kiwewa v. Postmaster General*, No. 18-3807, 2019 WL 4122013 (6th Cir. Mar. 26, 2019) (denying employment-discrimination plaintiff's motion to seal district court record on appeal); and Patrick Dorrian, *Massage Parlor Patron Suing Over Police Cameras Must Reveal Name*, BLOOMBERG LAW (Sept. 10, 2019, 4:06 PM), <https://news.bloomberglaw.com/class-action/massage-parlor-patron-suing-over-police-cameras-must-reveal-name>.

²⁸⁰ Something close to this privacy default long prevailed in English courts, though recent decisions have expanded public access to documents filed during civil litigation. See, e.g., *Cape Intermediate Holdings Ltd. v. Dring ex rel. Asbestos Victims Support Grp.* Forum UK [2019] UKSC 38, [2019] 3 WLR 429 (determining court's jurisdiction under Civil Procedure Rules to permit a nonparty to obtain copies of documents in court records); *Guardian News & Media Ltd. v. City of Westminster Magistrates' Court* [2012] EWCA (Civ) 420, [2012] 3 WLR 1343 (Eng.) (construing "open justice principle" as a constitutional principle "to be found not in a written text but in the common law").

“reputation” unless the victim “place[s] it in controversy.”²⁸¹ A privacy default would extend a weaker version of this protection to all of a plaintiff’s personal information, and would govern pretrial discovery as well as the introduction of evidence at trial. The protection would be weaker because plaintiffs would be able to withhold their personal information only from the public, not from the defendant or the court; nor would they be able to prevent the defendant from using the information in the litigation.

One can thus understand this proposal as a kind of qualified *humiliation privilege*. As with any privilege, plaintiffs could keep certain personal information secret unless they took steps to waive the privilege, yet the privilege would be only qualified because the information could still be used in the course of resolving the dispute, just out of public view. Such an approach would better protect plaintiffs’ dignity-as-image than our current civil justice system does while allowing them to publicly humiliate themselves when that tactic might be to their advantage.²⁸²

The most significant legal hurdle that even a qualified humiliation privilege would have to surmount is the First Amendment, at least as currently construed. Lower courts have interpreted the First Amendment (and related common law doctrines) to create a strong presumption of publicity in civil litigation and to permit secrecy only in very limited circumstances.²⁸³ Imposing a privacy default with a publicity opt-out would likely run afoul of that understanding. Although a comprehensive First Amendment analysis is beyond the scope of this Article, it’s worth noting that the arguments for publicity are weaker in the civil context

²⁸¹ FED. R. EVID. 412(b)(2). To protect the victim’s privacy, the rule also establishes special confidential procedures for determining the admissibility of such evidence. FED. R. EVID. 412(c).

²⁸² Plaintiffs’ control under a humiliation privilege would have to be limited somewhat to account for the most significant systemic effects of their individual decisions to keep information private. *Cf., e.g.,* Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 76 (2018) (advocating proposal that would permit general use of nondisclosure agreements (“NDAs”) in settlement of sexual-misconduct claims, but would require such NDAs to allow disclosure of settled allegations to investigative authorities if same perpetrator is later accused by another individual). *But see* Hoffman & Lampmann, *supra* note 181, at 189-207 (arguing that courts should apply contract law’s public policy doctrine to refuse to enforce most NDAs in sexual-misconduct cases, given significant externalities generated by such agreements). In addition, due process would demand that defendants be permitted to invoke the privilege on similar terms as plaintiffs. And even putting due process concerns aside, a humiliation privilege would have to account for the fact that it might induce would-be defendants to use the joinder rules or declaratory-judgment remedy to claim the privilege’s protections by designating themselves formally as plaintiffs. *See supra* note 12 and accompanying text. But again, following the dignitarian turn, I am not focusing in this Article on the dignitarian interests of parties who are typically defendants.

²⁸³ *See* Ardia, *Court Transparency*, *supra* note 182, at 836 (examining history of publicity in court proceedings); Ardia, *Privacy*, *supra* note 136, at 1385 (criticizing “categorical exclusion” of certain information from court records).

than in the criminal context, where the constitutional right to public access originated.²⁸⁴ For whereas in the criminal context the government exercises the state's coercive power in an effort to deprive citizens of their physical liberty, in the civil context other private parties generally invoke that power (subject to judicial oversight) to demand answers and a remedy.²⁸⁵ There is thus a correspondingly diminished imperative to involve the public in the civil process and should be wider latitude to accommodate plaintiffs' privacy interests. This isn't to deny that the public has significant interests in obtaining information produced through civil litigation, but a more nuanced understanding of the civil process would afford more room to balance those interests with litigant privacy than current categorical constructions of the First Amendment allow.

Even a qualified humiliation privilege, moreover, would still permit greater publicity than the current arbitration regime. As explained in Part II, most arbitration proceedings are conducted in total secrecy, and the parties are sometimes even forbidden to publicize what occurs during the proceedings as well as the details of the dispute. Arbitration can thus deprive would-be plaintiffs of any meaningful opportunity to publicly humiliate themselves in an effort to shame their opponents. To be sure, a would-be plaintiff bent on publicity could seek vacatur or oppose confirmation of an adverse arbitral award, proceedings that occur in open court and produce a public record. But the record in such proceedings comprises only a very limited set of materials,²⁸⁶ and in any event, seeking vacatur or opposing confirmation is rarely worth the candle given the strict limits on judicial review of final arbitral awards. So not only do confidentiality rules insulate arbitration from public accountability, as access-to-justice scholars have rightly noted; they also strip would-be plaintiffs of their most potent expressive weapon. A qualified humiliation privilege, by contrast, would afford plaintiffs some of the privacy benefits of arbitration while still allowing them to exploit the indignities of civil litigation.²⁸⁷

2. Other Potential Expressive Doctrines

Short of supporting a generally applicable humiliation privilege, the previous Section's expressive insights also suggest more modest adjustments to specific

²⁸⁴ See *supra* note 178 and accompanying text.

²⁸⁵ See generally Matthew A. Shapiro, *Delegating Procedure*, 118 COLUM. L. REV. 983, 995-1031 (2018) (examining how ordinary civil litigation delegates state power to private parties).

²⁸⁶ See 9 U.S.C. § 13 (2018).

²⁸⁷ One might also question how radically a humiliation privilege would differ from current civil practice, given some courts' willingness to issue protective orders and approve confidential settlements as a matter of course. See *supra* notes 8-11 and accompanying text (examining current trends in court-ordered privacy). But be that as it may, a humiliation privilege would lodge control over plaintiffs' personal information in civil litigation with plaintiffs themselves, rather than leaving it to judges' individual discretion.

procedural doctrines. Before deciding whether to adopt such reforms, we would, of course, have to assess their potential consequences for other values besides dignity, as well as their material effects. But it's worth at least pondering how the value of dignity, in all its complexity, might challenge prevailing assumptions in access-to-justice theory about which procedural rules and practices empower plaintiffs.

The Expressive Dimension of the Civil Complaint. Appreciating the ability of weaker plaintiffs to shame more powerful defendants by humiliating themselves reveals a potentially pro-*plaintiff* effect of the Supreme Court's plausibility pleading standard. Most civil procedure scholars have focused on pleading's traditional functions of giving defendants notice of the claims against them and efficiently sorting potentially meritorious claims from frivolous ones.²⁸⁸ From that practical perspective, the plausibility standard is an unmitigated boon for defendants, since it requires plaintiffs to include more factual allegations in support of their claims in their complaints before being permitted to proceed to discovery.

But from an expressive perspective, the plausibility standard may have a less obvious upside for plaintiffs, too. Part II showed how that standard (paternalistically) protects plaintiffs' dignity-as-image by limiting the *duration* of any humiliation they must suffer when their claims are unlikely to succeed. At the same time, though, it can amplify the *intensity* of the humiliation they suffer at the outset of the litigation and thus enhance the shaming power of the civil complaint. To satisfy the standard, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"²⁸⁹ Although this standard purports to restrict plaintiffs' access to discovery,²⁹⁰ it does so by incentivizing plaintiffs to plead more facts in support of their legal claims. Plaintiffs, to be sure, weren't limiting themselves to the barest "short and plain statement" of their claims under the old notice-pleading regime.²⁹¹ But at the margin, the plausibility standard encourages plaintiffs to include additional allegations they might otherwise omit, particularly allegations that, while supportive of their claims, concern sensitive matters they are loath to make public. Those additional allegations can *augment* the expressive power of the civil complaint. More specifically, by complying with the plausibility standard, plaintiffs can enhance both of the components of a shaming ritual analyzed by Miller: pleading additional facts about their disadvantage undermines their self-presentation and thus intensifies their self-humiliation, while pleading additional facts about the defendant's wrongdoing and

²⁸⁸ See, e.g., Bone, *supra* note 207, at 904; Spencer, *Understanding*, *supra* note 207, at 19-25; Steinman, *supra* note 207, at 1347.

²⁸⁹ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

²⁹⁰ See, e.g., *id.* at 678-79 (stating that pleading standard "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions").

²⁹¹ FED. R. CIV. P. 8(a)(2).

recalcitrance intensifies his shame. Ironically, an ostensibly pro-defendant pleading standard might actually end up strengthening the expressive hand of some plaintiffs.

This is by no means to deny the plausibility standard's potential to illegitimately deprive deserving plaintiffs of access to discovery. Indeed, the plausibility standard threatens to inflict its own kind of dignitarian harm on plaintiffs, for having one's potentially legitimate grievances rejected prematurely as implausible can be understood as a failure by the courts to take seriously one's standing as an equal entitled to an explanation.²⁹² The point isn't that the plausibility standard unambiguously favors plaintiffs, but that it might have one significant pro-plaintiff effect—an effect we miss if we focus on the standard's practical consequences alone.

Even putting practical consequences to one side, a universal heightened pleading standard remains a problematic way of enhancing the civil complaint's expressive force. For just as the plausibility standard paternalistically protects plaintiffs' dignity-as-image by cutting their humiliation short when their claims are weak, so, too, does it paternalistically strengthen their demand for recognition of their dignity-as-status by essentially requiring them to include more potentially humiliating information in their complaints in order to proceed to discovery. The standard effectively forces plaintiffs to humiliate themselves, on pain of having their claims prematurely rejected as implausible.

A pleading regime more respectful of plaintiffs' dignity might allow plaintiffs to elect different pleading standards, depending on their willingness to make their allegations public.²⁹³ If, for example, they wanted to keep their allegations private in order to avoid humiliation, they would have to satisfy the plausibility standard. This option would allow plaintiffs to protect their dignity-as-image in exchange for forgoing the civil complaint's expressive potential and risking a premature dismissal of their claims. Alternatively, if they were willing to make their allegations public, they would have to satisfy only a laxer "notice pleading" standard.²⁹⁴ They could then choose whether to include sensitive personal information in their publicly available complaints, humiliating themselves in an attempt to shame the defendant, or to omit such information and severely limit both the credibility and the expressive force of their allegations. Such a bifurcated pleading regime would give plaintiffs greater say in trading off their dignity-as-status against their dignity-as-image, rather than having the state effectively make the choice for them.

²⁹² See *supra* text accompanying note 168.

²⁹³ Cf. Nagareda, *supra* note 209 (proposing bifurcated pleading standard for lawsuits based on public and private information).

²⁹⁴ Cf. *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (stating that "simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues").

The Timidity of Aggregate Litigation. For the same reasons that civil litigation's shaming potential strengthens the access-to-justice case for publicity in civil procedure, it also complicates the access-to-justice case for class actions. Access-to-justice scholars defend class actions primarily as a means of aggregating claims that aren't worth prosecuting individually. As explained in Part II, with that aggregation comes a degree of anonymity for the absent class members, who can largely rely on the named plaintiffs to divulge any personal information necessary to establish the defendant's liability to the class. While this anonymity protects the absent class members' dignity-as-image, it also deprives them of the chance to publicly humiliate themselves and to thereby augment the shaming effects of the litigation beyond whatever compromising information the named plaintiffs choose to disclose. The flipside of the anonymity of aggregate litigation is thus a form of timidity, as absent class members preserve their privacy by free-riding on the willingness of the named plaintiffs to expose themselves to public scrutiny.

None of this, of course, is a reason to dispense with aggregate litigation or to make it more difficult to certify class actions, as recent Supreme Court decisions have attempted to do.²⁹⁵ After all, in many cases, class actions provide the only viable avenue for seeking any kind of relief. But we should nevertheless consider the dignitarian effects of class actions in structuring aggregate litigation, so that absent class members can enjoy the practical benefits of aggregation while preserving the opportunity to reap some of the expressive advantages of individual litigation. One possibility would be to make greater use of opt-in class actions, as opposed to the currently favored opt-out class actions. The Supreme Court has suggested that due process requires that absent class members be given an opportunity to opt out of a class action, at least where the action is "wholly or predominantly for money judgments."²⁹⁶ Consistent with these statements, class actions certified under Federal Rule of Civil Procedure 23(b)(3), the rule governing nonmandatory class actions and the primary means of certifying class actions seeking money damages, must afford absent class members the right to opt out.²⁹⁷ Many civil procedure scholars prefer this arrangement to a requirement that potential class members opt in on the ground that opt-out rights result in larger classes than would be certified under an opt-in regime, since the typical class member is unlikely to take the affirmative steps necessary to join the litigation.²⁹⁸

As an expressive matter, however, opt-in class actions have certain advantages over opt-out class actions—advantages that might outweigh the

²⁹⁵ See, e.g., *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011).

²⁹⁶ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 n.3 (1985); see also *Wal-Mart*, 564 U.S. at 362-63; *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 848 n.24 (1999).

²⁹⁷ See FED. R. CIV. P. 23(c)(2)(B).

²⁹⁸ See Dodson, *supra* note 221, at 184-86.

practical benefits of an opt-out regime (depending, of course, on the magnitude of those benefits). In particular, requiring potential class members to opt in eliminates, or at least reduces, the anonymity of aggregate litigation. Rather than be included in the class automatically, prospective class members must come forward, identify themselves, reveal any personal information necessary to establish their membership in the class, and affirmatively choose to join the litigation.²⁹⁹ The class members can exploit this moment of publicity to shape the expressive valence of the lawsuit by revealing personal information that emphasizes their lower status and thus shames the defendant. When combined with the disclosures of the other prospective class members who choose to join the litigation, this self-humiliation can significantly amplify the litigation's expressive effects beyond those of an opt-out class action. To be sure, depending on the substantive cause of action, class certification and the defendant's liability may sometimes be established using statistical or other representative evidence, rather than information particular to any individual class member.³⁰⁰ But in many cases an opt-in requirement will force prospective class members who wish to join the litigation to reveal information they might otherwise want to keep private—an opportunity for self-humiliation that can endow aggregate litigation with some of the expressive power of individual litigation.

One might worry that requiring absent class members to opt in leaves them with little choice but to subject themselves to humiliation. Although they can technically avoid the publicity that attends opting in by forgoing the litigation altogether, it seems unreasonable to demand that they abjure their right to a portion of any class-wide relief in order to maintain their dignity-as-image. The better dignitarian compromise would be to give them some say over the structure of the litigation and, specifically, the extent to which it protects their privacy. In this respect, appreciating the cross-cutting dignitarian effects of aggregate litigation bolsters Professor Scott Dodson's proposal to give prospective class members an option to have a class certified on either an opt-out or an opt-in basis.³⁰¹ Such an arrangement would allow prospective class members to collectively (if not individually) balance the benefits to their dignity-as-image from the anonymity associated with an opt-out regime against the costs to their dignity-as-status from avoiding the publicity associated with having to opt in.

²⁹⁹ In current civil practice, individuals must affirmatively opt in to "collective actions" brought under statutes such as the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b) (2018), and the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(e) (2018). *See, e.g.*, Stephanie Russell-Kraft, *Facebook Lawyer Joins Jones Day Gender Bias Suit*, BLOOMBERG LAW (June 10, 2019, 1:33 PM), <https://news.bloomberglaw.com/us-law-week/facebook-lawyer-joins-jones-day-gender-bias-suit> (reporting on plaintiff who opted in to FLSA collective action).

³⁰⁰ *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016) (holding that representative evidence may be used to support class claims).

³⁰¹ *See* Dodson, *supra* note 221, at 202.

CONCLUSION

From a dignitarian perspective, civil litigation poses a dilemma for plaintiffs. On the one hand, as some civil procedure scholars have recently begun to suggest, civil litigation can promote one aspect of plaintiffs' dignity, by allowing them to call those who have wronged them to account. On the other hand, along the way, civil litigation can undermine another aspect of plaintiffs' dignity, by forcing them to reveal personal information that is inconsistent with their public image and that they'd rather not share. Appreciating this dilemma complicates standard access-to-justice positions regarding not only secrecy in civil litigation, but also several other procedural issues—each of which potentially presents a trade-off between the two aspects of plaintiffs' dignity. The dilemma can't be resolved as a categorical matter. But at least in conditions of socioeconomic inequality, weaker plaintiffs can seize on the indignities of civil litigation to more effectively assert their standing as equals. It turns out that an institution that aspires to legal equality can more fully realize that ideal amid socioeconomic inequality by allowing plaintiffs to publicly call attention to their weakness—to humiliate themselves.

This complex dignitarian account of civil litigation holds important lessons for civil procedure, as well as for legal and political theory. For civil procedure scholars, it should sound a note of caution. I agree—and have argued elsewhere³⁰²—that civil procedure scholarship would indeed benefit from greater attention to concepts from political theory, including dignity. Among other things, justifying civil litigation in dignitarian terms reveals that civil procedure has its own “expressive economy.”³⁰³ While debates over various procedural practices (understandably)³⁰⁴ tend to focus largely on practical costs and benefits, equally important are the values those practices express—what they say about the kind of society in which we live. But civil procedure's expressive dimension turns out to be more complicated than proponents of the dignitarian turn seem to think. In developing a theoretical account of civil procedure, then, we can't just import concepts from political theory wholesale, but must instead consider how those ideals are instantiated in and shaped by our society's institutions as they actually exist.³⁰⁵

³⁰² See generally Shapiro, *supra* note 285, at 1065 (advocating “greater focus in civil procedure scholarship on liberal political theory and its account of political power”).

³⁰³ Cf. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 417 (1999).

³⁰⁴ Cf. Hershovitz, *Wrongs*, *supra* note 37, at 3 (“This is a hardheaded view, as it locates the importance of tort law in its practical consequences. And it has the appeal that hardheaded views do, for it is hard to deny that practical consequences are important.”).

³⁰⁵ For a similar methodological approach, but applied to criminal law rather than civil procedure, see Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 944-48 (2016).

The corresponding lesson for political theorists is that, while there is of course an essential role for ideal theory, it is also important to develop accounts of fundamental political concepts such as dignity for extant institutions.³⁰⁶ It may well be that one important aspect of a status-based conception of dignity is legal equality, and that in ideal social conditions, legal equality requires *blindness* to differences of social status. In conditions of socioeconomic inequality, however, we may need to *highlight* those differences to better approximate the principle of equality before the law. In this respect, civil procedure confirms the more general insight that, in order to overcome our society's imperfections, we may need to confront them more directly first.³⁰⁷

³⁰⁶ Cf. Jeremy Waldron, *Political Political Theory: An Inaugural Lecture*, 21 J. POL. PHIL. 1, 8-9 (2013).

³⁰⁷ Cf. Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404, 410 (2012) (arguing that "path to racial equality sometimes requires racial recognition" in judicial opinions).