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Participation and Procedure

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INTRODUCTION

Some years ago, Judge Weinstein lamented that in the process of overseeing the *Zyprexa* litigation, he never saw any of the plaintiffs.[1] The Judge's experience raises the following question: How much participation should our procedural system offer litigants? This question poses a challenge because in a mass society it is too difficult to support a civil justice system that provides every litigant with the opportunity to speak directly to a judge about her individual case. We live in a world of process scarcity.[2] Yet seeing the litigants in person is helpful for a judge who wants to understand how the law affects people in real life, and it is helpful for those subject to his rulings to see how justice operates.

Mass cases, where tens of thousands of lawsuits are filed about the same subject matter, lead to process scarcity for litigants.[3] Such cases put pressure on the idea that every person is entitled to the opportunity to be heard at a meaningful time in a meaningful manner.[4] Many

* Joel Barlow Professor of Law, University of Connecticut. My gratitude to Stephan Landsman for inviting me to the Clifford Symposium and to Josh Graboff for his research assistance.

1. *In re* Zyprexa Prods. Liab. Litig., 433 F. Supp. 2d 268 (E.D.N.Y. 2006). The Judge was speaking on a panel entitled "9/11 Lessons for Mass Torts" at Benjamin A. Cardozo School of Law on September 12, 2011.

2. *See generally* Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561 (1993).

3. Process scarcity is in part the result of the number of cases in relation to the amount of resources, especially the number of judges, but also the result of the decisions those judges make and the economics of litigation. An increase in the number of judges and other court resources would alleviate some process scarcity, but are not likely to solve the participation problem addressed here. *See* Stephen N. Subrin & Thomas O. Main, *The Fourth Era of Civil Procedure*, 162 U. PA L. REV. 1839, 1856–76 (2014) (discussing the various explanations for the vanishing trial); *see also Chief Justice's 1991 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan. 1992, at 1, 2 ("[A] federal judiciary rising above 1,000 members will be of lesser quality and could be dominated by a bureaucracy of ancillary personnel.").

4. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). Our due process jurisprudence only offers the opportunity to be heard, not a full and fair hearing. Robert Cover noted the disconnect between the very minimalist regime described in the Supreme Court's due process cases and the expansive process provided for in the Federal Rules. Robert M. Cover, Foreward, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732–33 (1974).

of these cases are transferred to districts far away from the place where they were originally filed and are run by a plaintiffs' management committee. The powerful lawyers in these cases have "inventory" clients numbering in the thousands.[5] It is easy to see how in such a system the judge may never see an actual litigant in the courtroom. These realities challenge the idea that every person is entitled to his or her day in court because the system is not structured to offer that experience to each and every litigant.

Even in ordinary litigation, involving one plaintiff and one defendant, we might wonder to what extent the litigant, as opposed to her lawyer, can be said to directly participate in the process. Studies show that many disputes are resolved by settlement mills where a lawsuit may not even be filed.[6] Under the modern procedural regime, cases are mostly decided through dispositive pretrial motions or settlement.[7] There is often no oral argument, so litigants rarely have an opportunity to come to the courtroom to hear argument on their case.[8] This is especially true in mass actions, where the lawyers seem to be nearly autonomous and clients never appear before the court at all.

These facts offer practical reasons not to insist on or expect significant litigant participation, but they do not offer a normative reason. For that, we have to ask why we value litigant participation. Once we understand what is valuable about participation, we can think about what type of participation is normatively desirable even in a world of process scarcity.

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5. Elizabeth Chamblee Burch, *Financers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1292 (2012); *see also* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 89 N.Y.U. L. REV. (forthcoming 2015), *available at* http://ssrn.com/abstract=2437853 (demonstrating that judges appoint lawyers who are repeat players to high level positions in multidistrict litigation).

6. *See generally* Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011). This phenomenon is an old one. *See* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1583–84 (2004) (describing early instances of settlements by matrix).

7. *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (documenting the decline in trials).

8. Jordan M. Singer & William G. Young, *Measuring Bench Presence: Federal District Judges in the Courtroom, 2008–2012*, 118 PENN. ST. L. REV. 243, 258 (2013) (stating that aggregate data show courtroom hours are in steady decline, which means that judges are hearing fewer arguments in open court); *cf.* Judith Resnik & Dennis Curtis, *Re-Presenting Justice: Visual Narratives of Judgment and the Invention of Democratic Courts*, 24 YALE J.L. & HUMAN. 19, 83 (citing U.S. GEN. ACCOUNTING OFFICE, COURTHOUSE CONSTRUCTION: BETTER COURTROOM USE DATA COULD ENHANCE FACILITY PLANNING AND DECISIONMAKING, GAO/GGD-97-39, at 2–3, 10 (1997)) (discussing the decline in the use of courtrooms).

The American legal system values participation and continues to pay homage to the idea of direct participation in lawsuits for two reasons,[9] even if it does not take concrete steps to realize this ideal in practice. The first reason for valuing participation is that participation is a predicate to consent. The idea is that results of litigation are legitimate—legally, morally, and especially sociologically—if the participants have consented to them. Litigant consent requires direct participation in the lawsuit.

A second reason for valuing participation is that it affirms a commitment to public reason. Litigation plays a role in articulating reasons that are important to deliberation in a democracy. The process of litigation produces arguments from the plaintiffs and defendants and reasons from the judge. These arguments and reasons are made public and are subject to critique from people outside the litigation. Public reason is a contested concept, and of particular difficulty is the line between a public and a private reason. I do not address the question of what ought to constitute appropriate arguments for public reason in a democracy in this Article, but rather hold to a relatively narrow view that the types of reasons publicly articulated and accepted in open court qualify as public reason.[10] What is important is that reasons are articulated and defended publicly, as opposed to mere assertions of preference. This idea is consistent with what Judge Weinstein calls a "communicatarian ethics."[11]

Of the two dominant reasons for valuing participation in litigation—consent and public reason—the latter offers the better normative underpinning for participation in mass litigation. The consent approach to litigation is a poor fit in mass cases for two reasons. First, it leads judges to acquiesce to a thin, nominal definition of consent that cannot justify the results in mass cases. Second, it promotes an orientation towards private, individual resolutions in cases that are fundamentally collective and have broad social effects. The public reason rationale for valuing participation in litigation is a better fit for the best practices in mass tort litigation, and is more likely to lead to innovative procedures that promote greater litigant participation. Judge Weinstein has pioneered specific procedural tools that are consistent with the public reason rationale for participation. Procedural

9. *See* Taylor v. Sturgell, 553 U.S. 880 (2008) (affirming the importance of the day in court ideal).

10. Philosophers are more precise. For a discussion of what reasons ought to count as public reasons, with a particular focus on John Rawls' theory, see Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449 (2006).

11. JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 46–52 (1995).

innovations that promote public reason should be more widely adopted.

II. Consent and Public Reason

The idea of participation based on consent is epitomized by a settlement agreement, a consent decree, or an opt-in class action. Public reason is epitomized by a trial, oral argument on a dispositive motion, the certification of a class action, or perhaps a fairness hearing in a class action settlement. These two approaches to participation correlate with two dominant ideas about the purpose of adjudication: dispute resolution and law declaration.

Before moving to the definition of consent and public reason rationales for participation in litigation, it is important to recognize that the two constructs are not mutually exclusive, just as the dispute resolution and law declaration models of adjudication are not mutually exclusive. Nevertheless, treating consent and public reason separately is helpful for understanding the values driving the debate about participation.

The consent rationale is based on the dispute resolution model of litigation. The idea that one ought to be able to participate in the resolution of one's own dispute, the most familiar rationale for participation, is grounded in recognition of individual autonomy. If the purpose of litigation is to resolve cases, it is important that litigants accept that resolution. Obtaining participants' consent to the process is one way to gain acceptance of the outcome, even if that outcome is unfavorable. Adherents to the dispute resolution model prefer the litigants to resolve their dispute through negotiation and settlement methods. As Justice Harlan explained, "[P]rivate structuring of individual relationships and repair of their breach is largely encouraged in American life, subject only to the caveat that the formal judicial process, if resorted to, is paramount."[12]

Under the dispute resolution model, settlement is the most efficient way to resolve disputes and has legitimacy because it is predicated on litigant consent. The rules that permit parties to waive many due process protections, such as personal jurisdiction and their Seventh Amendment right to a jury trial, similarly focus on litigant consent to the dispute resolution process.[13] The rights to a jury trial and to various due process protections allow litigants to participate in their law-

12. Boddie v. Connecticut, 401 U.S. 371, 375 (1971).

13. *See* Fed. R. Civ. P. 12(h); *see also, e.g.*, Patton v. United States, 281 U.S. 276 (1930).

suits. Because litigants can waive these rights, participation can be understood as mostly a matter of consent.

By contrast, the public reason rationale for participation correlates with the law articulation model of litigation. Under this model, as Owen Fiss wrote, "[a]djudication is the social process by which judges give meaning to our public values."[14] Similarly, Lon Fuller wrote that adjudication is "a device which gives formal and institutional expression to the influence of reasoned argument in human affairs."[15] Fuller contrasted adjudication, with its "higher responsibility toward rationality," to contracting and voting.[16] Whereas a participant need not give a reason for her decision when entering into a contract or casting a ballot, adjudication is based on the presentation of proofs and reasons in favor of or against an outcome. The particular form of participation that characterizes litigation—presentation of proofs and reasoned argument—encourages deliberation and critical engagement with the underlying justification for a decision, at least in its best incarnation.[17] The idea is rooted in deliberative democratic theory. In order for decisions to be politically legitimate, the reasons justifying the decisions must be made public.[18] Under the law articulation model, settlements are suspect even though the parties have con-

14. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

15. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366 (1978).

16. *Id.* at 367. There was much more than this to the theory Fuller proposed in his classic article, but I want to focus on the presentation of proofs and reasoned argument as an expression of public reason here. Fuller focused a great deal of effort on distinguishing between the types of cases for which judicial action is appropriate and those for which it is not. That debate is an important one still, but my focus is not on the question of what types of disputes are appropriately decided by courts, but on the question of participation once a dispute is in the court system. Particularly relevant here is Fuller's description of adjudication as a special kind of participation in social ordering, which affirms a commitment to reasoned argument. *See generally* Fuller, *supra* note 15. For a recent iteration of the debate about the limits of adjudication in solving complex social problems, see the majority and dissenting opinions in *Brown v. Plata*, 131 S. Ct. 1910 (2011).

17. This Article draws on the literature about the role of education, communication, and deliberation on the polity. *See, e.g.*, HANNAH ARENDT, THE HUMAN CONDITION 192–212 (1958) (discussing the role of democracy in fostering communication regarding issues that shape social life); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 45 (1996) ("Many constitutional democrats focus on the importance of extensive moral deliberation within one of our democratic institutions—the Supreme Court. They argue that judges cannot interpret constitutional principles without engaging in deliberation, not least for the purpose of constructing a coherent view out of the many moral values that our constitutional tradition expresses." (footnote omitted)). *See generally* HUGH BAXTER, HABERMAS: THE DISCOURSE THEORY OF LAW AND DEMOCRACY (2011).

18. HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY (2003). *See generally* Joshua Cohen, *An Epistemic Conception of Democracy*, 97 ETHICS 26 (1986); GUTMANN & THOMPSON, *supra* note 17, at 95–127.

sented, because settlements do not provide a justification of the outcome available for public review and criticism.[19]

A critic might respond that the description of adjudication as governed by reason through arguments and responses to those arguments is inaccurate because adjudicators do not always provide reasons for their decisions. Judges' rulings are not always accompanied by written opinions explaining their reasoning.[20] The Supreme Court, an institution singled out by some theorists as an exemplar of public reason, routinely denies petitions for certiorari without explaining its reasons for denial.[21] Even when courts give reasons, these reasons may not be very rigorous or satisfying, and may even be insincere.[22] The fact that our system tolerates an absence of reasons or poor reasons indicates that we do not value reasons very much—or so the argument goes.

Yet instances when judges fail to give reasons are the exception, not the rule. Most of the time, we expect judges to give reasons. Furthermore, pointing to instances of judges failing to give reasons does not make it normatively desirable not to give reasons. If judges were not giving reasons most of the time, it might be necessary to consider why we are willing to tolerate a regime that decides cases without reasons. But because we have a regime that requires reasons most of the time, we need not consider that hypothetical.

The jury presents a harder case. Jury deliberations are conducted in a "black box." Even when they fill out verdict forms, jurors are not required to state the reasons for their findings. In a jury trial, reasons are developed through the presentation of proofs and arguments to the jury and there is a further expectation that the jury will engage in

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19. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–90 (1984).

20. *See* Maya Sen, *Courting Deliberation: An Essay on Deliberative Democracy in the American Judicial System*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303 (2013) (arguing that "contributions both from social sciences and from doctrinal scholarship suggest that judges are strategic (and oftentimes political) actors, and that their 'deliberations' might be more similar to quid pro quo bargaining than to reasoned intellectual exchanges"); *see also* Mathilde Cohen, Because I Said So: The Federal Courts' *Ipse Dixit* Problem (Sept. 23, 2011) (unpublished manuscript) (on file with author).

21. For a description of the Court as an exemplar of public reason, see JOHN RAWLS, POLITICAL LIBERALISM 231–40 (1996). The Court also avoids some questions that would require it to give reasons, and confronts other questions it might avoid. *See* Henry Paul Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665 (2012).

22. *See* Mathilde Cohen, *Sincerity and Reason Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091 (2010). An example of this is the Supreme Court's recent pleadings jurisprudence, which requires that a litigant assert facts in support of her complaint even when it is clear that she will be unable to do so absent discovery. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662 (2009). Fifty years ago, Judge Weinstein criticized the types of categories that litigants currently struggle with under the new pleadings regime. Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520–21 (1957).

serious deliberation about those proofs and arguments.[23] Special verdict forms may ask for the factual predicate of the jury's findings, but this is not the same as a reasoned opinion. In theory, judges could ask for publicly stated reasons from the jury, and the fact that we accept jury verdicts as legitimate, although they do not provide reasons, demonstrates that the idea that participation in adjudication requires public reason giving is not universal. Conversely, the lack of reasons accompanying jury verdicts may be one reason why there is so much criticism of the civil jury.

Sometimes the problem is not that there are no reasons, as discussed above, but that the reasons are not good enough. The objection that the reasons are not *good* reasons, or good enough reasons, presents the least of the problems for adjudication because the process of articulating a reason begins a dialogue about the validity and strength of that reason, which is the essence of the enterprise. The fact that adjudication is based on reasoned arguments does not guarantee that the reasons given will be good ones. Good reasons require further criteria for evaluation. But to engage at the level of proofs and reasoning is a fundamental step that creates a basis for critiquing reasons and suggesting better reasons in support of alternative outcomes. A judge's failure to give a reason for her decision is a far more serious problem.[24]

Some argue that the process of litigation obscures reasons rather than elucidates them. This is especially true for people not acclimated to the court system. To them, the types of reasons presented by lawyers and accepted by judges may seem beside the point to the problem at hand. The reasons that lawyers provide to the court and that judges accept do not always fit with the common sense of ordinary people, nor do these reasons always do justice to the narratives that give rise to disputes.[25]

Furthermore, members of a pluralist society such as our own have difficulty agreeing on which reasons are good reasons.[26] The process

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23. Studies show that jurors do take deliberation seriously. *See generally* Shari Seidman Diamond et al., *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 Nw. U. L. Rev. 1537 (2012) (discussing a study of real jury deliberations in Arizona state courts to demonstrate that jurors take jury instructions and the deliberation process seriously).

24. *See, e.g.*, Turner v. Rogers, 131 S. Ct. 2507, 2519–20 (2011) (describing a contempt proceeding in which the judge neglected to apply the governing law to the case at hand).

25. *See generally* Patricia Ewick & Susan S. Sibley, The Common Place of Law (1998).

26. *See generally* Democracy and Difference: Contesting the Boundaries of the Political (Selya Benhabib ed., 1996) (presenting essays on the theme of the challenges of pluralist democracy).

of reason giving, without more, does not help us evaluate the quality of reasons. For example, imagine there is a case that requires the court to balance two competing values. The process of reason giving does not dictate which value should be given precedence. Adjudication gives us a process for presenting reasons, but even if that process is entirely satisfactory, more is needed to determine *which* reasons to choose. This is an argument in favor of adjudication as a process of participation through presentation of reasoned proofs rather than against it. It is true that we have trouble agreeing on which reasons are good, and that these arguments are often arguments regarding fundamental values about which people can reasonably differ. This is at least one reason that process-based theories have had such staying power in American legal thought.[27] Adjudication is a process for making reasoned arguments even if that process does not dictate the values that will ultimately determine which reason is the right reason or the best one.

A final argument against the public reason rationale for participation in litigation is that people are fundamentally irrational, and reason plays a smaller role in decision making than many assume.[28] Irrationality may be a fact of human decision making, but this does not mean that we are incapable of recognizing reasons, debating them, and trying to reach the best possible decision. That the process of presenting proofs and arguments on the side of the litigants, and evaluating them on the side of the judge, is an imperfect one is not a sufficient basis for giving up on public reason and its corollary, self-government.

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27. *See* Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 703–05 (1993) (challenging the intellectual history of a discrete "legal process" school and arguing that the legal process tradition "must be understood primarily as the embodiment of an attitude concerning the importance of rationality within a democracy" and that "faith in reason lies at the heart of American legal culture," even if that faith is contested by competing schools of thought). For a critique of legal process approaches, see generally Lawrence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

28. *See, e.g.*, DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (rev. ed. 2009); DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2012) (describing studies showing that the use of heuristics in fast thinking can obscure truth); Dan Kahan et al., *Cognitive Bias and the Constitution of the Liberal Republic of Science* (Yale Law School, Public Law Working Paper No. 270, Nov. 11, 2012), *available at* http://ssrn.com/abstract=2174032 (describing studies showing that large groups are more likely to make ideologically driven interpretations of data).

III. Understanding Participation Through Preclusion Doctrine

One window on the judicial understanding of participation as a value in litigation is preclusion doctrine. Preclusion is the other side of participation. Under the general principles of preclusion, only a person who has been a party to the litigation (that is, who has had the opportunity to be heard) may be bound by that suit. Plaintiffs who seem virtually identical and who bring the same claim must each be given the opportunity to litigate her own lawsuit independently.[29]

The exceptions to this general rule underscore the dominant consent rationale of participation. For example, litigants may be bound by a prior judgment although they did not have a "full and fair opportunity to litigate" their lawsuit (1) by agreement of the parties; (2) when they exercised control over the first litigation; or (3) when they attempt to litigate by proxy, using their agent as a plaintiff in the second suit.[30] In each of these exceptions, it is the litigant's consent that determines whether she will be bound. Similarly, the historical antecedents of preclusion based on a legal relationship (such as that between heirs and assigns of property) are based on the idea that because the assign lacked control over the property, she was not entitled to participation.[31] In other words, the courts believed that there was no autonomy interest to protect. Consent was not an issue because there was no loss of rights that triggered a need for it.

A different rationale is needed in the case of preclusion in the context of representative litigation such as class actions. In the class action context, the litigants do not expressly consent: absent class members may be bound so long as they are adequately represented.[32] Some might argue that class members impliedly consent by not opting out. This argument is consistent with the Supreme Court's holding in *Phillips Petroleum v. Shutts*,[33] which made the right to opt out in money damages class actions a due process requirement.[34] The failure to opt out may be described as consent as a formal matter, but as a practical matter, implied consent, especially in cases where damages

29. Taylor v. Sturgell, 553 U.S. 880, 885 (2008) (rejecting the doctrine of virtual representation).

30. *Id.* at 892–94 (listing recognized reasons to preclude).

31. *See* Robert G. Bone, *Rethinking "The Day in Court" Ideal and Non-Party Preclusion*, 67 N.Y.U. L. Rev. 193, 210–11 (1992) (discussing eighteenth- and nineteenth-century cases involving preclusion of nonparties in property matters).

32. *Taylor*, 553 U.S. at 896.

33. 427 U.S. 797 (1985).

34. *Id.* at 812.

are small, is widely recognized as a fiction.[35] Injunctive and limited fund class actions are inconsistent with the consent rationale even as a formal matter because absent class members cannot opt out and so they signal no implied consent by remaining in the litigation.[36]

The participation problem in mandatory class actions, and to some extent in money damages class actions, is solved through interest representation. Individual class members do not need to participate in the litigation because their interests are adequately represented by others. When the courts find that those interests are not adequately represented, the previous lawsuit cannot preclude the class member.[37]

The idea of interest representation is more consistent with the public reason rationale than with the consent rationale for participation. Interest representation relies on the class representative to make the best arguments in favor of the class because she shares similar interests to the absent class members. At the class certification stage, the judge determines that the representative is adequate in order to justify applying the result of this lawsuit to absentees.[38]

Consider the attempt to settle a mass of asbestos lawsuits in *Amchem Products v. Windsor*.[39] Reviewing the settlement, the Supreme Court expressed concern about future claimants who were not represented or inadequately represented in that settlement.[40] The problem was not that the future claimants were not able to individually or collectively consent, or that they could not appear in court.[41] The Court recognized that future claimants could be bound if they had separate class representatives who agreed to the settlement on their behalf, but held that the future claimants needed separate representation because their interests conflicted with those of present claimants.[42] The future claimants lacked an adequate representative who could protect their interests and, as a result, their treatment in

35. In a very influential article, Professor Coffee argued that the class action is directed by entrepreneurial lawyers rather than class representatives, so lawmakers should focus on creating incentives to align the lawyers' interests with those of the class. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); *see also* Alexandra D. Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 79–89 (2004) (discussing the limits of claimant participation in class actions).

36. *See* FED. R. CIV. P. 23(b)(2) (providing rules for injunctive class actions).

37. Hansberry v. Lee, 311 U.S. 32, 42–43 (1940).

38. *Id.* at 42.

39. 521 U.S. 591 (1997).

40. *Id.* at 597.

41. *Id.* at 626–27.

42. *Id.*

the settlement was not justified.[43] In the Court's view, future claimants received unfair treatment in the settlement because of structural conflicts of interest.[44] The dissent's support of the settlement similarly relied on ideas of public reason—the justification for the settlement in light of the alternative of long waits and costly suits—rather than an argument about absent class member consent, express or implied.[45]

IV. Perceptions of Participation: What We Know About What Litigants Want

The public reason approach could have found expression in the mass tort class action, but *Amchem* heralded the end of such class actions for the most part. The doctrine in mass torts, instead, favors the consent rationale for participation: each plaintiff must individually consent to a settlement. While legal doctrine does not support a pure public-reason approach to participation, some support can be found in psychological and sociological studies of litigant satisfaction. These studies indicate that while litigants want to participate individually in their suit, consenting to a settlement does not necessarily satisfy them. Litigants seek the experience of reason giving and information exchange that litigating a case to trial offers.

Psychological studies show that litigants are more likely to think procedures are fair when they have an opportunity to present proofs and arguments as part of the proceedings.[46] One study found that litigants prefer more formal proceedings such as trial, mediation, and arbitration over resolution by settlement. In these proceedings, they had an opportunity to tell their story, as opposed to informal settlement talks where they were not present. Litigants' preference for in-person dialogue held even when the judge is involved in the settlement discussion.[47] These findings are supported by a study of the participants in the 9/11 Victim Compensation Fund (VCF).[48] Reflecting on their choice to receive a settlement from the fund, rather than sue,

43. *Id.*; *see also* Stephenson v. Dow Chem. Co., 273 F.3d 249, 257–59 (2d Cir. 2001) (upholding a collateral attack to the *Agent Orange* class action settlement on the grounds that the future claimant was not adequately represented at the time of the settlement).

44. *Id.*

45. *Amchem*, 521 U.S. at 631 (Breyer, J., dissenting).

46. *See generally* John Thibaut & Laurens Walker, Procedural Justice: A Psychological Analysis (1975). For an update summarizing the large procedural justice literature and empirical findings since 1975, see Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 Fordham Urb. L.J. 473 (2010).

47. E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 Law & Soc'y Rev. 953, 976 (1990).

48. Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 Law & Soc'y Rev. 645 (2008).

many claimants from the fund expressed mixed feelings or regret at not having a public formal proceeding in which the airline industry was called to account.[49]

The VCF study demonstrates that although people recognize the value of presentation of proofs and arguments and the articulation of reasons for the decision by the court (what I am calling public reason), they still want direct participation. Some victim's families did file lawsuits and did not participate in the VCF, but the fact that lawsuits were pursued by others did not seem to assuage the regrets of the many who chose the fund over litigation. Public reason exercised by others was not a replacement for individual engagement with the legal system. This might be because no trial was held and no public accounting was had; all the plaintiffs who chose to sue settled.[50] Had there been a trial, perhaps those who had not sued would be satisfied. But it is also possible that individual direct participation is linked so tightly with the idea of the "day in court" that public reason without direct, individualized participation can never be sufficient. After all, the VCF claimants were not completely satisfied with the public hearings and report of the 9/11 Commission, although these hearings publicly exposed the same information and spurred a national dialogue about the same thing that would have been the subject of an individual lawsuit. Although the special master of the VCF, Kenneth Feinberg, spent a great deal of time listening to claimants, these meetings were not public, and ultimately the reasons for his individual decisions with respect to each claimant are not public. As a result, it is not possible to call the VCF settlement a process of public reason like that practiced by the courts.[51]

V. Public Reason in Mass Cases

Several arguments militate in favor of increasing reasoned dialogue in the mass tort context. As Judge Weinstein pointed out,

> Dialogue may lead to more satisfying solutions because many of those affected will have played some role in the process. The felt needs and reasoning of those directly concerned may provide insights otherwise overlooked. Dialogue also increases the sense of

49. *Id.* at 645–82.

50. Benjamin Weiser, *Family and United Airlines Settle Last 9/11 Wrongful-Death Lawsuit*, N.Y. Times, Sept. 20, 2011, at A28.

51. However, the process was more inclusive and gave individuals more agency than the settlement talks held without litigants present described in Lind et al., *supra* note 47, which litigants found unsatisfactory.

> dignity of the participating person as an important entity, one who counts and will be heard.[52]

Judge Weinstein's defense of dialogue in mass cases rests on sociological, utilitarian, and dignitary grounds. The argument that dialogue may lead to more satisfying solutions sounds in sociological legitimacy. The idea that dialogue will provide insights that might otherwise be overlooked may be understood as utilitarian—by considering all arguments, the most accurate result will be reached—or as ontological, promoting autonomy and dignity values. Finally, Judge Weinstein presents dignity as an independent value fostered by participation.

If it is impossible for every voice to be heard when aggregated cases number in the thousands, how is the idea of participation through public reason to be realized? We must first consider the barriers procedural innovators face before turning to the question of how procedural innovation can provide forms of participation grounded in the ideal of public reason.

A. The Legal Landscape of Mass Claims

One of the most significant challenges to court administration today is the continued influx of mass cases. The busy docket of the Judicial Panel on Multidistrict Litigation (MDL) provides evidence of the extent of the problem. In a variety of cases, from products liability to antitrust to securities, between forty and eighty MDL transfers are ordered every year.[53] Each of these transfers can represent hundreds or thousands of cases. This is also a subject area in which Judge Weinstein's doctrinal innovations and legal theory have been particularly influential.

The most challenging mass cases are products liability suits. It is very difficult to resolve these cases through a class action settlement that would bind all the plaintiffs because oftentimes the plaintiffs cannot meet the class action requirement that common issues predominate over individual ones.[54] Tort law's requirements of specific causation and proof of injury depend on individual determinations, and courts often find that these individual questions

52. WEINSTEIN, *supra* note 11, at 47 (footnotes omitted).

53. JUDICIAL PANEL ON MULTIDISTRICT LITIG., CALENDAR YEAR STATISTICS OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION 1–3 (2014), *available at* http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2014_0.pdf.

54. I would have said impossible but for the *In re Deepwater Horizon* litigation, in which a settlement class action of economic damages claims and medical benefits claims arising out of the massive oil spill in the Gulf of Mexico in 2010 was approved. *In re* Deepwater Horizon, 739 F.3d 790, 795 (5th Cir. 2014) (approving an economic damages settlement over objections).

predominate over the common issues regarding the product. Differences in state laws may also defeat the predominance requirement for certifying a money damages class.[55] If future claimants are included in a mass tort class action, they must be adequately represented, and chances are they will be able to relitigate adequacy in a collateral proceeding.[56] Accordingly, a class action resolution is difficult to achieve.

Lawyers also find it difficult to resolve mass tort cases through individual settlements collected on a wholesale basis unless only a few firms represent most of the plaintiffs. The main reason for this is that defendants use mass settlement to obtain global peace, and to achieve this goal, they need a negotiating partner who can bring significant numbers of plaintiffs into the settlement.[57] Several factors can stand in the way of global peace. Plaintiffs with high-value cases may opt out of the settlement, leaving the defendant with a large settlement that includes only low-value claims. Or a settlement announcement may induce new plaintiffs to file lawsuits not included in the aggregate agreement, increasing the defendant's exposure.[58] Global peace is not only difficult to obtain, but may result in unfairness. Lawyers may unfairly allocate the award by reducing the amount paid to some plaintiffs in order to induce others to join the settlement by paying them more.[59] The risk that lawyers will allocate settlement funds un-

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55. Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 796–97 (2013) ("Numerous courts hold that when the laws of multiple states are involved and are not uniform, class certification is essentially per se inappropriate."). *But see* Sullivan v. DB Investments, Inc., 667 F.3d 273, 308–09 (3d Cir. 2011) (approving certification of the settlement class despite choice of law issues).

56. Stephenson v. Dow Chem. Co., 273 F.3d 249, 258 (2d Cir. 2001); *see also* Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1182, 1196 (1998).

57. *See* Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 267–88 (2011). As Erichson and Zipursky explain:

> If too many claimants decide not to participate, the defendant faces substantial ongoing liability exposure and litigation expenses. Defendants worry that the claimants with the most serious claims may be the least inclined to settle. The last thing a defendant wants to do is put serious money on the table only to find that the settlement eliminated junk claims while leaving high-value plaintiffs in the litigation pipeline. Aggregate settlements can and often do resolve large bundles of mass tort claims, but when numerous law firms each represent numerous plaintiffs, true closure is hard to find.

Id. at 267–68.

58. *See* Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1383–84 (2005) (describing elasticity in mass torts).

59. For a discussion of the ethical issues, see Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 FORDHAM L. REV. 1985 (2011); and Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998).

fairly between their inventory clients runs especially high when the defendant conditions settlement on global peace.[60]

B. Solutions to the Problem of Participation in Mass Litigation

Several changes to the procedures for resolving mass litigation have surfaced in recent years. The American Law Institute (ALI) has proposed a kind of majority-vote rule that would allow litigants to vote on whether to accept a settlement. This proposal rests on the consent rationale. By contrast, Judge Weinstein has developed several innovative approaches that lean more towards the value of public reason, such as the quasi class action and the use of advisory juries. A discussion of these different approaches to the problems of mass litigation, and their significance for the normative question of participation and legitimacy, follows.

1. The ALI Voting Proposal

One proposal for resolving mass actions through settlement is to permit lawyers to ask clients to agree in advance to any settlement which is approved by a majority or supermajority of plaintiffs. The ALI has propounded such a voting proposal, permitting lawyers to obtain client consent in advance and making a settlement binding on all clients by a supermajority vote.[61] At the moment, this approach violates the ethics rules of all fifty states.[62] The main reason for this is an ethics rule that requires a lawyer who represents multiple clients in one proceeding to provide full disclosure of the terms of a settlement to each client prior to asking for written consent to an aggregate settlement.[63]

The current rule requiring individual consent and the settlement-by-vote proposal represent steps along a continuum from consent to public reason. The rule against aggregate settlement by vote rests on a consent rationale. It is a well-established principle that the decision

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60. *See* WEINSTEIN, *supra* note 11, at 61–66.

61. A.L.I., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 (2010) [hereinafter AGGREGATE LITIGATION]; *see also* Lynn A. Baker & Charles Silver, *The Aggregate Settlement Rule and Ideals of Client Service*, 41 S. TEX. L. REV. 227, 228–40 (1999); Silver & Baker, *supra* note 59, at 1500–06; Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733 (1997).

62. *See, e.g.*, Tax Authority, Inc. v. Jackson Hewitt, Inc., 898 A.2d 512 (N.J. 2006); *see also* MODEL RULES OF PROF'L CONDUCT r. 1.8(g) (2014); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-438 (2006); AGGREGATE LITIGATION, *supra* note 61, § 3.17 cmt. b(1) (2010).

63. MODEL RULES OF PROF'L CONDUCT r. 1.8(g) (2014).

whether or not to settle a case belongs to the client, not the lawyer.[64] In ordinary lawsuits, the client is the only one empowered to accept a settlement offer and the model is one of express consent.[65] The proposal that clients agree by vote is one step removed from the consent rationale in that it shifts the point in time of the decision to consent. Some clients may not consent once they learn the content of the settlement, but they will nevertheless be bound by the settlement agreement if the supermajority approves it. As described, this proposal is not an expression of the ideal of public reason because the client discussions are individualized and presumably private, protected by the attorney–client privilege. The discussions will, one hopes, include reasons to accept (or to decline) the settlement. But unlike litigation, those reasons are not likely to be made public or presented to the court. The ALI voting proposal also includes a provision allowing judicial review of settlements if individuals choose to appeal to the court.[66] This aspect of the proposal is one step closer to public reason, but only if plaintiffs take advantage of it .[67]

2. Judicial Solutions Sounding in Public Reason

Judicial intervention in mass settlements has been the most interesting development in this area of the law in the last ten years. One innovation was Judge Weinstein's response to the *Zyprexa* litigation, discussed at the beginning of this Article.[68] In that litigation, recall, the judge complained that he had not seen a single plaintiff—just their lawyers. In response, he decided that judicial intervention was needed to oversee the lawyers. He called this innovation a "quasi class action." That term describes a mass aggregation of lawsuits that are settled all together as though they were a class action but cannot be certified as a class action because they do not met the criteria of the class action rule.[69] Judge Weinstein observed that because these cases have some features of class actions, including that they raise concerns

64. MODEL RULES OF PROF'L CONDUCT r. 1.2 (2014).

65. *Id.* This is also true of the aggregate settlement rule, which requires individual consent. *See* MODEL RULES OF PROF'L CONDUCT r. 1.8(g); *see also supra* notes 62–63 and accompanying text; *cf.* Nancy J. Moore, *Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule*, 81 FORDHAM L. REV. 3233 (2013) (discussing the relationship between the ALI proposal and the aggregate settlement rule).

66. AGGREGATE LITIGATION, *supra* note 61, § 3.18.

67. There are structural reasons why plaintiffs are unlikely to file such challenges, such as the fear of losing their lawyer, for example. Erichson & Zipursky, supra note 57, at 266.

68. *In re* Zyprexa Prods. Liab. Litig., 433 F. Supp. 2d 268 (E.D.N.Y. 2006).

69. *Id.* at 271.

of authentic client consent and attorney overreaching, judicial oversight is appropriate. Other judges have followed suit.[70]

A second innovation championed by Judge Weinstein is the use of advisory juries. While not exclusively the province of mass litigation (Judge Weinstein initially advocated the use of an advisory jury in sentencing), the advisory jury can be an important part of large-scale litigation because of its capacity to promote reason giving to citizens serving as lay adjudicators.

a. Quasi Class Actions

Creating a new common law doctrine by adding the prefix "quasi" to an older, related doctrine is a classic response to the breakdown of doctrinal categories by building a bridge between them.[71] Judge Weinstein observed the breakdown of the class action as a unitary concept. Instead of either being certified as a class action and resolved collectively or being litigated on an individual basis, cases were being resolved collectively without the procedural protections of the class action.[72] This development creates potential conflicts of interest between clients represented by the same lawyer and between the clients and the lawyer. The judiciary's decision to consolidate large numbers of similar cases in one venue (to the extent consistent with federalism) makes this phenomenon of collective, nonclass resolution possible. Accordingly, judicial involvement is both necessary and warranted, and in any event, has become standard in such cases.

By naming the quasi class action and asserting judicial input into the mass settlement made possible by judicial intervention and shepherding, Judge Weinstein illuminated the importance of public reason in the resolution of litigation. The advent of quasi class action settlements has caused concern among critics who worry that plaintiffs are

70. Another example of this trend is Judge Hellerstein's decision in the 9/11 First Responders Litigation to hold a fairness hearing even though the case was not certified as a class action. For a discussion of that decision, see Howard M. Erichson, Commentary, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015 (2013).

71. Other examples include quasi in rem in personal jurisdiction doctrine or quasi-contract. Quasi in rem, forever emblazoned on the memory of every first year law student from the canonical case *Pennoyer v. Neff*, involved the breakdown of jurisdictional categories in personam and in rem. *See* 95 U.S. 714, 724 (1877). In that case, the reader hardly needs reminding, a litigant attempted to obtain jurisdiction to enforce a contract for services in reliance on the existence of property within the jurisdiction. *Id.* at 719–20. This attempt fit neither the extant legal category of in personam—which required personal service—nor in rem, which covered suits about the property itself even when the owner was outside the jurisdiction. *Id.* at 736–37 (Hunt, J., dissenting). The doctrine of quasi in rem bridged these categories.

72. These include the right to judicial approval of the settlement, a fairness hearing before that approval, and the right to object to the settlement or to opt out of the proceeding. FED. R. CIV. P. 23(e).

denied control over their own decision making.[73] These concerns have focused on the proposal that plaintiffs be permitted to bind themselves to a settlement agreement by a majority vote. But critics have also argued against judicial intervention on the grounds that judicial review of mass settlements deprives plaintiffs of control over their own case if the judge rejects the settlement and inoculates lawyers against charges of malfeasance if the judge approves it.[74]

The core case against judicial review of mass settlements rests on the idea of consent. But the choice in mass cases need not be between consent and closure, as two prominent academics have described it.[75] Instead, the quasi class action can be understood as a judicial attempt to instill the value of public reason into a dynamic created by court-ordered procedures that cannot reliably be expected to produce authentic consent. This is not to concede that consent is the only valid rationale for participation, or that public reason is a concept only important where authentic consent is not possible. Public reason is an equally valid way to achieve collective participation where authentic consent is not possible.

Those who believe that the purpose of litigation is dispute resolution and that the measure of participation is consent do not approve of judicial involvement in mass settlement.[76] But for those who recognize that the purpose of litigation is also the articulation of law and the just resolution of legal disputes, public reason is a corollary to those values. Judicial involvement is a welcome development from the public reason point of view because it promotes the reasoned articulation of arguments in favor of (and against) a particular collective resolution.

The best argument against judicial intervention in mass settlements, even from a public reason perspective, sounds in separation of powers. Martha Minow has suggested that the resolution of mass cases through large-scale settlement constitutes the creation of temporary administrative agencies and asked whether this poses a separation of powers issue: "Has the court strayed into the domain of the executive to enforce the law or taken over the task of the legislature to devise prospective rules and establish governmental agencies?"[77] She de-

73. *See, e.g.*, Erichson & Zipursky, *supra* note 57, at 313, 317 (arguing that a voting mechanism for resolution of mass cases ignores plaintiffs' autonomy as rights holders, and that the proper role of tort law is protecting the rights of the individual).

74. Erichson, *supra* note 70, at 1024.

75. Erichson & Zipursky, *supra* note 57, at 311, 320–21.

76. *See generally* Erichson, *supra* note 70 (arguing against judicial involvement).

77. Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2022 (1997).

fended Judge Weinstein's pioneering work in mass settlement on three grounds. First, judges in cases such as mass torts act in the vacuum left by the elected branches, potentially spurring dialogue between the branches regarding the best solution to social problems such as mass torts.[78] Judge Weinstein has explained that the judge's role "is a stopgap in the absence of legislative action."[79] The judge in a mass action can serve as a voice of the community as a whole, or at least attempt to enable fruitful dialogue about social issues that is not possible in a cacophony of individual voices.[80] Second, Minow points out that judicial action in mass torts is more like other forms of adjudication than critics allow.[81] It has long been the province of the judiciary to regulate the conduct of lawyers before the court and to raise issues of justice and fairness even when the litigants do not.[82] Third, Minow argues that "exposure and defense of the boundaries between the branches are necessary for reasoned debate" and that innovative judicial action can make concrete a vision of the relationship between law and justice that can start that debate.[83]

Returning to the central claim of this Article, it is possible to create an opportunity for a full and fair hearing of the stakeholders in a litigation (including the plaintiffs) and to obtain an official statement from a government official (i.e., the judge) as to the propriety of that settlement. The focus of that hearing cannot be individual consent, because it is clear that consent will be inauthentic. Instead, the focus ought to be the articulation of reasons, made public and challenged. One avenue for this public dialogue is the quasi class action. Critics who accept the public reason approach to participation may still ask whether we can trust the judge to say whether a settlement is fair. This important question continues to plague class actions. Yet, the best protection we have against judicial acquiescence to poor settlements is public reason, testing arguments against one another, and presenting proofs in support of those arguments.[84] Judges ought to

78. *Id.* at 2023; *see also* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 356–72 (1990) (discussing a dialogic conception of separation of powers).

79. WEINSTEIN, *supra* note 11, at 104.

80. "When so many discordant voices are heard and so much money is at stake, a hand with no financial interest in the outcome is necessary to impose order and discipline and avoid chaos." *Id*. at 102.

81. Minow, *supra* note 77, at 2024.

82. *See generally* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447 (2009) (discussing the limits on the ability to judges to raise issues sua sponte).

83. Minow, *supra* note 77, at 2024–25.

84. *Cf.* Lahav, *supra* note 35 (arguing in favor of "devil's advocates" and other procedures to increase the adversarial nature of fairness hearings).

explain why the requirements of Rule 23 are met and why a settlement is fair to the participants, recognizing that plaintiffs' ability to consent to the settlement is limited by features of modern legal practice that are beyond their control.

What makes the consent rationale a poor fit in the mass tort context is the entrenched practice of aggregating cases informally by lawyers in the first instance and in the courts after filing, in order to make litigation economical. The conflicts of interest between clients, and between lawyers and clients, that result from this aggregation further limit consent. Aggregation also means that the litigation is larger and its mechanisms more far reaching than in any individual lawsuit. This is not to say that judges should forget about the individual within the aggregate, but rather that the ideal of authentic individual consent and total autonomy in decision making by each plaintiff in the mass tort context is inconsistent with lived reality.[85] Understanding litigation exclusively as a means for resolving disputes, the basis for the consent rationale, does not capture the modern function of litigation which reaches beyond the individual controversy.[86] Judge Weinstein observed: "As a general rule, the need for more intense court intervention is in inverse proportion to the effectiveness of the community in dealing with disasters."[87] The set of circumstances that gives rise to mass actions is often a systemic course of conduct towards many people and involving the failures of a number of institutions. In other words, it is a type of social problem that comes before the court as a set of lawsuits.

b. Advisory Juries

The Federal Rules of Civil Procedure permit a court to try any issue with an advisory jury on its own without party consent, although party consent is required if the jury verdict is to have the same effect as a jury trial under the Seventh Amendment.[88] The advisory jury was developed to permit a court in equity to have its "conscience enlightened."[89] It can do this by providing community input with points of

85. *Cf.* Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996) (describing similar problems in mass tort class actions).

86. *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). An economist would call these effects externalities.

87. WEINSTEIN, *supra* note 11, at 48.

88. FED. R. CIV. P. 29(c), 39(c)(1).

89. Vosburg Co. v. Watts, 221 F. 402, 408 (4th Cir. 1915) (stating "to have its 'conscience enlightened' as the phrase has it, or its work facilitated by referring to a jury some question of fact which is incidental and subordinate to the main contention"). Today, an advisory jury may decide any issue of fact, but that decision is not binding upon the judge, who must make his own

view different from members of the judicial branch. An advisory jury can also increase sociological legitimacy by putting the imprimatur of the community on the judicial decision, and appointing an advisory jury recognizes the importance of a legal issue to the larger community. Consistent with the thesis that participation can be understood as a form of public reason, a jury trial promotes deliberation.[90] This deliberation is not limited to the "black box" of the jury room. A jury trial, like a bench trial, is a public event in which lawyers present proofs and make arguments to convince the jury that the facts and law are on their side. But the presence of jurors adds a different quality to the determination of a just outcome than a judge acting alone because it includes different points of view.

Judge Weinstein has recognized the importance of including points of view outside the judge's experience and has advocated for the use of advisory juries in sentencing to "bridge the lifestyle and empathy gap between judge and criminal" and to provide "insights and the opportunity for a more humane and effective administration of justice."[91] His views are consistent with the insights of cultural cognition theory: people with different experiences and points of view may see different narratives in the same facts.[92] The jury does more than inject different points of view into the judicial branch, however. It forces judges to grapple with these differences. This is especially true in the case of the advisory jury, because a judge who has empanelled one is not permitted to rest on the jury's decision but must provide her own findings of fact and legal reasons.

Other judges have pointed out how the advisory jury can provide sociological legitimacy in legal decision making, or at least greater acceptance when particularly contentious issues are at stake. Before the trial on the New York City police department's stop-and-frisk practices—a case seeking injunctive relief and therefore not subject to the Seventh Amendment—Judge Shira Scheindlin suggested that a bench

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determination, nor the appellate court, which will use the same standard of review as for a bench trial. DeFelice v. American Int'l Life Assurance Co. of N.Y., 112 F.3d 61, 65 (2d Cir. 1997); *see also* FED R. CIV. P. 52(a)(1) (requiring a court to find facts and specifically state its conclusion when an action is tried to an advisory jury).

90. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577 (2008) ("Holding public trials and allowing juries to determine outcomes constitutes a deliberative process in which reasoned arguments are presented to citizens who participate in decisionmaking."); *see also* Alexandra D. Lahav, *The Political Justification for Group Litigation*, 81 FORDHAM L. REV. 3193, 3204–05 (2013).

91. United States v. Kahn, 325 F. Supp. 2d 218, 220 (E.D.N.Y. 2004).

92. *See* Dan Kahan et al., *Whose Eyes Are You Going To Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV 837, 852–53 (2009) (describing the idea of cultural cognition in the context of judicial decision making).

trial was "not the preferable route, because whatever the outcome, the criticism will be, 'This is one person.'"[93] Her ruling, she explained, might be attacked as "not a verdict of the community."[94] It was "important to hear from the community" which, unlike the judge, could provide "many points of view."[95] These statements could be understood to express a concern that the judge's rulings—for whichever side—will be perceived as expressions of her own political preferences rather than of sound legal reasoning.

Challenges to the relative autonomy of law from politics are also challenges to the institutional legitimacy of the judiciary. Including the community in the decision making process and shoring up the public end of the public reason that leads to the decision can perhaps mitigate these challenges or reduce their force. But the very legal questions at the core of the lawsuit—whether the stop-and-frisk policy was reasonable under the Fourth Amendment, and whether the policy violated equal protection of the laws—are questions that are not fully answerable by expert knowledge and thus legitimately raise the question of who decides.[96]

In a series of cases brought by private groups and the City of New York against gun manufacturers, Judge Weinstein discussed the use of an advisory jury. In the first lawsuit, the NAACP sued gun manufacturers on a public nuisance theory.[97] Judge Weinstein held that an advisory jury was appropriate even if the request for injunctive relief meant that there was no Seventh Amendment right to a jury trial because the question in the case involved community standards.[98] Several years later, the City of New York sued a number of gun manufacturers, also on a public nuisance theory.[99] The defendants

93. Benjamin Weiser & Joseph Goldstein, *Without Jury, Judge Warned That Stop-and-Frisk Ruling Would Be Disputed*, N.Y. TIMES, Jan. 3, 2014, at A15.

94. *Id.*

95. *Id.*

96. *See* Akhil Reed Amar, *An Unreasonable View of the 4th Amendment*, L.A. TIMES (Apr. 29, 2001), http://articles.latimes.com/2001.apr/29/opinion/op-57091 (stating that "[t]he landmark English search-and-seizure cases that inspired the framers were themselves civil-damage suits where juries helped determine whether government officials had acted reasonably" and arguing that the text of the Fourth Amendment, read in conjunction with that of the Seventh Amendment, promises that the people should interpret the scope of the right to be free from unreasonable searches and seizures).

97. NAACP v. Acusport Corp., 226 F. Supp. 2d 391 (E.D.N.Y. 2002).

98. "It is appropriate to take into consideration the values and standards of the community through the use of an advisory jury in determining whether the conduct of the defendant gun manufacturers and distributors illegally endangers the public health, safety, and peace." *Id.* at 400.

99. City of New York v. Beretta U.S.A. Corp., 317 F. Supp. 2d 193, 195 (E.D.N.Y. 2004).

moved to strike the City's demand for a jury.[100] In holding that an advisory jury was appropriate, Judge Weinstein explained:

> Here, one of the world's great cities is challenging the international handgun industry's practices that are alleged to put at unnecessary risk millions of urban residents. The precedential value and impact of such a case is likely to be substantial. A jury is likely to enhance the sense of parties and public that justice has been served—providing the litigation with greater moral as well as legal force. No suggestion has been offered that a jury representative of the citizens of this district would be unqualified to fairly try the issues.[101]

Why would a jury increase the public perception that justice has been served? First, an advisory jury is a protection against accusations of judicial overreaching or politicization. But this argument is insufficient because it makes the advisory jury a fig leaf. Another way of thinking about the question is to consider what arguments and deliberations are involved in a jury trial that differ from a bench trial. There are many similarities between the two, but one difference is that in a jury trial the lawyers and the judge are forced to explain the law and present the facts in a way that ordinary citizens can understand. Furthermore, the jury represents a concrete expression that in cases affecting a topic of with a significant public interest component—cases in which the law-declaration function of the courts is particularly important—the community is a part of the dialogue, and in convening an advisory jury, the judge recognizes the public import the underlying social realities that gave rise to a lawsuit and the outcome to the community.

The two procedural innovations described above as expressions of public reason—the quasi class action and the advisory jury—present opposite poles of judicial power. The quasi class action is a doctrine that allows judges to involve themselves in what are formally individual settlements because the judges recognize that the aggregate nature of the settlements presents risks to the administration of justice and to the deterrence function of the substantive law. The advisory jury, by contrast, injects the community into the adjudicatory process. The quasi class action empowers judges and the advisory jury empowers the community. Yet both share the common thread of being expressions of the ideal of public reason because both encourage public deliberation. In the quasi class action, an apparently private attorney–client relationship is recognized as having a significant impact on the public interest, which requires careful scrutiny and a pub-

100. *Id.*
101. *Id.* at 196.

lic airing of arguments. Similarly, by impanelling an advisory jury, the court recognizes the importance of providing a rationale for legal decisions that the community and the public can understand and accept.

V. Conclusion

The judiciary is a distinctive institution because of its role "in protecting the respect and dignity due to those before it."[102] Judge Weinstein has described his courtroom in the following terms:

> Judge, staff, and court personnel treat every person with dignity, listening respectfully and being as helpful as possible. Everyone who wishes to be heard—whether as a party, an amicus, stakeholder, victim, or someone indirectly affected—receives a hearing on the record.[103]

The emphasis on individual dignity before the court has been traditionally understood to mean that each person is entitled her "day in court." Waiver of that right by consent is rooted in an autonomy rationale and supported by a view of the courts as institutions committed to private dispute resolution. But the day in court ideal can also be understood as an expression of and a commitment to an ideal of public reason because the courts are enforcers and articulators of the law. The public reason approach to the right to be heard does not require individual participation, and for this reason, it is a worthwhile way to think about participation in mass litigation.

The public reason rationale for participation requires procedures that set up a robust dialogue, just as the consent rationale requires procedures that assure knowing consent. Under a consent rational for participation in litigation, the concern is that in aggregate settlements litigation ceases to be an expression of individual autonomy. Under the public reason rationale, the problem with aggregate litigation and other features of the modern litigation landscape is that the structure of the system suppresses the presentation of proofs and arguments on both sides. Suppressing the presentation of proofs, arguments, and reasoned decision making diminishes an institution that ought to provide public reason, the basis for self-government in a deliberative democracy.

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102. United States v. Kahn, 325 F. Supp. 2d 218, 228 (E.D.N.Y. 2004).

103. Jack B. Weinstein, *The Roles of a Federal District Court Judge*, 76 Brook. L. Rev. 439, 439 (2011).