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Article 3

## **Notes on Uniformity and Individuality in Mass Litigation**

Jack B. Weinstein

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# NOTES ON UNIFORMITY AND INDIVIDUALITY IN MASS LITIGATION

*Jack B. Weinstein\**

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## I. DILEMMAS

I am overwhelmed at the generosity of this great law school and the presence of so many whose works I admire and whose friendship I cherish. Thanks to Professor Stephan Landsman and so many of you at DePaul for your work in organizing this event and, of course, Jus-

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\* Senior Judge, Federal District Court, Eastern District of New York. This is the basis of a speech given at the Clifford Symposium on Tort Law and Social Policy at DePaul University, April 25, 2014. I am grateful for the help of my law clerks Andrew Braver and Tulsi E. Gaonkar (2013–2014), and Nora Ahmed and Caitrin McKiernan (2014–2015).

tice Stephen Breyer's remarkable introduction is one I am not prepared to disagree with.

If you dig down through the debris of my judicial work of almost half a century, you will find much the same kinds of decisional sediment as other federal trial judges, colleagues in whose names I accept this honor.<sup>1</sup>

We have been fortunate participants in a post-World War II world where Americans lobbied for the enactment of, and adherence to, laws preventing discrimination based on race, gender, disability, age, sexual orientation, and other invidiousness.

A pause to glance back on how our federal trial courts address some of our massive legal problems and our biases, stereotypes, and general litigation practices seems in order.

#### A. *Law's Fundamental Dilemma*

In the first days of law school, we began to sense one of the law's central dilemmas. Law holds itself out as treating each person equally. As Professor Judith Resnik put it, "[T]he great ambitions of the twentieth century [were] equality and dignity . . ."<sup>2</sup> But because every person is different, the impact of the law on each person is necessarily different. We have had a "Catch-22" obvious from the beginning in the Declaration of Independence's principle: "all . . . are created equal."<sup>3</sup> But they are not—and cannot be—treated equally by the law.

In some aspects the law recognizes the individual needs of parties; in others it stresses uniformity. The tide shifts: sentencing and class action are illustrative.<sup>4</sup>

Each day, district judges are enthralled by observing through their window to the world—the courtroom—the incredible diversity of humanity in all its bewitching and sordid guises. Yet our great courthouse factories with their procrustean, cookie-cutting assembly lines

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1. Cf. Daniel Sandstrom, *My Life as a Writer: An Interview with Philip Roth*, N.Y. TIMES, Mar. 16, 2014, at BR14 (Philip Roth, speaking for himself and us less talented, quoting the great heavyweight Joe Louis, "I did the best I could with what I had").

2. Judith Resnik, *Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century*, 11 INT. J. CONST. L. 162, 163 (2013).

3. THE DECLARATION OF INDEPENDENCE para 2. (U.S. 1776).

4. See, e.g., Jack B. Weinstein & Christopher Wimmer, *Sentencing in the United States*, in CURRENT TRENDS IN CRIMINAL PROCEDURE AND EVIDENCE: A COLLECTION OF ESSAYS IN HONOR OF PROFESSOR ELIAHU HARNON 453 (Anat Horovitz & M. Krennitzer eds., 2009) (covering a history of U.S. sentencing from colonial punitive uniformity, to postindependence individual rehabilitation, to guideline uniformity, to current increasing emphasis on the individual).

are expected to convert these diverse materials into uniform, one-size-fits-all decisions.

The humanitarian Denis Donoghue encapsulated our problem when he pointed out “the judicial casuistry involved in the application of principles to cases that are always in some respects unique.”<sup>5</sup>

Chicago poet Carl Sandburg’s insight into the law’s dilemma was put in *The People, Yes*:

“Do you solemnly swear before the ever-  
living God that the testimony you  
are about to give in this cause shall  
be the truth, the whole truth, and  
nothing but the truth?”

“No, I don’t. I can tell you what I saw  
and what I heard and I’ll swear to  
that by the everliving God but the  
more I study about it the more sure  
I am that nobody but the everliving  
God knows the whole truth and if  
you summoned Christ as a witness in  
this case what He would tell you  
would burn your insides with the  
pity and the mystery of it.”<sup>6</sup>

Anatole France’s take on the problem of dealing with humankind’s diversity in abstract legal uniformity was cryptic and cynical: “[T]he majestic equality of the laws . . . forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.”<sup>7</sup>

The law constructs rigid cubbyholes into which we stuff diverse people and situations to achieve the illusion of equality. It is difficult to soften these matrices to meet individual differences. This is not to say that we ignore this problem. For example, in dealing with the education of children with disabilities, the law increasingly recognizes that “every child is unique” and we go to great lengths to provide an appropriate education for each child.<sup>8</sup>

5. See generally Denis Donoghue, *Introduction* to DAEDALUS, Winter 2014, at 5 (an issue entitled “What Humanists Do”).

6. CARL SANDBURG, *THE PEOPLE, YES* 193 (1936), quoted in Jack B. Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 233, 240 (1966).

7. ANATOLE FRANCE, *THE RED LILY* 95 (1910), cited in T. Ward Frampton, *Bivens’s Revisions: Constitutional Torts After Minneci v. Pollard*, 100 CALIF. L. REV. 1711, 1734 n.167 (2012).

8. See, e.g., Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2012) (requiring states receiving federal funds to provide “all children with disabilities” a “free appropriate public education”); *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 161 (2d Cir. 2014) (“Because every child is unique, determining whether a student has been placed in the least restrictive environment requires a flexible, fact-specific analysis.” (internal quotation marks

After the *Agent Orange* case was settled, Special Master Kenneth Feinberg and I talked about how to distribute the fund. I suggested we pitch a tent in the park across from the court. I would sit on cushions with chests of gold coins alongside. And the veterans would come in one at a time to get their fair share. But then I thought: the second veteran would probably say, "Why should he get more than me? My life was harder than his; I should get more." So we hit on devising a uniform insurance policy for herbicide-exposed veterans and access for all their families to social work agencies in each state.

Uniformity is sometimes administratively convenient. It has the advantage of providing assurances that everyone's rights are protected whether they need protection or not. *Gideon*,<sup>9</sup> *Miranda*,<sup>10</sup> and pro se litigation<sup>11</sup> are examples. In pro se cases, the court must make special efforts to keep litigants out of the law's procedural tar pits through such techniques as liberal interpretation of pleadings and warnings on summary judgment.<sup>12</sup>

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omitted)). Employers of the disabled must also try to provide adequate individual accommodations. See Americans with Disabilities Act, 42 U.S.C. §§ 12111–12117.

9. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (providing the right to counsel in all criminal cases).

10. *Miranda v. Arizona*, 384 U.S. 436 (1966) (providing notice of rights to all those arrested).

11. See *Wechsler v. R.D. Mgmt. Corp.*, 861 F. Supp. 1153, 1157 (E.D.N.Y. 1994) (Glasser, J.). Speaking of pro se cases:

Prompted . . . are questions concerning the role of a judge. More specifically, is it ever appropriate for a judge to intervene in the prosecution of a lawsuit, and if it is, when and under what circumstances? Does the [Court of Appeals] direct the district court to enlist in the fray on behalf of *all* pro se litigants? . . . [D]oes the solicitude it commands extend to a wealthy and sophisticated pro se litigant?

*Id.* As the Supreme Court pointed out:

[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel. As we have noted before, "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of even-handed administration of law."

*McNeil v. United States*, 508 U.S. 106, 113 (1993) (footnote omitted) (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980)).

12. See, e.g., *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474–75 (2d Cir. 2006).

It is well established that the submissions of a pro se litigant must be construed liberally and interpreted to raise the strongest arguments that they suggest. . . .

This policy of liberally construing pro se submissions is driven by the understanding that implicit in the right of self-representation is an obligation on the part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training.

*Id.* (citations omitted) (internal quotation marks omitted).

### B. Sentencing

The difficulties in achieving uniformity across cases is most clearly revealed in sentencing. Congress and the Sentencing Commission had obfuscated the issue by providing for seeming uniformity through mandatory guidelines, compelling gross individual injustices.<sup>13</sup> The Supreme Court has sanitized that cesspool with Justice Stephen Breyer's opinion in *Booker*, turning the ukases of the Sentencing Commission into mere suggestions.<sup>14</sup> But congressional minimum sentence statutes continue to mandate gross injustices.<sup>15</sup>

Individual judges vary in their view of what is just. Even a single judge is not always consistent.<sup>16</sup> But at least we have now been allowed to avoid the hypocrisies involved in mechanical uniformity in sentencing, and we are seeking some consensus in our approaches to

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13. See 18 U.S.C. § 3553(b)(1).

14. *United States v. Booker*, 543 U.S. 220 (2005).

15. See *United States v. C.R.*, 972 F. Supp. 2d 457 (E.D.N.Y. 2013) (revisiting mandatory, inappropriately harsh sentencing requirements); see also *United States v. Diaz*, No. 11–CR–00821–2 (JG), 2013 WL 322243, at \*1 (E.D.N.Y. Jan. 28, 2013) (“[T]he mandatory minimum sentences in drug trafficking cases distort the sentencing process and mandate unjust sentences.”); *United States v. Dossie*, 851 F. Supp. 2d 478, 484 (E.D.N.Y. 2012) (noting that in drug cases statutory minimums are frequently used to “overly punish a defendant”); cf. Jess Bravin, *Two Supreme Court Justices Say Criminal-Justice System Isn't Working*, WALL ST. J. (Mar. 24, 2015, 7:46 AM), <http://www.wsj.com/articles/two-supreme-court-justices-say-criminal-justice-system-isnt-working-1427197613> (“Justice Breyer says mandatory minimums are a ‘terrible idea.’”); Mark W. Bennett, *How Mandatory Minimums Forced Me To Send More than 1,000 Nonviolent Drug Offenders to Federal Prison*, NATION (Oct. 24, 2012), <http://www.thenation.com/article/170815/how-mandatory-minimums-forced-me-send-more-1000-non-violent-drug-offenders-federal-pri> (“Many people across the political spectrum have spoken out against the insanity of mandatory minimums.”); Letter from Hon. Robert Holmes Bell, Chair, Criminal Law Comm., Judicial Conference of the U.S., to Hon. Patrick J. Leahy, Chair, Comm. on the Judiciary, U.S. Senate 1 (Sept. 17, 2013) (“For 60 years, the Judicial Conference has consistently and vigorously opposed mandatory minimums and has supported measures for their repeal or to ameliorate their effects.”). But see Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Office of the Assistant Att’y Gen., U.S. Dep’t of Justice, to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n 12 (July 11, 2013) (“[W]e do not support the elimination or dramatic reduction of any existing mandatory minimum penalties.”); Letter from Anne Gannon, Nat’l Coordinator for Child Exploitation Prevention & Interdiction, Office of the Deputy Att’y Gen., U.S. Dep’t of Justice, to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n 6 (Mar. 5, 2013) (“[T]he Department opposes the elimination of, or significant reduction in, mandatory minimum sentences in the event that the receipt and possession offenses are merged.”).

16. I worry about that inconsistency. I am in the process, with the help of my law clerks, of developing a kind of guidelines for my own sentences: do I treat a garden variety heroin importer on Monday as I do on Friday? Is there a garden-variety importation case? See, e.g., *United States v. G.L.*, No. 12–CR–475, 2015 WL 1517397, at \*3 (E.D.N.Y. Apr. 2, 2015) (attempting to rationalize sentences by laying out general criteria for “similar” cases). Cf. John Tierney, *To Choose Is To Lose*, N.Y. TIMES, Aug. 21, 2011, at MM33 (discussing the effects of decision fatigue).

reducing incarceration and avoiding unnecessary destruction of lives and communities by excessive punishment.<sup>17</sup>

Courts and judges are newly embarking on a course of closely supervising individual defendants before and after conviction to improve their capacities and opportunities to overcome crime and poverty.<sup>18</sup> Using medical and social work personnel,<sup>19</sup> court probation officers, and private institutions, judges themselves work intensively to help individuals move from the criminal world into that of the law abiding. The shift marks a return to individual rehabilitation rather than mass uniform rules of incarceration. One of the anomalies of these programs is that some criminals obtain more help from society than their peers who struggle alone painfully but successfully to lead lawful lives.

### C. Class Action

In the civil arena, the class action is one way of equalizing the power of enfeebled individuals and the powerful entities they confront.

In an address on rules for federal trial judges dealing with diversities of the real world and mass cases, I pointed out that:

The doors were opened to our courthouses for the poor, the oppressed, the legally deprived by the 1938 Federal Rules of Civil Procedure. Easy pleading, full discovery, and subsequent class action

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17. See, e.g., Stephanie Clifford, *Citing Fairness, U.S. Judge Acts To Undo Sentence He Was Forced to Impose*, N.Y. TIMES, July 29, 2014, at A16; Eric H. Holder, Jr., *Time To Tackle Unfinished Business in Criminal Justice Reform*, WASH. POST (Feb. 27, 2015), [http://www.washingtonpost.com/opinions/time-to-tackle-unfinished-business-in-criminal-justice-reform/2015/02/27/e17878bc-bdf9-11e4-bdfa-b8e8f594e6ee\\_story.html](http://www.washingtonpost.com/opinions/time-to-tackle-unfinished-business-in-criminal-justice-reform/2015/02/27/e17878bc-bdf9-11e4-bdfa-b8e8f594e6ee_story.html) (noting an emerging consensus in favor of federal drug sentencing reform and continuing initiatives to reduce the use of mandatory minimum sentences for low-level drug offenses); Matt Apuzzo, *Unlikely Allies Push for a Liberalization of Sentencing Laws*, N.Y. TIMES, Mar. 4, 2014, at A13 (reporting that Attorney General Eric Holder had begun outreach with Republican Congresspersons to form a bipartisan consensus for legislation that would reduce sentences for certain drug crimes).

18. See, e.g., ALTERNATIVES TO INCARCERATION IN THE EASTERN DISTRICT OF NEW YORK: THE PRETRIAL OPPORTUNITY PROGRAM AND THE SPECIAL OPTIONS SERVICES PROGRAM (2014), available at [https://img.nyed.uscourts.gov/files/local\\_rules/EDNY-TWOYEARREPORT-ATI\\_Programs\\_April-2014.pdf](https://img.nyed.uscourts.gov/files/local_rules/EDNY-TWOYEARREPORT-ATI_Programs_April-2014.pdf) (a report to the Board of Judges, U.S. District Court, E.D.N.Y., by Judges John Gleeson, Dora Irizarry, Joanna Seybert, Steven Gold, Joan Azarack, Robert Levy, Cheryl Pollak, and Gary Brown); Memorandum from Senior Judges Charles P. Sifton & Jack B. Weinstein on a Proposed Drug Court Program to Chief Judge Korman & Members of the Board of Judges, U.S. District Court for the Eastern District of New York (Nov. 30, 2005) (on file with author). Cf. Andrew Keshner, *Holder Endorses Eastern District Alternatives to Prison*, N.Y. L.J., Oct. 31, 2014, at 1, available at <http://www.newyorklawjournal.com/id=1202675146471/Holder-Endorses-Eastern-District-Alternatives-to-Prison>.

19. Jack B. Weinstein, In Response to Stein Award at Fordham Law School (Nov. 30, 2013) (discussing interplay between law and social work) (on file with author).

amendments were critical. That door is now being closed by reducing the availability of class actions through legislation and decisions, by tightening pleading rules, by limiting discovery, by encouraging summary judgment, by increasing standing requirements, by favoring arbitrations over litigation, and by a generally negative attitude towards joint action through unions, other voluntary associations, or individuals being denied standing.<sup>20</sup>

By increasingly emphasizing and requiring more and more uniformity among the putative members of the class with respect to relevant issues, the opportunity for individuals to utilize class actions as an equalizing device is being diminished.

## II. MECHANISMS

### A. *Juries and Others*

The United States legal system provides some built-in mechanisms to minimize injustice created by unnecessary emphasis on uniformity. Particularly important is the jury, which can exercise its equitable powers to nullify by imposing its view of the facts and law.<sup>21</sup>

Arbitration, mediation, and settlement practices in which assent is voluntary also sometimes soften the impact of law that may seem too rigid under the circumstances. Government attorneys—aware of the fact that both sides of a conflict are often constituents—properly sometimes try to reduce unnecessary harshness in enforcement.<sup>22</sup>

### B. *Judges*

Trial judges are called on to help level the playing field, to apply equally and uniformly the Constitution and laws. Sitting in a unique position between the lawmakers and the people, they are the representatives and human face of the law.

But what is the role of a trial judge? To merely “call balls and strikes”?<sup>23</sup> To try to interpret and apply law in a way that will help

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20. Jack B. Weinstein, *Federal Trial Judges: Dealing with the Real World*, 69 U. MIAMI L. REV. (forthcoming Winter 2015) [hereinafter Weinstein, *Dealing with the Real World*].

21. See *United States v. Polouizzi*, 687 F. Supp. 2d 133, 167–68 (E.D.N.Y. 2010) (outlining my view that juries should know what punishment could be imposed in some cases as they did in eighteenth-century Britain); see also Jack B. Weinstein, *Considering Jury “Nullification”: When May and Should a Jury Reject the Law To Do Justice?*, 30 AM. CRIM. L. REV. 239 (1993); Jack B. Weinstein, *Proceedings of the Fifty-Third Judicial Conference of the District of Columbia Circuit: Panel Discussion on Jury Nullification*, 145 F.R.D. 149, 170 (1993) (comments on jury nullification).

22. See generally Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155 (1966).

23. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (speaking



society? To apply the law to individuals in a way that will assist them? For a trial judge, all three options must be answered “yes.”<sup>24</sup> In approaching individual and generic problems, a judge must take account and be aware of the diversity of situations and people before the court, as well as of the necessity of some uniform interpretation of the law so it may be complied with by laypersons and enforced.<sup>25</sup>

Trial judges’ empathy and appreciation of the feelings they have for fellow men and women are vital elements in the resolution of legal disputes. To force judges to rigidly and mechanically apply unjust laws, such as those requiring oversentencing, is to strip them of part of their own humanity. Where they *must* impose an unfair rule, they have the *duty* to expose the injustice<sup>26</sup> and to act with humanity in

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before the Senate Judiciary Committee at his confirmation hearing, United States Supreme Court Chief Justice John Roberts stated, “I will remember that it’s my job to call balls and strikes, and not to pitch or bat”).

24. See Jack B. Weinstein, Essay, *The Roles of a Federal District Court Judge*, 76 BROOK. L. REV. 439, 451 (2011).

While the trial court is obliged to follow a ruling decision, its position observing people and situations may . . . provide a useful understanding of developing problems and the need for change. The trial judge physically observes the people who are affected by the law and may sense their problems through direct interactions, rather than through the indirect medium of the record or abstract analysis.

*Id.*

25. Cf. Letter from Judge Charles E. Wyzanski, Jr., Federal District of Massachusetts, to Senator Leverette Saltonstall (Jan. 12, 1959), reprinted in WALTER F. MURPHY & C. HERMAN PRITCHETT, COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 456 (3d ed. 1961).

[A] District Judge has a chance to help the lawyers frame the issues and develop the facts so that there may be a meaningful and complete record. He may innovate procedures promoting fairness, simplification, economy, and expedition. By instructions to juries and, in appropriate cases, by comments on the evidence he may help the jurors better to understand their high civic function. He is a teacher of parties, witnesses, petitioners for naturalization, and even casual visitors to his court. His conduct of a trial may fashion and sustain the moral principles of the community. More even than the rules of constitutional, statutory, and common law he applies, his character and personal distinction, open to daily inspection in his courtroom, constitute the guarantees of due process.

*Id.*

26. See, e.g., *United States v. Ingram*, 721 F.3d 35, 43 n.9 (2d Cir. 2013) (Calabresi, J., concurring) (“[W]e judges have a right—a duty even—to express criticism of legislative judgments that require us to uphold results we think are wrong.”); Jack B. Weinstein, *Beyond the Courtroom, Into the World: The Federal Trial Judge and Fact-Finding*, ANN. SURV. AM. L. (forthcoming 2015) (“That we may be reversed on appeal must not inhibit us.”). See generally Jack B. Weinstein, *Every Day Is a Good Day for a Judge To Lay Down His Professional Life for Justice*, 32 FORDHAM URB. L.J. 131 (2004); Jack B. Weinstein & Mae C. Quinn, *Some Reflections on the Federal Judiciary Role During the War on Drugs*, in THE JUDICIAL ROLE IN CRIMINAL PROCEEDINGS 269 (Sean Doran & John D. Jackson eds., 2000); Jack B. Weinstein & Nicholas R. Turner, *The Cost of Avoiding Injustice by Guideline Circumventions*, 9 FED. SENT’G REP. 298 (1997); Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GENDER & L. 169 (1996); Jack B. Weinstein, *Some Reflections on Seven Lean Years of*

administering and interpreting the law in what they conceive to be a just manner.<sup>27</sup>

### C. Legal Community

In the first half of the 20th century, there was significant cooperation at the national level in articulating rules of law appropriate to the challenges of an increasingly complex society and economy. While proceduralists were laying the foundation for the Federal Rules of Civil Procedure, the American Law Institute (ALI) was formulating critical restatements and model codes to meet modern conditions. The mission of the ALI was to simplify the law, to make it workable in a new society, and to clarify it.<sup>28</sup> This effort drew together lawyers, judges, and professors from across the country. While it had both supporters and critics, the ALI focused the national legal profession on vital common questions. The argument that the Restatements were misguided attempts to simplify what could not be made simple is applicable to almost any statement of a legal rule and should not be the cold water thrown on reforming forges.<sup>29</sup> For mass actions, the ALI recently assessed some of the critical problems with its 2010 publica-

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*Guidelines Sentencing*, 8 FED. SENT'G REP. 12 (1995); Charles E. Wyzanski, Jr., *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1303 (1952) ("[C]learly ethical in its nature . . .").

27. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013) (holding that federal law defining marriage as only between a man and a woman is an unconstitutional deprivation of liberty under the Fifth Amendment's Due Process Clause); *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) ("[M]andatory life-without-parole sentences for juveniles violate[s] the Eighth Amendment."); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) ("[T]he death penalty is disproportionate punishment for offenders under 18 . . ."); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the execution of mentally retarded criminals violates the Eighth Amendment); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

28. G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1, 7 (1997) ("The founders of the ALI saw the 'complexity' of contemporary American society . . . as flowing, in significant part, from the growth and diversification of the American economy . . .").

29. Charles E. Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643, 653 (1933) ("Our civilization is complex and our law, if it is to keep abreast of business and social life, cannot be simple.").

tion of the Principles of the Law of Aggregate Litigation.<sup>30</sup> Courts have been receptive to this contribution.<sup>31</sup>

Conflict of law rules also continue to need reform permitting effective utilization of aggregate litigation. Courts are currently required to apply the choice of law rule of the state in which they sit,<sup>32</sup> but there have been repeated calls for reforms in the area of conflict of laws from attorneys, professors, and judges that would permit a single court to analyze claims from around the country under one law in a more unified fashion.<sup>33</sup>

States differ in the particularities of their laws. Each state has an interest in the fair and efficient resolution of mass cases in which its residents have alleged an injury. Yet, we now participate in a national and global economy where consumers and producers interact with relatively little concern for state boundaries. Effective treatment of legal claims arising from attendant litigation may require more emphasis on a flexible view of appropriate choice of law and venue to permit one judge and one law in mass cases.<sup>34</sup> Uniformity sometimes has advan-

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30. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010); *see also* Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628, 686 (2011) (noting the difficulty that objectors to class action settlements would have in re-opening and re-aggregating their claims under the ALI's 2009 PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION).

31. *See* Karen Shanley, *The Institute in the Courts: Principles of the Law of Aggregate Litigation*, ALI REP., Summer 2012, at 4.

As courts continue to deal with new issues and challenges in class-action lawsuits, they are frequently turning to the Institute's Principles of the Law of Aggregate Litigation for guidance, seeking ways to promote judicial efficiency without sacrificing individual parties' rights. Recently, the Principles have been particularly influential in addressing a problem common in class actions, but foreign to simpler, non-aggregate proceedings: who gets paid when settlements are reached?

*Id.* at 6.

32. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941).

Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws.

*Id.* at 496.

33. *See, e.g.*, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.05 & cmt. (2015) (noting the principles and methods by which a court can aggregate claims from multiple jurisdictions). *See generally* Luke McCloud & David Rosenberg, *A Solution to the Choice of Law Problem of Differing State Laws in Class Actions: Average Law*, 79 GEO. WASH. L. REV. 374 (2011); Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001 (2008); Friedrich K. Juenger, *The Complex Litigation Project's Tort Choice-of-Law Rules*, 54 LA. L. REV. 907 (1994); Paul S. Bird, Note, *Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse*, 96 YALE L.J. 1077 (1987).

34. *See* Jack B. Weinstein, *Mass Tort Jurisdiction and Choice of Law in a Multinational World Communicating by Extraterrestrial Satellites*, 37 WILLAMETTE L. REV. 145, 151 (2001) (discussing

tages of effective administration for the benefit of many over diverse treatment for the theoretical benefit of individual control.

### III. MASS ACTIONS

Mass tort litigation exemplifies some of the law's incongruities. It is rife with issues posed largely by the need to deal fairly, yet uniformly, with individuals in groups. I but touch on some of the dissonance.

#### A. Unavailability of Efficient Procedures for Courts

We face the probability of increased massive litigations, *but* we are reducing our courts' ability to handle such cases by reducing the availability of procedures for efficiency, such as class actions.

Massive litigations present challenging issues for trial court administration. In recent years, in addition to more typical mass tort cases, we have seen a series of devastating disasters, both natural and man-made—the 9/11 attack on the World Trade Center, Hurricane Katrina, the British Petroleum Oil Spill, and Hurricane Sandy, to name a few. These events have introduced new challenges in managing mass litigations.<sup>35</sup> They involve large numbers of cases across state and federal district court lines with a broad range of issues from personal injury and death to property damage, economic loss, and environmental degradation.<sup>36</sup> We tend to think of the individual states and of federal districts (and circuits) as separate, but the forces of nature and the integration of national life (within and between states and nations) sometimes will require ignoring state lines to improve fairness and efficiency in dealing with future mass problems.

Hurricane Sandy, for instance, has given rise to thousands of claims throughout the northeast. Over 800 cases related to Hurricane Sandy are currently pending in the Eastern District of New York alone.<sup>37</sup>

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the need to expand personal jurisdiction to permit a single court and law to deal with massive litigations); *see also infra* notes 37–40 and accompanying text (discussing the need to ignore state lines in administering cases deriving from massive disasters).

35. *See generally* Jack B. Weinstein, *Procedural and Substantive Problems in Complex Litigation Arising from Disasters*, 5 *TOURO L. REV.* 1 (1998).

36. *See, e.g.*, Edward F. Sherman, *The BP Oil Spill Litigation and Evolving Supervision of Multidistrict Litigation Judges*, 30 *MISS. C. L. REV.* 237 (2011).

The BP Oil Spill Litigation presents some of the most challenging issues for court administration in any piece of complex litigation. The very magnitude of the litigation—involving dozens of different kinds of claims across the five Gulf states directly affected but also numerous claims from outside that area and based on a wide range of tort, environmental, statutory, and maritime law—reflects the problems it poses.

*Id.* at 237.

37. For the cases that are pending, see Docket No. 41-MC-14 (E.D.N.Y.). *See also, e.g.*, Andrew Keshner, *Tentative Deals Reached in 160 Sandy Cases*, N.Y. L.J., Mar. 4, 2015, at 1 (noting

The majority involve insurance claims dealing with coverage and business interruption disputes.<sup>38</sup> They center on common legal and factual issues, including whether the losses result from wind or water damage, anticoncurrent causation clauses, business interruption policy coverage, coinsurance, and other insurance problems.<sup>39</sup> There are also Hurricane Sandy-related employment law, tenants' rights, discrimination, and personal injury claims pending in various courts.<sup>40</sup>

The same range of issues, and of tort claims, was litigated in the wake of Hurricane Katrina.<sup>41</sup> Varying state laws of insurance prevent uniformity from state to state, though Federal Emergency Management Association (FEMA) regulations provide a substantial degree of uniform procedures for resolving damage issues. New Jersey state

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that "[o]f the 1,329 Eastern District cases, 421 have been resolved. If finalized, the 160 settlements disclosed . . . would bring the total to 581"); Andrew Keshner, *Eastern District Plan for Handling Sandy Lawsuits Moves Forward*, N.Y. L.J., Mar. 12, 2014, at 1.

38. See *Superstorm Sandy Insurance Litigation*, HARRISMARTIN PUBLISHING, [http://harrismartin.com/publication/archive/superstorm\\_sandy/](http://harrismartin.com/publication/archive/superstorm_sandy/) (last visited Feb. 8, 2015) (archiving the *Superstorm Sandy Insurance Coverage Litigation Report*, online and monthly print reports that track insurance coverage litigation filed in the wake of Superstorm Sandy).

39. See Docket No. 41-MC-14 (E.D.N.Y.); see also, e.g., Sebastien Malo, *New York Court Gives FEMA More Time To Help Settle Sandy Litigation*, REUTERS (Feb. 18, 2015, 6:45 PM), <http://www.reuters.com/article/2015/02/18/us-usa-sandy-insurance-idUSKBN0LM2ET20150218> ("[T]he New York State attorney general's office has opened a criminal investigation into what it calls 'insurance issues' related to damaged caused by Sandy . . ."); Andrew Keshner & Tania Karas, *Eastern District Awash in Sandy Insurance Cases*, N.Y. L.J., Feb. 13, 2014, at 1; Christine Simmons, *Cleary Sues Insurer To Recover Income Lost in Sandy's Wake*, N.Y. L.J., Feb. 10, 2014, at 1.

40. See, e.g., *Brooklyn Ctr. for Independence of the Disabled v. Bloomberg*, 290 F.R.D. 409 (S.D.N.Y. 2012) (certifying a class action brought by disability rights advocates who claimed the city failed to accommodate the disabled during disasters such as Superstorm Sandy); Keith A. Bruett et al., *Coping with the Impacts of Superstorm Sandy*, in ASPATORE SPECIAL REPORT: THE ONGOING IMPACT OF HURRICANE SANDY ON THE LEGAL COMMUNITY 15 (2013).

41. See Alex J. Lathrop, *From Katrina to Sandy: Lessons from the Whirlwind*, WESTLAW J. INS. COVERAGE, Mar. 29, 2013, at 3 ("After Katrina, many policyholders were surprised to learn that even though they had coverage for 'windstorms'—either because windstorms were a specifically enumerated named peril or because they were not excluded from their all-risk coverage—insurers nevertheless denied their claims because they did not have coverage for water damage."); see also Robert Redfearn, Jr., *Will Hurricane Katrina Legal Issues Be Resurrected in Sandy Claims?*, INS. J. (Nov. 18, 2013), <http://www.insurancejournal.com/magazines/legalbeat/2013/11/18/311009.htm> ("Following Hurricane Katrina, courts in Louisiana and Mississippi dealt with thorny legal issues such as whether damage was caused by wind and/or rain, the resulting coverage of such damage under homeowner, business and flood insurance policies and the scope of an insurance agent's duty to provide information about and procure coverage for their customers."). In the Gulf Coast, British Petroleum's compensation scheme, administered by Kenneth Feinberg, permitted ignoring some differences among the laws of the affected states. Amy D. Paul, *Rethinking Oil Spill Compensation Schemes: The Causation Inquiry*, 9 LOYOLA MAR. L.J. 137, 147–49 (2011).

courts are devising methods of consolidation, as is the Eastern District of New York.<sup>42</sup>

Scientists tell us that we should expect to see an increase in natural disasters in coming years.<sup>43</sup> History tells us that we should be prepared for more human-made disasters. Yet, even as we face a probable increase in mass actions, courts' tools to handle them efficiently are being restricted. An assault on claim consolidation has contracted the availability of efficacious class actions and other forms of aggregation.<sup>44</sup>

The asbestos-related personal injury and wrongful death cases are examples. Trying hundreds of thousands of asbestos-related claims on

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42. See, e.g., *In re Hurricane Sandy*, No. 14 MC 41 (E.D.N.Y. Feb. 21, 2014) ("Case Management Order No. 1"); Young Ha, *N.J. Court Seeking Ways To Expedite Sandy Flood Litigation Process*, INS. J. (Feb. 26, 2014), <http://www.insurancejournal.com/news/east/2014/02/26/321568.htm>; Letter from Brian R. Martinotti, Judge, Superior Court of New Jersey, to Jack B. Weinstein (Mar. 10, 2014) (on file with author) (discussing New Jersey judges' efforts to consolidate Superstorm Sandy claims and coordinate case management).

43. See generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT (R.K. Pachuari et al. eds., 2014) available at [http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR\\_AR5\\_FINAL\\_full.pdf](http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full.pdf); NAT'L CLIMATE ASSESSMENT DEV. ADVISORY COMM., CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THIRD NATIONAL CLIMATE ASSESSMENT REPORT (Jerry M. Melillo et al. eds., 2014), available at <http://nca2014.globalchange.gov/downloads>; VIVIEN GORNITZ, RISING SEAS: PAST, PRESENT, FUTURE (2013); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, MANAGING THE RISKS OF EXTREME EVENTS AND DISASTERS TO ADVANCE CLIMATE CHANGE ADAPTATION (Christopher B. Field et al. eds., 2013), available at [http://ipcc-wg2.gov/SREX/images/uploads/SREX-All\\_FINAL.pdf](http://ipcc-wg2.gov/SREX/images/uploads/SREX-All_FINAL.pdf); THE LAW OF ADAPTATION TO CLIMATE CHANGE: U.S. AND INTERNATIONAL ASPECTS (Michael B. Gerrard & Katrina Fischer Kuh eds., 2012). See also *Have We Reached the Point of No Return on Climate Change?*, SCI. AM. (Apr. 13, 2015), <http://www.scientificamerican.com/article/have-we-passed-the-point-of-no-return-on-climate-change/>; Henry Fountain, *California Drought Is Worsened by Global Warming, Scientists Say*, N.Y. TIMES, Apr. 2, 2015, at A16; Justin Gillis, *U.N. Panel Issues Its Starkest Warning Yet on Global Warming*, N.Y. TIMES, Nov. 3, 2014, at A8; Russell Shorto, *Water Works*, N.Y. TIMES, Apr. 13, 2014, at MM20.

44. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011) ("[Rule 23(b)(2)] does not authorize class certification when each class member would be entitled to an individualized award of monetary damages."); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (holding that California rule rendering class-wide arbitration waivers potentially unconscionable is preempted by the Federal Arbitration Act); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864 (1999) (holding that Rule 23(b)(1)(B) mandatory class certification under "limited funds" theory not allowed when limitation of funds is due to prior settlement by the parties); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624–25 (1997) (holding that individual differences between putative class members prevents mass certification of settlement class for asbestos tort claims). See generally Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 623 (2012) ("Courts in recent years have ramped up the standards governing the certification of damages classes and created new standing requirements for consumer class actions."); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 761 (2013) ("Recent case law has also imposed rigorous obligations on plaintiffs in defining the scope of the putative class action."); Tony Mauro, *Justices May Shy Away from Overturning Class Precedent*, N.Y. L.J., Mar. 6, 2014, at 2.

an individual or small-scale court-by-court basis was unrealistic and inefficient.<sup>45</sup> Appellate courts' Rule 23 requirements of commonality, typicality, and predominance barred certification of asbestos claims.<sup>46</sup> Following the same analysis, the Multidistrict Litigation Panel repeatedly rejected multidistricting the asbestos litigation.<sup>47</sup>

Individual trial judges and courts sometimes found their efforts to consolidate asbestos cases curtailed. For example, I successfully consolidated for trial seventy-nine asbestos-related cases arising from exposure in the New York Navy Shipyard.<sup>48</sup> Another judge's consolidation of many similar cases involving stationary engineers was rejected—to my mind unwisely—by the Second Circuit Court of Appeals.<sup>49</sup> It was only at the urging of a self-appointed committee of federal trial judges that the Multidistrict Litigation Panel finally relented in the early 1990s and sent all the federal cases to a single federal judge.<sup>50</sup> Massive tobacco tort cases were also blocked, allowing less effective civil prosecutions.<sup>51</sup> Limiting trial courts' ability to effec-

45. See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 141 (1995) [hereinafter *INDIVIDUAL JUSTICE*] ("If we persist in trying cases on an individual or even small-scale jurisdiction-by-jurisdiction basis, many plaintiffs will die before they are compensated, a great many will wait years, and some may receive nothing as the available monies are dribbled away by earlier awards and transaction costs.").

46. See *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) (denying certification for trial of a class of 2,990 asbestos claimants in Eastern Texas).

47. See *In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906, 909–10 (J.P.M.L. 1977) (denying consolidation of 103 asbestos-related personal injury claims on grounds that the plaintiffs were from many different trades and the cases presented differing causation and medical needs); see also *In re Asbestos Sch. Prods. Liab. Litig.*, 606 F. Supp. 713, 714 (J.P.M.L. 1985) (denying consolidation in school district cases); *In re Asbestos Prods. Liab. Litig. II*, No. MDL-416 (J.P.M.L. Mar. 13, 1980) (unpublished order) (same).

48. See *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 836 n.1 (2d Cir. 1992) (approving consolidation of cases for trial).

49. *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 353 (2d Cir. 1993) (denying consolidation of 600 asbestos cases due to lack of commonality of geographic location of injury); see also *In re Allied-Signal Inc.*, 915 F.2d 190, 192 (6th Cir. 1990) (referencing attempts of federal judges to aggregate and dispose of asbestos claims on a national basis).

50. *INDIVIDUAL JUSTICE*, *supra* note 45, at 141.

51. See, e.g., *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) (reversing class certification of tobacco smokers due to individual differences among class members), *rev'g* *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006); *In re Simon II Litig.*, 407 F.3d 125, 140 (2d Cir.) (same), *rev'g* 211 F.R.D. 86 (E.D.N.Y. 2005). Consolidation of punitive damages may be particularly valuable in mass actions. Full punishment should be given once. As it now stands, large jury awards are subject to reduction under the Supreme Court's rule that punitive damages generally should not exceed compensatory damages by more than ten times over. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (holding that single-digit punitive damage multipliers are "more likely to comport with Due Process"). This rule cuts off punitive damages from any relationship to total punishment or to a theory of damages to harmed individuals or the group. When attempting consolidation, however, trial judges have been stymied. In one of my tobacco cases, the Court of Appeals for the Second Circuit

tively manage massive litigations leads to inefficient administration, reduced ability of plaintiffs to sue effectively, limited opportunity for defendants to pay for the full damages they caused, expense, and delay.

### B. *Limitations on Individual Access to the Courts*

We emphasize the right of individuals to control disposition of their own legal disputes in courts, *but* we deny people the opportunity to conduct personal private litigations.

The right of individuals to control the disposition of their legal disputes in court is often used to justify limits on class actions and claim aggregation. Nevertheless, individual litigants' effective access to courts is restricted.<sup>52</sup> The two most important litigation deficiencies involving large numbers of potential injustices are those in which no effective litigation can occur. The first is the unavailability of lawyers in civil cases for persons of limited means.<sup>53</sup> The second is inadequacies in institutional reform litigation. Strict enforcement of adhesion contracts and increased enforcement of private rights in criminal courts and administrative agencies also undermine individual litigation. The law has recently recognized the victim's right to be heard and seek restitution in criminal litigation.<sup>54</sup> Administrative procedure should be adjusted to meet the needs of injured victims by allowing them to participate more effectively in the process as well.<sup>55</sup>

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rejected a class action based on punitive damages. *In re Simon II Litig.*, 407 F.3d at 136–40, *vacating* 211 F.R.D. at 163–65. If a punitive damage class were permitted, a single jury might impose one comprehensive punishment. This is preferable to many juries, each making a separate judgment on the total punishment earned by the defendant. *See, e.g.*, Martin Fackler & Andrew Pollack, *Jury Awards \$9 Billion in Damages in Drug Case*, N.Y. TIMES, Apr. 9, 2014, at B3 (reporting on *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11-md-2299, 2014 WL 2872299 (W.D. La. June 23, 2014)) (reporting that jury awarded \$9 billion in punitive damages to a single plaintiff).

52. *See generally* 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 (2011).

53. *See* Floyd v. Cosi, Inc., No. 14-CV-3772, 2015 WL 148458, at \*3 (E.D.N.Y. Jan. 12, 2015) (discussing the unavailability of counsel for the indigent in most civil cases).

54. *See infra* Part III.B.4.

55. *See* Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 976 [hereinafter Weinstein, *Compensation for Mass Private Delicts*] (noting that “those seeking to be protected or compensated are usually only peripheral players in the administrative . . . system[ ]”); *see also infra* notes 74–79 and accompanying text.



### 1. *Lack of Lawyers*

Socioeconomic barriers prevent masses of immigrants, middle class, and poor from effectively bringing their legal disputes to court.<sup>56</sup> The democratic model of litigation by the pro se plaintiff does not work well.<sup>57</sup> Lawyers are essential to help individuals navigate the complexities of the modern justice systems.<sup>58</sup>

Pressure to meet this problem of lack of counsel is increasing. The growing gap between the super-rich and others,<sup>59</sup> coupled with recent Supreme Court cases lifting restrictions on the wealthy to finance elections,<sup>60</sup> tell us that the most powerful individuals increasingly influence legislatures. The less powerful, more and more, will need to turn to the courts for relief.

The United States system of contingent fees for plaintiffs with potential money judgments helps. So, too, may alternative financing.<sup>61</sup> But neither is an adequate solution for lack of individual legal aid.

Congress has, in civil rights, disability, and other cases, provided for legal fees to the plaintiff to encourage bringing of these suits.<sup>62</sup> Small boutique firms grow up around such cases. They probably stir up some inappropriate litigation, but also encourage enforcement of congressional policy.

Masses of small individual claimants need lawyers. At the same time, there are too few jobs for present law graduates.<sup>63</sup> Law schools

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56. See generally Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475 (2002); Jonathan D. Rosenbloom, *Exploring Methods To Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 310 (2002); Jack B. Weinstein, *Adjudicative Justice in a Diverse Mass Society*, 8 J.L. & POL'Y 385 (2000).

57. Cf. Karen Sloan, *An Access to Justice Scorebook; Report: Even the Best States Post So-So Grades*, NAT'L L.J., Mar. 3, 2014, at 1.

58. The Eastern District of New York, in partnership with the New York City Bar Association, has launched an innovating pilot program to provide free legal assistance to non-prisoner, pro se litigants in civil cases. See *Floyd*, 2015 WL 148458, at \*3 (appending attorney job description for pilot program).

59. See generally Nelson D. Schwartz, *The Middle Class Is Steadily Eroding. Just Ask the Business World*, N.Y. TIMES, Feb. 3, 2014, at A1; Sabrina Tavernise, *Middle-Class Areas Shrink as Income Gap Grows, New Report Finds*, N.Y. TIMES, Nov. 16, 2011, at A16.

60. See, e.g., *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1442 (2014) (holding that statutory limitations on aggregate political donations violate the First Amendment); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) (holding that suppressing political speech of corporations violates the First Amendment).

61. See sources cited *infra* note 111.

62. See 28 U.S.C. § 1915(e)(1) (2012) ("The court may request an attorney to represent any such person unable to employ counsel."); Act of Oct. 14, 1970, Pub. L. No. 91-447, 84 Stat. 916, 919 (amending 18 U.S.C. § 3006A to authorize payment for appointed counsel in *habeas* cases).

63. See generally Joel Stashenko, *No Easy Answers for Challenges Faced by Nation's Law Schools*, N.Y. L.J., Jan. 30, 2014, at 1; Ross Todd, *ABA's Task Force on Legal Education Issues*

and practitioners are beginning to work together to help create a new paradigm in legal representation and training to meet these massive unmet legal needs.<sup>64</sup> We need programs, such as those supported by Chief Judge of the Second Circuit Court of Appeals Robert Katzman and Chief Judge of New York State and the New York Court of Appeals Jonathan Lippmann, to put young lawyers to work serving those in need.<sup>65</sup>

## 2. *Restrictions on Institutional Litigation*

The second largest group of persons needing protection is those in badly operated public institutions. Litigation that reforms prisons, schools, and homes for the aged will increasingly affect the people in these institutions, as well as those who will finance, oversee, and administer them. I learned this early in my school desegregation cases, prison cases, and cases involving the developmentally disabled.<sup>66</sup>

Pressure to reduce the effectiveness of such litigation continues. As Professor Margo Schlanger put the matter:

Institutional reform litigation is not a judicial movement but a political practice. How courts began, and whether they continue, to be an arena for such litigation; how the litigation looks; and whether it succeeds or fails are functions not simply of judicial will and role, but of the goals, resources, and actions of many groups and actors, filtered through the rules of litigation. . . . [W]e must free ourselves from our long-bred urge to talk only about judges and open our eyes instead to the full range of participants and forces at work.<sup>67</sup>

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*Report but Won't Seek Quick Action*, N.Y. L.J., Jan. 29, 2014, at 2; Deborah Jones Merritt, *What Happened to the Class of 2010? Empirical Evidence of Structural Change in the Legal Profession*, 2015 MICH. ST. L. REV. (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2577272](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577272).

64. See generally N.Y.C. BAR, DEVELOPING LEGAL CAREERS AND DELIVERING JUSTICE IN THE 21ST CENTURY (2013) ("A Report by The New York City Bar Association Task Force on New Lawyers in a Changing Profession"); A.B.A. TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS (2014).

65. The Immigrant Justice Corps trains recent law graduates in immigration law and then sends them to community-based organizations for two years of service. See generally IMMIGRANT JUSTICE CORPS, <http://justicecorps.org/our-story/> (last visited Apr. 17, 2015); Tania Karas, *Order Prompts Expansion of Immigrant Justice Corps*, N.Y. L.J. (Dec. 1, 2014), <http://www.newyorklawjournal.com/id=1202677608150/Order-Prompts-Expansion-of-Immigrant-Justice-Corps>; Kirk Semple, *Seeking Better Legal Help for Immigrants*, N.Y. TIMES, Jan. 19, 2013, at A19. See also Fern A. Fisher, *Launch Pads and Incubators, Providing Access to Justice Using Law Graduates and New Lawyers*, A.B.A. JUDGES' J., Winter 2014, at 4.

66. See, e.g., *Hart v. Cmty. Sch. Bd.*, 383 F. Supp. 769, 770 (E.D.N.Y. 1974), *aff'd sub nom. Hart v. Cmty. Sch. Bd. of Educ.*, 512 F.2d 37 (2d Cir. 1975). See generally *Soc'y for Good Will to Retarded Children v. Carey*, 466 F. Supp. 722 (E.D.N.Y. 1979).

67. Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2036 (1999) (footnote omitted) (reviewing MALCOLM M. FEELEY & Ed.

Prisoners suffer in poorly run jails and are then denied effective entry to courthouses.<sup>68</sup>

### 3. *Binding Arbitration*

Compelling strict enforcement of adhesion contracts for arbitration prevents many individuals from effectively bringing their legal disputes to court.<sup>69</sup> Binding arbitration clauses are a standard feature of agreements for the sale of consumer goods and for healthcare, insurance, banking, and credit card service agreements. These contracts, forced on consumers, do not allow for arm's-length negotiations.<sup>70</sup> They are offered on a "take it or be denied service" basis. "Arbitration in itself is not the problem; lack of [real] consent is."<sup>71</sup> Consumers or employees may be unaware that their right to resolve legal disputes in court has been replaced by a private adjudication system until they seek legal redress.<sup>72</sup> Entire classes of litigants and categories of claims are disappearing from the courts, sucked into a private realm of justice controlled by the powerful.

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WARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998)).

68. See Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 UNIV. PA. J. CONST. L. 139, 142 (2008) (noting the Prison Litigation Reform Act is "preventing inmates from raising legitimate claims" in many instances (footnote omitted)). See generally Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003). But see *Brown v. Plata*, 131 S. Ct. 1910, 1926 (2011) (citing to *Coleman v. Wilson*, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995), where the court appointed a special master to implement and oversee remedial plans involving mentally ill inmates who were not given access to treatment); Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 215 (2013) ("[T]he California prisoners' rights bar is mobilizing to attack unlawful jail conditions on several fronts.").

69. See, e.g., *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1750–53 (2011) (holding that a state class arbitration scheme was preempted by the Federal Arbitration Act due to its interference with arbitration based on factors including the law's detrimental effects on individual claimants); *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2304, 2312 (2010) (permitting individual arbitration in order to further the goals of arbitration, namely speediness and cost-effectiveness).

70. See, e.g., *Berkson v. Gogo LLC*, No. 14–CV–1199, 2015 WL 1600755, at \*19 (E.D.N.Y. Apr. 9, 2015) (noting how these types of contracts, also known as "contracts of adhesion," have become ubiquitous in modern consumers' commercial transactions).

71. Ana Maria, *Arbitration and Fairness in the United States*, STANFORD L. SCH. BLOG (Apr. 24, 2014), <http://blogs.law.stanford.edu/gouldcenterblog/2012/04/24/arbitration-and-fairness-in-the-united-states/>; see also Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 245 (1996).

72. See generally *Berkson*, 2015 WL 1600755.

4. *Enforcement of Private Rights in Criminal and Administrative Proceedings*<sup>73</sup>

Shifting the enforcement of private rights to criminal courts and administrative agencies has reduced the need for individual civil litigation. In criminal law, there has been an expansion of fraud actions, the creation of so-called racketeer influenced criminal actions, and a vast increase in environmental and consumer protection prosecutions—many of which might have been prosecuted as private tort actions.<sup>74</sup> In the administrative arena, powerful agencies have been created to protect the broader public against dangers of injury through regulations, orders for recalls, fines, injunctions, and orders for disgorgement and restitution.<sup>75</sup>

Juxtaposed with current pressure on courts to reduce private mass litigation, these developments present the danger of alienating individual victims from the legal process. In the administrative and criminal law systems, individuals seeking to be protected or compensated are usually peripheral players.<sup>76</sup> By contrast, in the traditional tort model, the individual litigant and groups play a central role.<sup>77</sup>

Criminal sentencing now emphasizes victim hearings on sentencing, restitution, and seizing of assets through forfeiture as well as punishment.<sup>78</sup> The right of the crime victim to be heard in criminal prosecutions may not provide full protection to the injured. When I have had criminal cases or administrative cases and there are pending (or potential) private civil class actions, I have attempted to coordinate them. Administrative and executive action should be adjusted to meet individual needs of the injured victims by allowing them to participate in the process. Agencies would do well to follow the developments we have seen in criminal law, providing for victims' statements, restitution, and the seizing of assets through forfeiture, coordinating their work with that of private attorneys.<sup>79</sup>

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73. See *supra* notes 54–55 and accompanying text.

74. See generally Weinstein, *Compensation for Mass Private Delicts*, *supra* note 55.

75. *Id.*

76. *Id.* at 976.

77. See generally John C. 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 (2005).

78. See, e.g., Crime Victims' Rights Act, Pub. L. No. 108–405, §§ 101–104, 118 Stat. 2260, 2261–65 (2004) (codified at 18 U.S.C. § 3771).

79. See Weinstein, *Compensation for Mass Private Delicts*, *supra* note 55, at 956.

### C. Aggregation

Appellate courts and legislatures have instructed us to favor individual handling of disputes, *but* it is a reality of modern mass complex litigation that carefully monitored aggregation is often necessary to ensure efficient and effective resolution of disputes.

#### 1. Class Action

The Federal Rules of Civil Procedure were based on a theory of trans-substantive uniformity.<sup>80</sup> Because procedural mechanisms will always be playing catch up to the needs imposed by changing conditions of life, the federal procedural rules were designed to be sufficiently flexible to apply to any area of substantive law.<sup>81</sup> For this system to work well, trial judges must be entrusted with discretion to ensure that the broadly conceived procedural tools are effectively deployed to resolve specific substantive disputes.

Adapting the Federal Rules of Civil Procedure to the problems of mass society is an ever-pressing concern.<sup>82</sup> Prior to proposing the 1966 amendments to Rule 23, the advisory committee vigorously debated its application to mass torts.<sup>83</sup> Although its report concluded that class actions should be available in such cases, the contours of its application have remained in dispute.<sup>84</sup>

At times, legislatures and courts have expanded the availability of class actions and other methods of encouraging aggregation. In the 1960s and 1970s, for example, legislatures increased statutory protec-

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80. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975). See generally Stephen B. Burbank, *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 AKRON L. REV. 1189 (2010); Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072).

81. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 300 (1938) (“The trend of procedural rules towards undue rigidity is often at variance with a developing substantive law. New political and economic forces are likely to force new relationships between persons, and new governmental attempts to control such relationships, while the process of enforcement becomes ever slower and more cumbersome.”).

82. For an early identification of the changes in law brought about by mass society, see Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

Our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like, where the damages might be taken to lie where they fell by legal judgment. But the torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses. . . . The liability for them is estimated, and sooner or later goes into the price paid by the public.

*Id.* at 467.

83. John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 327 (2005) (“Class actions take many forms. . . . It is extremely difficult to draft a single rule that fits all these variances.”).

84. *Id.* at 336–43. For an excellent workbook, see Federal Courts Comm. City Bar Ctr. for Continuing Legal Educ., N.Y.C. Bar, *The Future of Class Actions* (Mar. 3, 2015).

tions for aggrieved parties,<sup>85</sup> while courts revisited fundamental concepts of duty, causation, and damages.<sup>86</sup> In the last decade, by contrast, we have seen a movement toward contracting the availability of class actions.

Two cases from the 2010 Supreme Court term highlight this trend.<sup>87</sup> In *AT&T Mobility LLC v. Concepcion*,<sup>88</sup> the Court enforced a waiver of class arbitration that had been found unconscionable by the state court.<sup>89</sup> After individuals have already been pushed out of the courtroom and into the arbitration room,<sup>90</sup> they now find themselves without a realistic, cost-effective means to seek redress by aggregating their claims in arbitration.<sup>91</sup>

In the Rule 23 context, the Court's ruling in *Wal-Mart Stores, Inc. v. Dukes*<sup>92</sup> heightened the commonality requirement at the expense of meeting individual needs.<sup>93</sup> It emphasized uniformity at the expense of the diversity of parties seeking help from the courts and cast doubt on the utility of statistical analysis of large numbers of cases in addressing individual circumstances.

Appellate court skepticism about statistical analysis purportedly protects due process, yet it too often prevents us from understanding the experience of individuals in the larger context of a national economy. It blocks courts from dealing effectively with the grievances of individuals. Without broad sociological and statistical data, systematic problems merely effervesce as anecdote. And without aggregation,

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85. For examples of consumer protection laws, see Consumer Protection from Deceptive Acts and Practices, N.Y. GEN. BUS. LAW §§ 349–350(e) (McKinney 2012) (enacted in 1980); and Consumer Legal Remedies Act, CAL. CIV. CODE §§ 1750–1784 (West 2012) (enacted in 1970). For attorney's fees, see Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (2012).

86. PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 27 (1986) (“Generally speaking, the judicial innovations of the 1960s and 1970s made it much easier for a plaintiff [to have his case] submitted to a jury.”).

87. See Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions: Wal-Mart v. Dukes and AT&T Mobility v. Concepcion*, 7 DUKE J. CONST. L. & PUB. POL'Y (SPECIAL ISSUE) 73 (2011).

88. 131 S. Ct. 1740 (2011).

89. *Id.* at 1753.

90. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005) (“Developed in the late 1990s by marketers for one of the arbitral bodies, among others, the [class action] waiver works in tandem with standard arbitration provisions to ensure that any claim against the corporate defendant may be asserted only in a one-on-one, non-aggregated arbitral proceeding.” (footnotes omitted)).

91. See generally Max Helveston, *Promoting Justice Through Public Interest Advocacy in Class Actions*, 60 BUFF. L. REV. 749 (2012).

92. 131 S. Ct. 2541 (2011).

93. *Id.* at 2550–52 (holding that class certification depends on common answers, not common questions).

economic impacts on individuals are too diffuse for appropriate legal accounting.<sup>94</sup>

Increasingly deft handling of class actions by trial judges can make them more protective of individuals when class certification is allowed under Rule 23. When Federal District Judge Alvin Hellerstein was presented with a proposed settlement for injuries resulting from 9/11, he recognized the need for the court to step in and ensure a fair result. He rejected the plan, even though no party in court opposed it,<sup>95</sup> because it did not provide, in his view, sufficient payment to the plaintiffs. The parties returned with a new proposed settlement that increased plaintiffs' recovery by over \$100 million.<sup>96</sup> Federal District Judge Anita Brody rejected a proposed settlement in a multidistrict litigation involving injuries suffered by players in the National Football League. She was concerned that there would not be sufficient funds to fairly pay all claimants.<sup>97</sup> To be effective, as these examples show, a judge must supervise the discovery, settlement, pretrial, and trial process to protect the many as well as the few.

## 2. *Alternate Modes of Aggregation*

Attorneys and judges have looked to avenues beyond class certification for aggregating mass trials and settlements.<sup>98</sup> These include both formal and informal systems. Among the formal systems, most significant has been the Judicial Panel on Multidistrict Litigation and state equivalents.<sup>99</sup> This system of "consolidation" has been used to create quasi-class actions that allow judges to appoint lead counsel and shape attorneys' compensation without certifying a class under Rule 23.<sup>100</sup>

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94. See generally DAVID H. KAYE & DAVID A. FREEDMAN, *FED. JUDICIAL CTR., REFERENCE GUIDE ON STATISTICS* (3d ed. 2011).

95. JOEL COHEN, *BLINDFOLDS OFF: JUDGES ON HOW THEY DECIDE* 104–18 (2014).

96. *Id.* at 120; see also Alvin K. Hellerstein et al., *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127, 175–76 (2012) (citing Transcript of Status Conference at 8, *In re World Trade Ctr. Disaster Site Litig.*, No. 21-MC-100 (AKH) (S.D.N.Y. June 10, 2010)).

97. *In re Nat'l Football League Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708, 716 (E.D. Pa. 2014); see also Order, No. 12-md-0002323 (E.D. Pa. Feb. 2, 2015) (offering amendments to proposed final settlement); Kat Greene, *NFL Concussion Judge Wants Changes to \$765 Settlement*, LAW 360 (Feb. 2, 2015), <http://www.law360.com/articles/617634/nfl-concussion-judge-wants-changes-to-765m-settlement> (summarizing settlement negotiations).

98. See generally Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269.

99. See, e.g., N.Y. C.P.L.R. § 602 (McKinney 2012) (consolidation of claims in New York); N.J. R. SUPER. CT., TAX. CT. & SUR. CTS. 4:38-1 (consolidation of claims in New Jersey).

100. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 480–81 (1994); see *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 496–97 (E.D.N.Y. 2006); see also *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-

Informal coordination among counsel can effectively consolidate claims. A handful of firms often represent a large proportion of the plaintiffs by agreement with other individual forwarding attorneys. Counsel may also enter into joint-defense agreements to pool their resources. They can obtain private funding for mass litigation. A few attorneys can then negotiate block settlements between large groups of plaintiffs and defendants.

Trial courts are devising new ways of consolidating court cases despite pressure from appellate courts and legislatures to reduce private mass litigations. Substantial groups of individual judges acting on their own initiative can structure these cases to provide effective mass litigation. Individual judges and those in a multijudge district court can consolidate their own cases. Related cases can be transferred between courts and judges.<sup>101</sup> It is not uncommon for a state judge to pick up the phone to call a federal judge with a similar case, and vice versa.<sup>102</sup>

The administration of large government and private compensation funds, with the aid of special masters, in both class and nonclass actions, is a critical aspect of handling important mass torts.<sup>103</sup> In unique circumstances, the legislature has participated in this process. In the weeks after the attacks on September 11, 2001, Congress passed the Air Transportation Safety and System Stabilization Act,<sup>104</sup> which required any lawsuits against the airlines to be brought in New York City and limited them to the financial liability of the airlines. The Act coupled these restrictions on litigation with the September 11th Victim Compensation Fund. In exchange for relinquishing litigation rights, victims could apply to the Fund to receive compensation without having to prove liability by the airline.<sup>105</sup> Kenneth Feinberg was able to settle almost every claim arising from this disaster using matrices and individual meetings with the aggrieved.

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1708 (DWF/AJB), 2008 WL 682174, at \*18–19 (D. Minn. Mar. 7, 2008); *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 616–18 (E.D. La. 2008).

101. S.D.N.Y. & E.D.N.Y. Ct. R. 50.3; *see also* 28 U.S.C. § 1404 (2012) (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action . . .”).

102. *See* U.S. J.P.M.L. & FED. JUDICIAL CTR., TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES 6–7 (2d ed. 2014).

103. *Cf.* Bill Vlasic & Matthew L. Wald, *G.M. Takes a Step Toward Families*, N.Y. TIMES, Apr. 2, 2014, at B1.

104. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107–42, 115 Stat. 230 (2001).

105. KENNETH R. FEINBERG, WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11, at 50–60 (2005).



Following the oil spill in the Gulf of Mexico, British Petroleum (BP) agreed to create a \$20 billion compensation fund to be monitored by the Department of Justice and administered by Kenneth Feinberg. In many instances, BP avoided arguing over legal liability in the courts and instead focused on quickly settling valid claims.<sup>106</sup> Eventually, a class action settlement was reached and upheld on appeal.<sup>107</sup>

The Fair Labor Standards Act (FLSA) has taken a variant of the Rule 23 approach to aggregate claims. Under the FLSA, a group of plaintiffs may bring a collective action through an opt-in procedure.<sup>108</sup> The judgment of the court will then be binding only on those litigants who opted in. The statute imposes a relatively lenient standard for certification.<sup>109</sup>

Each mode of aggregation attempts to provide litigants with a fair and efficient resolution of their case. This approach acknowledges that, in our complex and diverse society, rough justice for many is sometimes better than more perfect justice for only one. The costs of individualized litigation in both time and money are so great that aggregated claims and compensation schemes, even when some will receive slightly more and others slightly less than they might get in an individual case, provides a fair and viable option. Speaking of asbestos litigation, Justice Breyer, in dissent, pointed out that “the alternative to class-action settlement is not a fair opportunity for each potential plaintiff to have his or her own day in court. . . . [M]ost potential plaintiffs may not have a realistic alternative.”<sup>110</sup>

#### IV. TOWARD DEMOCRATIC PARTICIPATION

Perhaps the *thesis* of mass litigation efficiencies and *antithesis* of individual control can be resolved by the *synthesis* of more democratic participation.

The democratic ideal that the legal process should treat every person with fairness, equality, and dignity, and provide the right to be heard, is fundamental to our conception of justice. At the same time, the need for aggregate litigation is increasing in today's mass society. Individual justice can coexist with efficient case management and ag-

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106. KENNETH R. FEINBERG, WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL 129–30 (2012).

107. See *In re Deepwater Horizon*, 739 F.3d 790, 820 (5th Cir.), cert. denied sub nom. BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc., 135 S. Ct. 754 (2014).

108. 29 U.S.C. § 216(b) (2012).

109. See generally 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1807 (3d ed. 2013).

110. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 867–68 (1999) (Breyer, J., dissenting).

gregation.<sup>111</sup> The inherent tension between individual justice and mass resolution of complex litigation presents difficult, at times baffling, questions, but they can be resolved.

Small, individual claimants often have little idea of what is going on in their cases despite the fact that their own lives have been affected. This detachment is heightened in the context of aggregate litigation. Those injured may feel left out, disaffected, and resentful. Litigators are not always candid with clients who did not directly retain them, and they may take advantage of those clients they will never meet.

When faced with an individual plaintiff and defendant, I have begun requiring the parties to attend hearings.<sup>112</sup> This serves to return the individual to the center of the process. A question remains: to what extent is it possible, and desirable, to provide parties with the capacity to participate in the process of mass actions?<sup>113</sup>

Judges in mass actions have a responsibility to ensure that the litigation stays focused on the parties and remains responsive to their actual needs. We must make decisions that require us to know about and protect both plaintiffs and defendants. Learning what is going on in the real world, outside of the courthouse, and connecting with the parties and lawyers is critical. It is much more difficult for judges to make connections and exercise the requisite oversight in massive

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111. See, e.g., Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. 667, 670–71 (“On one hand, aggregation allows plaintiffs to present a united front and a credible threat to defendants, but, on the other, it weakens their autonomy when pursuing claims that are deeply personal. . . . [A]ggregating could fulfill procedural justice goals by bringing plaintiffs together and encouraging them to reason together about appropriate litigation ends, deliberate about how to best achieve those ends collectively, and pursue those ends with concerted force.”). The availability of alternative litigation financing in the form of consumer legal funding, subprime lending to plaintiffs’ law firms, and investments in commercial lawsuits, has grown considerably in recent years. See STEVEN GARBER, RAND INST. FOR CIVIL JUSTICE, *ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWN, AND UNKNOWN* 1 (2010). This increasing availability of alternative financing may lead to a more democratic litigation system but it also raises special ethical issues for attorneys and judges. See Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J.L. & SOC. PROBS. 451, 464–70 (2012) [hereinafter Weinstein, *Democratization of Mass Actions*]. See generally Symposium, *Third-Party Financing of Litigation: Civil Justice Friend or Foe?*, 8 J.L. ECON. & POL’Y 405 (2012); Suevon Lee, *Litigation Funder Blocked from Suing on Champerty Grounds*, N.Y. L.J., Mar. 3, 2014, at 1; A.B.A. Comm’n on Ethics, *White Paper on Alternative Litigation Financing* (Oct. 19, 2011) (unpublished draft), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20111019\\_draft\\_alf\\_white\\_paper\\_posting.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111019_draft_alf_white_paper_posting.authcheckdam.pdf).

112. See, e.g., 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, 344 & n.214 (2013) (outlining the process of Jack B. Weinstein).

113. See, e.g., Weinstein, *Democratization of Mass Actions*, *supra* note 111, at 461–64 (discussing problems with litigants getting involved with such matters as settlement).

cases. Yet, it is crucial that they do so.<sup>114</sup> Looking through the curtain between the judge and the rest of the world is essential.

Increasingly, new technologies and techniques are making it possible for judges to stay connected and for parties to stay informed and participate in aggregate litigation.<sup>115</sup> In the cases before me, I have tried to provide plaintiffs in mass actions with an increased degree of control and transparency. A few instances illustrate the techniques being used by judges.

We use special masters as eyes and ears. In the *Agent Orange* products liability litigation,<sup>116</sup> special master Kenneth Feinberg and I toured the nation to get input from veterans. In the California *Stringfellow* case, which consolidated individual hazardous waste claims, Professor Arthur Miller met with groups of clients to fill them in on the background of the case.<sup>117</sup> In the diethylstilbestrol (DES) cases, where the plaintiffs were women whose mothers had taken the drug during their pregnancy, I met with groups of those women after their cases were settled to try to explain what went on. Kenneth Feinberg made himself available to each of the 9/11 claimants,<sup>118</sup> and Judge Alvin Hellerstein has consulted closely with groups of those affected by the post-9/11 cleanup litigation.<sup>119</sup> In *Boykin*, the clerk of our court arranged for all of those who were prospective class members to obtain access to the filed documents and to listen to a streaming video of courtroom proceedings.<sup>120</sup>

These democratization techniques using modern technology do not solve the fundamental problems of mass litigation. They do, however, begin to return the affected individuals to the center of massive litigation. The process might be summed up as follows:

One person among many  
listens speaks  
through modern technology.

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114. Weinstein, *Dealing with the Real World*, *supra* note 20 (manuscript at 3–4) (“Rule 1: Be humble. Listen. Try to learn what’s going on. If you need to: Get out of the courthouse.”).

115. See, e.g., Weinstein, *Democratization of Mass Actions*, *supra* note 111.

116. *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984).

117. Weinstein, *Democratization of Mass Actions*, *supra* note 111, at 459 (discussing Newman v. Stringfellow, No. 16-59-94 (Cal. Super. Ct. May 9, 1995)).

118. FEINBERG, *supra* note 105, at 50–60.

119. See Alvin K. Hellerstein, *Democratization of Mass Tort Litigation: Presiding over Mass Tort Litigation To Enhance Participation and Control by the People Whose Claims Are Being Asserted*, 45 COLUM. J.L. & SOC. PROBS. 473, 475 (2012).

120. *Boykin v. 1 Prospect Park ALF, LLC*, 292 F.R.D. 161, 161 (E.D.N.Y. 2013).

## V. CONCLUSION

Whether the law emphasizes the individual or uniformity depends on a judgment that varies from time to time. At the moment, the tide is moving in the general direction of concern for the special needs of single parties in sentencing and civil rights. Increasingly, insistence on individual control in economic rights cases often hurts rather than helps the individuals with grievances. Effective litigation becomes too burdensome for them. Gaps in legal protections for the poor, the middle class, and those in institutions, threatens to become even greater than in the past. Major reforms are needed. Even where uniformity is stressed, as in aggregate actions, modern technology provides the possibility of greater individual lay participation.

