

# FROM “CASES” TO “LITIGATION”

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As is the case with many who write about large scale litigation, I have been involved in some fashion with some of the events described. I consulted with the Ad Hoc Committee on Asbestos of the Judicial Conference of the United States, am a member of the American Law Institute, and am a consultant to RAND’s Institute for Civil Justice. Of course, the views expressed here are my own.

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## I

CHANGING PERCEPTIONS OF CLASS ACTIONS AND MASS TORTS: THE  
1960s TO THE 1990s

Change is not always noticed. This article documents changes in attitude and practice about the propriety of resolving cases in groups—as part of one “litigation.” Over the past three decades, the aggregation of civil cases (briefly—the bringing together of claims of different individuals to prepare them for trial, other adjudication, or settlement<sup>1</sup>) has moved from being the exceptional and specially justified event to the more ordinary and expected response whenever patterns of similar cases appear in the federal courts. The “asbestos litigation,” the “DuPont Fire litigation,” the “Agent Orange Litigation”—these are now all phrases that sound familiar and that prepare us for whatever the next product liability, toxic tort, antitrust, savings and loan, or other group “litigation” will be.

I am interested in the history of the movement—from “cases” to “litigation”—and in the impact of aggregate litigation on the conception of what the work of the federal judiciary ought to be. In this article, I have five central points to make. First, participants and commentators have changed their attitudes substantially over the last three decades about the propriety of cases proceeding in the aggregate. Second, the change in attitude dovetails with changing practices, both formal and informal, that enable much more aggregative processing in federal courts than a few decades ago. Third, aggregation has been promoted as a means of enabling claims that would otherwise not be pursued or as a means of expediting cases already filed. Forms of aggregation claimed “only” to expedite pending claims are perceived to be less politically charged and have been more readily accepted than those aimed at enabling claims. However, these two functions of aggregation are not so distinct in practice, and both have political impact. Fourth, the increase in aggregative processing has changed the way in which cases about individuals are viewed and has influenced contemporary debates about the allocation of authority between state and federal courts and Article III and Article I judges. Fifth, aggregation poses a challenge to the civil justice system, which has been largely animated by individual claims of wrongdoing, to which government-empowered judges and juries respond in a relatively visible and litigant-specific way. Subsequent essays will address many of the issues raised by aggregation—the lessons to be drawn about procedural rulemaking from the array of techniques for aggregation, the

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1. This definition is much simplified. See discussion, below, in Part II for elaboration, at pp 21-25.

impact of aggregation on the course of lawsuits, on the relations among clients, attorneys, insurance companies, and courts, on the institutional activities of courts and auxiliary personnel, on public access to court-based decisionmaking, and on the import of individually-based case disposition.

As is evident, the topic is vast, and I want to speak with some degree of specificity. Hence, I take as my central examples the problem of whether and how to handle mass torts in the federal courts. I begin with conversations that occurred almost thirty years ago, in 1962 and 1963, among a group of people who had been appointed by the Chief Justice of the United States Supreme Court to review the Federal Rules of Civil Procedure.

A bit of history is in order. In 1934 Congress enacted the Rules Enabling Act<sup>2</sup> that authorized the federal courts to make uniform rules of practice and procedure. In 1935, the Supreme Court appointed an “Advisory Committee” to draft proposed rules.<sup>3</sup> With some modifications, those rules—the first set of nationwide rules for legal and equitable claims, the Federal Rules of Civil Procedure—were promulgated by the Court in 1938.<sup>4</sup>

In 1942, the Supreme Court appointed a standing “Advisory Committee”;<sup>5</sup> in 1956, that committee was “discharged,”<sup>6</sup> and in 1958, Congress enacted legislation giving the Judicial Conference of the United States the authority to advise the Supreme Court on rulemaking.<sup>7</sup> In 1960, the Chief Justice appointed several committees to study procedure in the federal courts; my interest here is the Advisory Committee on Civil Rules, appointed to advise the Standing Committee on the Rules of Practice and Procedure of the Judicial Conference, in its “continuous study” of the federal rules.<sup>8</sup>

That Advisory Committee was chaired by Dean Acheson, then a lawyer at Covington and Burling in Washington. The “Reporter” was Benjamin

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2. Pub L No 73-415, 48 Stat 1064 (1934), codified as amended in 1988 at 28 USC § 2072.

3. Order Appointing Committee to Draft Unified System of Equity and Law Rules, 295 US 774 (1935).

4. Rules of Civil Procedure, 308 US 645 (1938). See generally Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U Pa L Rev 1015 (1982); Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 Colum L Rev 1 (1989).

5. Order Continuing the Advisory Committee, 314 US 720 (1942). See Charles E. Clark, *The Proper Function of the Supreme Court's Federal Rules Committee*, 28 ABA J 521 (1942) (advocating an “active policy of continuous control and direction of the procedural functioning of the courts”). As Charles Clark subsequently wrote, the work of the ongoing committee was quite limited; in 1939, “amendments of a minor nature” were made, and then in 1948 “[m]ore extensive amendments, but of a clarifying nature,” were promulgated. Thereafter, amendments were made to conform to revisions of “newly adopted Title 28.” Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 Colum L Rev 435, 436 n8 (1958) (symposium, *The Federal Rules of Civil Procedure, 1938-58*). See also Walter P. Armstrong, *Report of the Advisory Committee, Federal Rules of Civil Procedure Recommending Amendments*, 5 FRD 339 (1946).

6. Order Discharging the Advisory Committee, 352 US 803 (1956).

7. Pub L No 85-513, 72 Stat 356 (1958), codified as amended at 28 USC § 331 (1989).

8. See Announcement of the Chief Justice of the United States, Committees on Rules of Practice and Procedure of the Judicial Conference of the United States (April 4, 1960), reprinted in 28 USCA at xvii (in first volume of FRCP). The other committees appointed included a Standing Committee on Rules of Practice and Procedure, an Advisory Committee on Admiralty Rules, Criminal Rules, General Orders in Bankruptcy, and Appellate Rules. *Id* at xviii.

Kaplan of Harvard Law School, and the members appointed in 1960 included George Doub (Assistant Attorney General in charge of the Civil Division of the Justice Department), Professors Sheldon Elliot (of NYU), Charles Joiner (of the University of Michigan), and David Louisell (of Boalt Hall); practicing lawyers such as John Frank (with a Phoenix law firm) and Albert Jenner (with a Chicago law firm); and sitting federal judges, such as Charles Wyzanski (of the District of Massachusetts) and Roszel Thomsen (chief judge of the federal district court in Maryland).<sup>9</sup>

Because some twenty years had elapsed since the drafting of the Rules, the Advisory Committee of the early 1960s undertook to review all of the Federal Rules of Civil Procedure.<sup>10</sup> While the Committee's work product, notes, and correspondence indicate that the members debated and proposed amendments to several of the rules, the members devoted special attention to revising and integrating the third-party practice rules, and to one rule in particular—Rule 23—about class actions.

The 1938 Federal Rules had included a provision called Class Actions.<sup>11</sup> That rule divided class actions into three categories: "true," "hybrid," and "spurious."<sup>12</sup> By the late 1950s and early 1960s, judges, lawyers, and commentators had become impatient with attempting to draw these distinctions.<sup>13</sup> In amendments drafted during the early 1960s and

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9. Also appointed in 1960 were lawyers Peyton Ford (Washington), Arthur Freund (St Louis), Archibald Mull (Sacramento), Byron White (then a Denver lawyer), as well as Judge John McIlvaine (Pennsylvania). Thereafter, the composition of the committee changed somewhat. For example, Mr. Ford was succeeded by W. Brown Morton (New York) and Charles Wright, a law professor from Texas, joined the group. See Benjamin Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-63 (I)*, 77 Harv L Rev 601, 602 (1964). By 1964, Albert Sacks, of the Harvard Law School, joined Kaplan as an Associate Reporter, and in 1966, became the Reporter. See Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 34 FRD 325, 326 (March 1964).

10. The Advisory Committee also considered proposals made by the prior committee. See Kaplan, *Amendments I*, 77 Harv L Rev at 603 (cited in note 9). See also the discussion of the first sets of amendments to the civil rules, effective July 19, 1961, that the 1960 committee proposed, in Charles Alan Wright & Arthur Miller, 4 *Federal Practice and Procedure* § 1007, at 40-43 (1987).

11. FRCP 23 (1938). The Supreme Court had, in 1842, promulgated Equity Rule 48, stating in part that, when

parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

The New Federal Equity Rules, annotated by James Love Hopkins, revised by Byron F. Babbitt at 52 (W.H. Anderson Co., 8th ed 1933). See also Equity Rule 48, 1866 Rules, id at 104-05 (same).

The 1912 Equity Rule on class actions stated that: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, one or more may sue or defend for the whole." Id at 239-40.

12. See James W. Moore, *Federal Rules of Civil Procedure: Some Problems Raised in the Preliminary Draft*, 25 Georgetown L J 551, 572-76 (1937).

13. See generally the Advisory Committee notes to the 1966 Amendments to Rule 23. See also the influential article by Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U Chi L Rev 684 (1941), which also conceptualized class actions differently than had the 1938 Rule 23. For histories of group litigation, see Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (Yale U Press, 1987); Robert G. Bone, *Personal and Impersonal Litigative Forms:*

promulgated by the Supreme Court in 1966, the class action rule was “vigorously” revised,<sup>14</sup> the three criticized categories jettisoned, and the text reworked to enable more cases to be certified as class actions. Those revisions delineated three kinds of class actions (called today (b)(1), (b)(2), and (b)(3) class actions), and the questions that spawned sustained debate within the Advisory Committee were about how to handle what had been called “spurious” class actions and the degree to which individuals could be mandatorily included in any of the kinds of class actions to be crafted.

The particular issue in the revision of Rule 23 that draws my attention<sup>15</sup> is a question about what are today called “mass torts”—cases in which many individuals are physically injured, either by a single event or by use of or exposure to a given product or environmental hazard. In the early 1960s (before widespread awareness of “toxic torts” and of consumer products causing injury), many commentators described such cases as “mass accident[s]”;<sup>16</sup> the references were to train and plane crashes. The issue debated—in the context of whether to require mandatory participation in class actions of all kinds—was whether such “mass accidents” were appropriate for class action treatment under the proposed revisions to Rule 23.

In a memo that then Professor, now Justice, Kaplan wrote as Reporter for a meeting on January 17, 1963, he raised the question of whether a revised class action rule should continue to be divided into categories describing the kinds of class actions. Kaplan reported that the Committee seemed to be in favor of retaining some categorization, and he stated that the absence of categories “might also tend toward the indiscriminate use of the class-action device in ‘mass tort’ situations, a result surely to be avoided.”<sup>17</sup> Kaplan continued:

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*Reconceiving the History of Representation*, 70 BU L Rev 213 (1990) (review of Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action*).

14. Conversation with Ben Kaplan, November 14, 1989.

15. And the attention of many others; see, for example, Linda Mullenix, *Class Resolution of the Mass Tort Case: A Proposed Federal Procedure Act*, 64 Tex L Rev 1039 (1986); Marvin E. Frankel, *Amended Rule 23 from a Judge’s Point of View*, 32 ABA Antitrust LJ 295, 297-98 (1966), and articles cited in note 60.

16. See 1966 advisory committee note on subdivision (b)(3).

17. Memo from Ben Kaplan to Advisory Committee, Box 24 (Topic EE, Class Actions), January 17, 1963 at 1 (folder labeled “Kaplan memo 1/17/63 enclosing Topics EE and FF for February meeting”), National Records Center, 4205 Suitland Blvd, Maryland, Record Group No 116, Accession No 82-0028 (all materials from Kaplan are quoted with his permission). My thanks to James Macklin and Ann Gardner of the Administrative Office of the United States Courts for facilitating my research at the Records Center.

A word about sources: Much of the unpublished material about the work of the Advisory Committee in the 1960s that I have used comes from boxes in the federal archives in Maryland. Those materials may well be incomplete; I found references in those files to other files that I was unable to locate. While I have found some additional and duplicative materials from the papers provided to me by Brown Morton and from those of Charles Joiner, obtained with permission from the Michigan Historical Collections of the Bentley Historical Library of the University of Michigan, I have not yet found a set of materials that appear to contain all of the memoranda exchanged by members of the Advisory Committee during this period.

A "mass accident" situation is not likely to meet the stated criterion [of the subdivision of Rule 23]; but even if it does, discretionary considerations will generally incline the court against allowing a class action. . . . One of the factors clearly deserving consideration here is any interest of the individual in pursuing his own litigation in his own way in a forum of his own selection.<sup>18</sup>

Given these sentiments, Kaplan provided a proposed note to the rule, which would have stated:

A "mass accident" resulting in injuries to numerous persons is on its face not appealing for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.<sup>19</sup>

In a letter written to Benjamin Kaplan and dated January 21, 1963, John Frank, one of the lawyer members of the Advisory Committee, wrote:

I am, I believe, unpersuadably opposed to the use of class actions in the mass tort situation. You seem, though less categorically opposed, unsympathetic to it yourself.<sup>20</sup>

Kaplan replied that he too was "anxious to keep [mass accidents] out."<sup>21</sup> He said:

It seems to me that it would strain interpretation to say that particular actions by injured parties in a mass accident will [quoting a part of the proposed criteria for class actions] "impair or impede the ability of the other members to protect their interests"; th[is] clause is redolent of claims against a fund.<sup>22</sup>

The net result of these memos and conversations was (again, according to then Reporter Kaplan) that "at the meeting of our committee it was decided not absolutely to exclude the 'mass accidents' [from certification under what is

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18. Box 24 at EE-3 (cited in note 17).

19. *Id.* at EE-27. In another part of the files, the draft note is reiterated but the language is somewhat changed. The note was revised to read: "A 'mass accident' resulting in injuries to numerous persons is [“on its face not appealing for” panned over by the phrase “ordinarily not appropriate for”] a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances, an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried." Box 24, Redwell entitled "Committee" and containing memos for October and November 1963 at EE-13. The citations after the text in both instances are to *Pennsylvania Railroad v United States*, 111 F Supp 80 (D NJ 1953) and to Jack Weinstein's article, *Revisions of Procedure: Some Problems in Class Actions*, 9 Buff L Rev 433 (1960). The text in the 1966 note as published is (with minor punctuation changes) the same as this revised text. See Amendments to Rules of Civil Procedure, transmitted to Congress, February 28, 1966, Preliminary Draft, 34 FRD 325, 391 (1966).

20. Letter, John P. Frank to Benjamin Kaplan, January 21, 1963, at 2-3, Box 24 (cited in note 17) (folder labeled "Kaplan memo 1/24/63 enclosing Topic U for Feb. meeting") (all materials from Frank quoted with his permission).

21. Letter, Benjamin Kaplan to John P. Frank, February 7, 1963 at 2, Box 24 (cited in note 17) (same folder as note 20).

22. *Id.*

now Rule 23(b)(3)]. However, the stated criteria of (b)(3) tend to exclude” mass torts.<sup>23</sup>

My purpose in rehearsing this conversation is not to spend the remainder of this article discussing either class actions per se or how the Advisory Committee drafts civil rules. Rather, my first point is that, less than thirty years ago, a group of lawyers and law professors struggled with the question of how inclusive a procedure for group litigation should be. These rule drafters—who collectively had great experience with federal litigation and who were prepared to generate new forms of aggregation—did not see the class action as responsive to the problems of mass torts.<sup>24</sup> Less than thirty years ago, thoughtful and creative commentators on federal litigation said with apparent confidence that mass tort claimants were not likely to be part of a group seeking to share in a limited fund.

What might have animated the drafters’ views about mass torts and class actions?<sup>25</sup> Was the decision about this aspect of the class action rule driven by

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23. Memo from Ben Kaplan and Al Sacks to Advisory Committee, December 2, 1963 at 5, Box 25 (cited in note 17) (folder labeled “Kaplan memo enclosing completion of work of committee meeting of October-November 1963, December 2, 1963”). Apparently, conversations with the Coordinating Committee (the precursor of the multidistrict litigation panel—see below at pp 29-35) had an impact: “In response to our question whether mass accident cases should be absolutely excluded, the judges of the Coordinating Committee seemed clear that they should not be.” *Id.* According to the memo, the Advisory Committee’s reporters met with judges of the Coordinating Committee on Multiple Litigation in November of that year and also watched the Coordinating Committee “in action” working on the electrical equipment antitrust cases. The memo stated that the judges of the Coordinating Committee were “convinced that multiple litigation . . . will henceforth be a staple item appearing with increasing frequency on the Federal court calendars” and a variety of devices should be available by which to respond. *Id.* at 4. See also discussion in note 112.

24. For comments before 1966 that shared that vision, see then-law professor Weinstein, *Some Problems in Class Actions*, 9 *Buff L Rev* at 469 (cited in note 19), cited by the Advisory Committee in its 1966 note; Recent Cases: Federal Courts—*Union Carbide & Carbon Corp. v Nisley*, 76 *Harv L Rev* 1675, 1679 (1963). Indeed, there was a debate in the case law about whether joinder of claims of individuals injured in the same accidents was appropriate. See, for example, *State ex rel Rosen v McLaughlin*, 318 *SW2d* 181 (Mo 1958) (holding, over a dissent, that a trial judge could order consolidation for trial of four actions involving the same car accident and four plaintiffs in the same family). A few comments can be found advocating class action treatment of some aspects of tort litigation. See, for example, Wythe W. Holt, Jr, *Proposed Rule 23 Class Actions Reclassified*, 51 *Va L Rev* 629, 643 (1965); Note, *Federal Rules: Class Actions: Federal Rule 23(a)(3)*, 7 *Okla L Rev* 472, 474 (1954) (authored by David L. Fist).

25. The vision that this group possessed has been the subject of sustained scholarly debate. Stephen Yeazell argues that Rule 23 is replete with tensions about whether participation by non-party members is required. Yeazell explains that the rule, as interpreted by the Supreme Court in *Eisen v Carlisle & Jacquelin*, 417 *US* 156 (1974), sometimes requires symbolic consent (by providing an opportunity to “opt out”), while in other instances the rule binds absentees without any action on their part, presumably relying upon the shared interests of the representative and of the group to suffice. See Yeazell, *Modern Class Action* at 249-66, ch 9 (cited in note 13); see also Stephen Yeazell, *From Group Litigation to Class Action: Part I: The Industrialization of Group Litigation*, 27 *UCLA L Rev* 514-64 (1980); Stephen Yeazell, *From Group Litigation to Class Action, Part II: Interest, Class, and Representation*, 27 *UCLA L Rev* 1067, 1107-21 (1980). Permitting some to “opt out” can, Yeazell believes, “overprotect individual autonomy.” Yeazell, *Modern Class Action* at 253 (cited in note 13). See also Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 *U Ill L Rev* 43.

Robert Bone shares Yeazell’s view that the rule reflects its drafters’ ambivalence about when group litigation is appropriate and when consent of those to be bound is needed, but Bone has a different view of what animated the drafters—that the “paradoxical features of Rule 23’s structure reflect the persistence of two fundamental ideas that have dominated representative litigation since at least the middle of the nineteenth century: the law-politics divide and the personal-impersonal

political theories about the need for participation of individuals in such lawsuits to enable accurate decisionmaking?<sup>26</sup> To obtain legitimacy of courts' decisions? To facilitate self-expression and preserve individuals' control over their bodies?<sup>27</sup> To enable efficient decisionmaking? To avoid attorney misbehavior?<sup>28</sup>

Some published information, much of it from Benjamin Kaplan, is available.<sup>29</sup> When writing about revision of Rule 23, Kaplan said that it was

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dichotomy." See Bone, *Personal and Impersonal Litigative Forms*, 70 BU L Rev at 292 (cited in note 13). For Bone, some aspects of the Rule reflect the Advisory Committee's commitment to a nineteenth century "rights-based framework" while other aspects evidence the Committee's twentieth century pragmatic approach. Id at 304. Bone argues that at times the Committee focused upon "the impersonal class as an aggregate," while at other points the Committee focused upon "class members as individuals." Id at 297. For additional discussion, see generally Symposium, *Class Actions and Private Attorneys-General*, 62 Ind L J 497 (1987).

26. See, for example, Kaplan's comment that one of the purposes of providing notice to members was "to help to democratize the procedure for members of the class" and his description, in a note, of a case in which notice was used (in his view) to give class members an opportunity to participate and challenge their representative. Benjamin Kaplan, *Continuing Work of Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv L Rev 356, 392 n140 and accompanying text (1967). Charles Alan Wright, who served on the Advisory Committee from 1961 to 1964 before becoming a member of the Standing Committee on Rules of Practice and Procedure, stated:

When personal injury and death claims are involved, a strong feeling prevails that everyone enmeshed in the dispute should have his own day in court and be represented by a lawyer of his choice. Thus the possibility that a class action might be used to adjudicate the claims arising out of a mass tort is particularly unattractive to those who believe the device to be inconsistent with the time-honored practice in personal injury cases and to others who fear that use of this procedure may encourage the unseemly solicitation of legal business.

Charles Alan Wright & Arthur Miller, *7A Federal Practice and Procedure* § 1783, at 115 (West, 1st ed 1972).

27. After the fact, some who declined to certify class actions in mass torts offered as explanation "the general feeling that when personal injuries are involved . . . each person should have the right to prosecute his own claim and be represented by the lawyer of his choice." *Yandle v PPG Industries, Inc.*, 65 FRD 566, 569 (ED Tex 1974). Consistent with the "bodies are different" theory is the limits on judicial power, under FRCP 35, to order individuals to submit to physical and mental examinations.

28. While much of the scholarly literature on Rule 23 (see note 25) has focused upon the role of individuals, groups, and the function of courts, the memoranda exchanged by the drafters of the 1966 revisions raise concern about the role that the lawyers for Rule 23(b)(3) damage litigants would play. In addition to comments found in the archival materials and cited in note 32, and Wright's explanation, in note 26, see *Causey v Pan American World Airways, Inc.*, 66 FRD 392, 397 (ED Va 1975) (mass tort class actions could lead to "legalized ambulance chasing"); *Yandle*, 65 FRD at 569 (ED Tex 1972) (explaining that one of the "policy reasons for the disallowance of class actions in mass tort cases [is concern] that the use of this procedure may encourage solicitation of business by attorneys"); *Hobbs v Northeast Airlines, Inc.*, 50 FRD 76, 77 (ED Pa 1970) ("At first blush, the use of the class action device in personal injury litigation seems to contain at least the suggestion of improper claim solicitation."). Because Rule 23(b)(3) did enable damage class actions in commercial settings (antitrust, securities, consumer injuries), some of these comments seem to reflect concern about the behavior of contingency fee personal injury lawyers in particular.

For discussion of contemporary perceptions of the impact of aggregate litigation on lawyers and lawyers' impact on aggregate litigation, see 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); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 Stan L Rev 1183 (1982); Mary Kay Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 Tex L Rev 385 (1977).

29. Most of the members of the Advisory Committee did not publish articles about Rule 23. A few members did write about this issue; see the references to materials by Charles Alan Wright in note 26 and by Charles Joiner in Charles Joiner, *The New Civil Rules*, 40 FRD 359, 367 (1966). See also David W. Louisell & Geoffrey C. Hazard, Jr., *Pleading and Procedure* 833-41 (Foundation Press, 2d ed 1968) (casebook discussion of the revised class action rule). In unpublished memos, some of the



designed to enable litigation when “community or solidarity of interest” was strong.<sup>30</sup> Perhaps he thought that such “solidarity” was not present when the only connection between individuals was that they had suffered injury via the same alleged tort. We also know (again from Kaplan’s published work) that he thought some “litigious situations affecting numerous persons ‘naturally’ or ‘necessarily’ called for unitary adjudication.”<sup>31</sup> Aggregation of tort cases, perhaps, intruded too deeply on “individual preference.”<sup>32</sup>

Further, Kaplan explained that the object of Rule 23(b)(3) (the so-called “damage class action”) was “to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party.”<sup>33</sup> He also wrote that “where the stake of each member bulks

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members expressed their views on class actions and mass torts. For example, W. Brown Morton wrote that he was “not offended by the class action device in even the so-called ‘mass accident’ situations”; he noted that such treatment might avoid inconsistent verdicts. Letter, W. Brown Morton, Jr., to Benjamin Kaplan, December 24, 1963, Box 25 (cited in note 17) (folder labeled “Acheson to Committee re: work unfinished at October-November Meeting February 25, 1964”) (published with permission of author).

30. Kaplan, *Continuing Work*, 81 Harv L Rev at 376 (cited in note 26).

31. *Id.* at 386 (explaining that the Advisory Committee wanted to pursue the idea of group litigation and to “elaborate this insight while avoiding the pitfalls of abstract classification on the style of 1938”). Kaplan stated that the committee looked to “factual situations or patterns that had recurred in class actions and appeared with varying degrees of convincingness to justify treatment of the case *in solido*.” *Id.*

32. *Id.* at 391 (explaining that the rule still permitted individuals to opt out, even when their stakes are “so small as to make a separate action impracticable”). Robert Bone notes that one might conceptualize the effect of “groupwide civil rights injunctions” as touching individuals in “deeply personal ways” while the monetary relief afforded in tort cases could be seen as having a less “profound personal impact.” Bone, *Personal and Impersonal Litigative Forms*, 70 BU L Rev at 299-300 (cited in note 13) (footnote omitted). Bone argues that “[r]ather than focus on the person affected and the quality and quantity of that person’s likely stake in the litigation, the Committee formulated the requirements for *res judicata* by focusing on elements of a less obviously subjective nature . . . .” *Id.* at 301. While taking “a pragmatic approach” (*id.* at 299) in some respects, Bone believes that the Committee relied upon what he terms the “impersonal” nineteenth century rights-based approach when the Committee insisted upon giving members of (b)(3) classes the opportunity to “opt out.”

My reading of the Advisory Committee’s memos in the Federal Archives leads me to describe at least that correspondence as permeated by “pragmatism.” Memos and letters invoke the need or absence of need for class actions in the context of specific cases. See, for example, letter from Charles Alan Wright to Benjamin Kaplan, February 6, 1963 at 5-7, Box No 24 (cited in note 17) (folder labeled “Topic U for February Meeting”); letter, Charles Alan Wright to Benjamin Kaplan, February 16, 1963, Box No 24 (folder labeled “Wright ltr. to Kaplan”); Memo from Dean Acheson to Advisory Committee, January 31, 1964, at 2-3 of attachment, Box No 25 (folder labeled “Acheson to Committee re: work unfinished at October-November meeting 2/25/64”). In addition, members of the Committee voiced concern about what role attorneys would play in damage class actions. Fears of attorney misbehavior, of solicitation (recall that in the early 1960s, attorney advertising was not yet permitted), and windfall profits are expressed in several letters. See letter from John Frank to Benjamin Kaplan, January 16, 1964, Box No 25, and letter of Albert Jenner to Benjamin Kaplan, January 27, 1964 at 1. Further, the correspondence demonstrates the desire to accommodate the diverse views of committee members so as to achieve a compromise rule and also to draft a rule that would be acceptable to the legal community.

33. Kaplan, *Continuing Work*, 81 Harv L Rev at 390 (cited in note 26). See also Kaplan’s comments at 28th Annual Judicial Conference—Third Circuit, Proceedings, discussion of *The Impact of the Electrical Anti-Trust Cases Upon Federal Civil Procedure*, 39 FRD 375, 516-18 (1965) (discussing group litigation in general and asking: “To what extent is it right to throw a particular claim under an umbrella with other similar claims . . . ?”).

large and his will and ability to take care of himself are strong,"<sup>34</sup> class action treatment is not necessary. Kaplan did not in this article elaborate on this statement—whether he thought that class treatment would somehow interfere with rights, would simply never be preferred by individuals with enough clout to proceed separately,<sup>35</sup> or would be unnecessary to protect rights. A few years later, when summarizing the purposes of the class action rule, Kaplan stated that its twin aims were to reduce duplication and, "even at the expense of increasing litigation, to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."<sup>36</sup> One inference from such comments is that, because of the contingent fee system, there was no perceived need for class actions in tort cases. In addition, the 1966 reforms might themselves have been sufficiently ambitious that, absent compelling justification, possible opposition from a segment of the bar was to be avoided;<sup>37</sup> tort cases were not a priority for which to take political risks.<sup>38</sup>

In his published work, Kaplan did address the question of mass torts directly. He cited the Committee's note, that "mass accidents . . . would ordinarily not be appropriate for class handling," and added, in explanation, that "the realities of litigation will often suggest that the class procedure is not 'superior' to more commonplace devices; in some of these cases, moreover, individual questions of liability and defense will overwhelm the common questions."<sup>39</sup> Presumably, individualization could come either from diverse

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34. Kaplan, *Continuing Work*, 81 Harv L Rev at 391 (cited in note 26).

35. See Kaplan's explanation about why "class actions were not conspicuous in the flood of private antitrust cases arising from the successful criminal prosecution of electrical equipment manufacturers . . . [I]f a like crisis should arise hereafter," Kaplan assumed that strong individual claimants would be induced "to opt out and conduct their own lawsuits." Id at n135.

36. Benjamin Kaplan, *A Prefatory Note, The Class Action—A Symposium*, 10 B C Indus & Comm L Rev 497, 497 (1969). Marvin Frankel quoted Kaplan as saying to him that the class action's "historic mission [was] taking care of the smaller guy." Frankel, *Amended Rule 23*, 32 Antitrust L J at 299 (cited in note 15). Charles Joiner also praised the rules for providing "additional safeguards to the underrepresented" and described Rule 23 as "one of the very great and important rules, for it gives real direction to the courts to protect litigants." Joiner, *The New Civil Rules*, 40 FRD at 359, 367 (cited in note 29).

37. For then-contemporary "misgivings" about the Committee's Rule 23 work, see Report, Committee on Federal Rules of Civil Procedure, Judicial Conference—Ninth Circuit (June 30-July 2, 1964), 36 FRD 209, 222-26.

38. The Weinstein article, cited in both the Committee's drafts and in the published notes, argued against class action treatment for torts, in part because such plaintiffs obtained legal services under the contingency fee system and attorneys who specialized in such cases participated in a "closely knit" negligence bar that coordinated and cooperated without formal organization and would provide plaintiffs with "most of the advantages of class actions." Weinstein, *Some Problems in Class Actions*, 9 Buff L Rev at 469 (cited in note 19).

39. Kaplan, *Continuing Work*, 81 Harv L Rev at 393 (cited in note 26) (footnote omitted). Reference is made to Weinstein, *Some Problems in Class Actions*, 9 Buff L Rev (cited in note 19), whose article is also mentioned in the Advisory Committee note in relationship to the discussion of "the customary expedients for handling" mass torts. Id at n145. Compare the comments of another member of the Committee, Charles Alan Wright, who when writing the 1971 Supplement to Volume 2 of Barron & Holtzoff, *Federal Practice and Procedure*, commented that on "its face (b)(3) appears potentially applicable to the airplane disaster" and while acknowledging the Advisory Committee note, added that "even before the 1966 amendments, it was common practice to consolidate individual actions arising out of the same accident for trial on the issue of liability." Barron &

facts on injuries and damages or from diverse state laws, about choice of law as well as liability and damages. From both or either source of individualization, the assumption seems to have been that practically, disaggregation was inevitable.<sup>40</sup>

While Kaplan's writings may give us hints as to *his* reasons for not advocating class action treatment for mass torts, we cannot get into the minds of the drafters or know if they formed or shared a collective intent or political view of the class action and its relationship to mass torts. We do not know the extent to which we can fairly attribute Benjamin Kaplan's comments to those of the other members of the Committee. (His introductory footnote in his article on the 1966 amendments states that the "views are entirely personal and have no other status."<sup>41</sup>)

What we do know is that the Committee undertook an ambitious reworking of rules on joinder in general and the class action rule in particular and that its efforts were aimed at creating an important revision of practice. As to the specific issue with which I am concerned—class actions and mass torts—we know that the Committee considered mass accidents and then decided that, in general, such cases did not fit the conception of class actions put forth in the 1966 amendments to Rule 23.<sup>42</sup> Whatever the "meta-theory" of the rule as a whole (if indeed one was shared, held or stated), the memos from the drafters' files, as well as the published notes that they wrote to accompany their work, reflect a willingness (perhaps born of a compromise to accommodate the diverse views of the Committee's members) to endorse the statement that, in general, tort cases—even those involving many people simultaneously injured by the same event—were not appropriately treated as class actions.<sup>43</sup>

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Holtzoff, 2 *Federal Practice and Procedure* 70-77 (Wright ed, Supp 1971). See also Charles Alan Wright, *Proposed Changes in Federal Procedure*, 35 FRD 317, 338 (1964) ("Conceivably (b)(3) could be employed in the case of an airplane crash or similar mass tort, though the Committee Note says that a class action 'is ordinarily not appropriate' in such cases."). In Wright's 1970 edition of his book, he states that, while there was "no sign" that class actions were "attempted in mass torts," "the need for more efficient methods of disposing of large numbers of cases arising out of a single disaster has a high priority in improving judicial administration." Charles Alan Wright, *Federal Courts* 313 (2d ed 1970). In the 1972 edition of Wright and Miller's *Federal Practice and Procedure*, the authors argue that class action treatment for issues of liability are appropriate in mass torts but that "allowing a class action to be brought in a mass tort situation is clearly contrary to the intent of the draftsmen of the rule. . . ." Wright & Miller, 7A *Federal Practice and Procedure* at 118, § 1783 (cited in note 26).

40. A view approved by some district courts that declined to certify class actions and invoked the Advisory Committee note. See, for example, *Harrigan v United States*, 63 FRD 402, 407 (ED Pa 1974). The assumed individualization could be understood as illustrative of what Bone calls the "old rights-based framework" that remained a part of the 1966 revision of Rule 23. Bone, *Personal and Impersonal Litigative Forms*, 70 BU L Rev at 304 (cited in note 13).

41. Kaplan, *Continuing Work*, 81 Harv L Rev at 356 n\* (cited in note 26).

42. This is not to say that the drafters did not conceive of such cases proceeding with some degree of coordination. Kaplan stated that "the procedural alternatives are hardly confined to the class action, on the one side, and the individual uncoordinated lawsuits, on the other; there are often other possibilities ranging from use of a model action to consolidation or coordination of the numerous individual actions for all or selected purposes." *Id* at 390-91 (footnote omitted).

43. My purpose is *not* to suggest that conclusion should bind us now, see Judith Resnik, *The Domain of Courts*, 137 U Pa L Rev 2219 (1989) (criticizing the use of the rule drafters' "intent" as decisive in current debates), but rather to try to understand the point of view of those who worked on

As is familiar, the drafters were not alone in worrying about the appropriate scope of class actions. The 1966 revisions to Rule 23 were followed by a heated debate, in which many challenged the enlarged reach of Rule 23. In a memo provided to the Advisory Committee in the early 1970s, the question was raised about whether the Committee should revise its rule.<sup>44</sup> That memo summarized the criticisms directed against amended Rule 23:

(1) Rule 23(b)(3) class actions (. . . typically brought for damages on behalf of extremely large numbers of persons) place an intolerable burden on the federal courts; (2) such actions force defendants into settlement regardless of the merits of the claims because the cost of defense or the size of potential recovery is intimidating; (3) procedures utilized by courts to make such actions "manageable" result in procedural unfairness and change the substantive law that is applicable to individual actions; and (4) such actions do not benefit the claimant class, but benefit only lawyers who represent it.<sup>45</sup>

The memo concludes that a study of the operation of the rule was needed and that "[a]part from the question of a radical revision of Rule 23, reported decisions during the last year do not seem to indicate the need for amendment of Rule 23, with the possible exception of changes in the notice provisions of the rule."<sup>46</sup>

Criticism and controversy continued. In 1973, Geoffrey Hazard spoke of how class actions could "offend the sense of individualization that is very important in the administration of justice."<sup>47</sup> In 1979, Arthur Miller, a defender of class actions, wrote an article in which he chronicled the "holy war" being waged against class actions.<sup>48</sup> And more recently, in the fall of 1989, Judge Robert Carter argued that hostility to class actions remains a problem for civil rights claimants in the federal courts.<sup>49</sup>

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and with the Federal Rules three decades ago and to compare those views with contemporary perceptions.

44. Unsigned typed memorandum, in which is written by hand "March 4-5, 1974 Meeting—Advisory Committee on Civil Rules" and entitled "Agenda 1, Rule 23, Preliminary Note," from the files of the Office of the Director of the Administrative Office of the U.S. Courts (on file with author). The memo was written after the Court of Appeals for the Second Circuit had decided *Eisen III*, 479 F2d 1005 (2d Cir May 1, rehearing en banc denied May 24, 1973) and before the Supreme Court had decided the case on May 28, 1974. See 417 US 156 (1974).

45. Rule 23 Preliminary Note (cited in note 44).

46. *Id.*

47. *The Effect of the Class Action Device upon the Substantive Law*, 58 FRD 307, 308 (1973).

48. Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 Harv L Rev 664 (1979). Arthur Miller has written about class actions in other articles as well; see, for example, Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after Phillips Petroleum Co. v Shutts*, 96 Yale L J 1 (1986); Arthur R. Miller, *An Overview of Federal Class Actions: Past, Present, and Future*, 4 Just System J 197 (1978-79); Arthur R. Miller, *Problems of Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3)*, 54 FRD 501 (1972). For additional description of the hostility to class actions, see Edward J. Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 Ga L Rev 701 (1978) ("federal judges have publicly admitted that they 'hate class action cases'") (footnote omitted). For discussion of what standards should be applied to class actions, see Mary Kay Kane, *Standing, Mootness and Federal Rule 23—Balancing Perspectives*, 26 Buff L Rev 83 (1976-77).

49. Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U Pa L Rev 2179, 2184-90 (1989). See also Stephen N. Subrin, *Fireworks on the 50th Anniversary of the Federal Rules of Civil Procedure*, 73 Judicature 4 (1989).

To summarize, in the early 1960s drafters of the federal rules created a vehicle for group litigation that has spawned a vigorous debate about the legitimacy of that form. While opening up the class action device for many kinds of claims, those drafters self-consciously attempted to discourage the use of the class action for mass torts. One source of distress about and hostility toward class actions in general arose from a view of lawsuits—and particularly of tort actions—as being quintessentially cases involving individuals.<sup>50</sup> These individuals, even when allegedly harmed along with others, have been understood to be complaining about a personal body-harming wrong, to be addressed in the specific, concrete circumstances of the events that caused the harm, of the nature of the bodily injuries, of the extent of the damage, of the diverse legal principles that governed the claim.<sup>51</sup> This vision of a specifically-injured individual and of a particular harm-doer meant that having that individuality and particularity melded into the rubric of a group action was somehow problematic—for plaintiffs whose autonomy, individuality, and control could be limited; for defendants who might be wrongly saddled with indiscriminate liability claims; for attorneys who were accustomed to the system of individual client representation (and who, as contingency fee lawyers, might engage in wrongdoing if working for an undifferentiated group); for the federal legal system which received many tort cases by virtue of the jurisdictional grant of diversity that had, by the 1960s, been under continual attack; and for federal judges who might be overwhelmed by the burden of mass cases and who, in the words of Geoffrey Hazard just eighteen years ago, remained committed to “the sense of individualization.”<sup>52</sup>

There is, however, another piece of the story of class actions and mass torts. Within a few years of the promulgation of the Rule 23 amendments in 1966, commentators and judges questioned the Advisory Committee’s note on mass torts.<sup>53</sup> Starting in the late 1970s, some federal district judges began

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50. As Arthur Miller explained in his 1979 discussion of class actions that “big cases” were a vital part of the litigation world and that the “ferocious attack on the class action may reflect anxiety over the growing challenge to” the “traditional notion of civil litigation as merely bilateral private dispute resolution.” Miller, *Of Frankenstein Monsters*, 92 Harv L Rev at 668 (cited in note 48).

51. Compare David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 Ind L J 561 (1987) (arguing that this perception has outlived its utility), with Roger Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 Cornell L Rev 779 (1985) (defending individualization). See also Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* 71-76, § 1783 (2d ed 1986) (discussing the “strong feeling” about individualization as well as the utility of class certification for some mass torts).

52. *The Effect of the Class Action Device*, 58 FRD at 308 (cited in note 47).

53. See, for example, J. William Moore, *Federal Practice* 23-811, ¶ 23.45[3] n35 (Matthew Bender, 1969) (“a mass accident appears peculiarly appropriate for class treatment”; the “question of liability to all those injured in a plane or train crash is . . . likely to be uniform”). See also J. William Moore, *Federal Practice* 23-354, ¶ 23.45[3] n40 (Matthew Bender, 1977) (entitled “mass personal injuries” and advocating class treatment for mass accidents but noting that “[w]hen one departs from the model of the public transportation disaster, the tort case becomes more individualized”) (citation omitted). My thanks to Rhea Siegel of Matthew Bender for providing copies of the 1969 and 1977 editions.

Charles Wright stated that he had a change of view about the issue. “I was an ex officio member of the Advisory Committee on Civil Rules when Rule 23 was amended. [While agreeing with the note on mass torts at the time,] I am profoundly convinced now that that is untrue . . . . Unless we

to certify (in whole or in part) mass tort cases as class actions. Some of the initial certifications were reversed on appeal; the more recent certifications have been upheld. For example, in 1977, Judge Carl Rubin certified a class for claims arising from the Beverly Hills Supper Club fire in Southgate, Kentucky.<sup>54</sup> In 1981, Judge Spencer Williams certified a class action—later reversed—that he called “*In re Northern District of California Dalkon Shield IUD Products Liability Litigation*.”<sup>55</sup> In the same year, Judge Scott Wright certified a class action—again later reversed—based upon the collapse of two skywalks at the Hyatt Regency Hotel in Kansas City, Missouri.<sup>56</sup> In 1983 Judge Jack Weinstein (whose 1960 *Buffalo Law Review* article was cited by the 1966 Advisory Committee when recommending against the use of class actions for mass accidents) certified a class—*In re Agent Orange Product Liability Litigation*.<sup>57</sup> In 1986, an asbestos class action certification was approved by the Fifth Circuit,<sup>58</sup> and in 1989 the Fourth Circuit approved class action treatment of part of the Dalkon Shield litigation.<sup>59</sup> By the late 1980s, some commentators were writing to urge revision of Rule 23—expressly to

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can use the class action and devices built on the class action, our judicial system is simply not going to be able to cope with the challenge of the mass repetitive wrong. . . .” Herbert B. Newberg, 3 *Newberg on Class Actions* 373, § 1706 (McGraw Hill, 2d ed 1980), quoting from transcript of oral argument, July 30, 1984, at 106 of *In re School Asbestos Litigation*, 594 F Supp 178 (ED Pa 1984); also cited in Richard Marcus, *Apocalypse Now?*, 85 Mich L Rev 1267, 1269 (1987). For an early class certification of a mass accident on the question of liability with which an appellate court subsequently disagreed, see *In re Petition of Gabel (Gabel v Hughes Air Corp)*, 350 F Supp 624, 627 (CD Cal 1972) (“notwithstanding the suggestion in the notes of the advisory committee that class actions should not be used in Tort cases, the plain language . . . was devised for just such a situation as this [a collision between a DC-9 jet and a military jet]”), aff’d in part and rev’d in part sub nom *Vincent v Hughes Air West, Inc.*, 557 F 2d 759, 767-768 (9th Cir 1977).

Of course, in accordance with the Advisory Committee’s notes, many judges declined to certify mass torts as class actions. See Note, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U Cinn L Rev 467, 485-90 (1985) (summarizing such decisions) (authored by Richard A. Chesley & Kathleen Woods Kolodgy).

54. *Coburn v A-R Corp.*, 77 FRD 43 (ED Ky 1977), mandamus dismissed sub nom *Union Light, Heat & Power Co. v United States District Court*, 588 F 2d 543 (6th Cir 1978), review dismissed, 443 US 913 (1979); see also *In re Beverly Hills Fire Litigation*, 695 F2d 207, 210 (6th Cir 1982), cert denied sub nom *Bryant Elec. Co. v Kiser*, 461 US 929 (1983). See generally Andrew Wolfson, *After 8 Years, A Complex Case Comes to an End*, 7 Nat’l L J 6 (No 49, August 19, 1985).

55. 521 F Supp 1188, modified, 526 F Supp 887 (ND Cal 1981), rev’d, 693 F2d 847 (9th Cir 1982), cert denied, 459 US 1171 (1983). See also Spencer Williams, *Mass Torts, Going, Going, Gone?*, 98 FRD 323, 328 (1983).

56. *In re Federal Skywalk Cases*, 93 FRD 415 (WD Mo 1982), rev’d, 680 F2d 1175 (8th Cir 1982), cert denied sub nom *Stover v Rau*, 459 US 988 (1982). Note that non-mandatory class actions in *Skywalk* were subsequently concluded by settlements. See Scott O. Wright & Joseph Colussi, *The Successful Use of the Class Action Device in the Management of the Skywalks Mass Tort Litigation*, 52 UMKC L Rev 141 (1984).

57. 100 FRD 718 (EDNY 1983), aff’d, 818 F2d 145 (2d Cir 1987), cert denied sub nom *Pickney v Dow Chemical*, 484 US 1004 (1988). See generally Peter H. Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* (Harvard U Press, 1987) (enlarged edition).

58. *Jenkins v Raymark Indus., Inc.*, 782 F2d 468 (5th Cir 1986), rehearing denied, 785 F2d 1034 (5th Cir 1986). See also *In re School Asbestos Litigation*, 104 FRD 422 (ED Pa 1984), aff’d in part, 789 F2d 996 (3rd Cir 1986), cert denied, 479 US 852 (1986), 479 US 915 (1986).

59. *In re A.H. Robins, Co. Inc.*, 880 F2d 709 (4th Cir 1989) (affirming class certification on behalf of those seeking recovery against Aetna Casualty and Surety Company, Robins’s insurer, as a joint tortfeasor; also affirming settlement provisions).

authorize class action treatment of mass torts,<sup>60</sup> and the 1991 Advisory Committee is revisiting the issue.<sup>61</sup>

In other respects, revision has to some extent occurred de facto—by virtue of lower courts certifying class action treatment of mass torts<sup>62</sup> and by virtue of other means for bringing cases together in packages that resemble class actions.<sup>63</sup> By the late 1980s, an impressive array of legal institutions have taken up the issue of large scale litigation, and a variety of proposals have emerged to enhance the means by which cases can be aggregated. Groups within both the American Law Institute (“ALI”) and the American Bar Association have enthusiastically endorsed aggregation of “complex litigation” or of “mass torts.”<sup>64</sup>

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60. See, for example, Note, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 Harv J Legis 461 (1988) (authored by Bruce H. Nielson); Rosenberg, *Class Actions for Mass Torts*, 62 Ind L J at 567 (cited in note 51) (“bureaucratic justice implemented through class actions provides better opportunities for achieving individual justice than does the tort system’s private law, disaggregative processes”); Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 Ga L Rev 429, 449 (1986) (calling for a federal statute for mandatory class actions); Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 Ind L Rev 507, 509 (1987) (calling for injunctions against duplicative litigation in other forums and for mandatory class actions); *In re A. H. Robins Co. Inc.*, 880 F2d 709, 740 (4th Cir 1989) (“the Advisory Committee’s Note suggestion . . . has proven unworkable and is now increasingly disregarded”).

61. In March of 1991, the Judicial Conference of the United States adopted the recommendations of its Ad Hoc Committee on Asbestos Litigation—including one of the Judicial Conference of the United States recommending that Rule 23 be amended “to accommodate the demands of mass tort litigation.” *Interview, Judge Thomas M. Reavley: Studying the Asbestos Litigation Explosion*, The Third Branch 10, 11 (April 1991) (Judge Reavley chaired the Ad Hoc Committee). See also Comments of Arthur R. Miller at the ALI Annual Meeting, 66th Annual Meeting, The American Law Institute Proceedings, 1989, at 363 (“The Advisory Committee on Civil Rules . . . has recently lifted its moratorium and will probably consider revision of 23 in the near future.”) (“1989 ALI Proceedings”); and letter, The Honorable Sam C. Pointer, Jr., Current Chair of the Advisory Committee on the Federal Civil Rules, to Judith Resnik, January 14, 1991 (anticipating that “the Advisory Committee will be revisiting Rule 23”) (letter on file with author).

62. See, for example, Andrew Blum, *Class Action Filed in Flight 811 Case*, 11 Nat’l L J 3 (No 34, May 1, 1989) (“In a departure from the norm in aviation litigation, a class action has been filed seeking damages for emotional distress on behalf of 320 survivors of a plane accident when a section of the plane came apart” and nine people were “pulled through the hole to their deaths.”). See also summary in *In re A.H. Robins*, 880 F2d at 729-38 (trend towards certifying mass torts as class actions), and Rebecca Schroff, *Class Certifications of Mass Torts* (unpublished manuscript, on file with author), chronicling cases from 1966-88 involving certification in whole or part. As noted, in several instances, class action certification for mass torts has been denied or reversed on appeal, in part on the basis of the Advisory Committee’s 1966 note. See, for example, *La Mar v H & B Novelty & Loan Co.*, 489 F2d 461, 465-66 (9th Cir 1973); *In re Northern District of Calif. “Dalkon Shield” IUD Products Liability Litigation*, 693 F2d 847 (9th Cir 1982). Further, in cases treated as class actions, individuals are still permitted to “opt out.” See the discussion by Rosenberg, *Class Actions for Mass Torts*, 62 Ind L J at 569 (cited in note 51).

63. Discussed, in part IIA, B, at pp 25-39. For additional suggestions about how to increase the techniques for aggregation, see Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U Pa L Rev 7, 8-14 (1986) (discussion of proposals for creating a federal forum for multiparty disputes); Linda Mullenix, *Class Resolution of the Mass Tort Case*, 64 Tex L Rev 1039 (cited in note 15); Allen R. Kamp, *The Shrinking Forum: The Supreme Court’s Limitation of Jurisdiction: An Argument for a Federal Forum in Multiparty, Multi-State Litigation*, 21 Wm & Mary L Rev 161 (1979) (urging Congress to create a federal forum to adjudicate multi-state cases).

64. American Law Institute sponsored efforts include the ALI, Complex Litigation Project, Tentative Draft No 1 (April 1989); ALI, Complex Litigation Project, Tentative Draft No 2 (April 1990); Reporters’ Study, Enterprise Responsibility for Personal Injury, Volume II, Approaches to

In addition, judicial and legislative bodies have considered aggregation. In March of 1988, the Judicial Conference of the United States "approved in principle the creation of federal jurisdiction based on minimal diversity to consolidate in the federal courts multiple litigation in state and federal courts involving personal injury or property damage arising out of a single event or occurrence."<sup>65</sup> Three years later, in 1991, the Judicial Conference endorsed a report of the Ad Hoc Committee on Asbestos Litigation that included recommendations for aggregate treatment of asbestos cases pending in the federal courts.<sup>66</sup>

Paralleling the earlier action of the Judicial Conference in 1988, the House of Representatives enacted a provision for federal jurisdiction over mass accidents, but the Senate did not concur.<sup>67</sup> In 1989, similar proposals were put forward, again unsuccessfully in the Senate.<sup>68</sup> On April 2, 1990, the Federal Courts Study Committee ("FCSC"), which had been chartered by Congress and composed of individuals selected by the Chief Justice of the United States Supreme Court, gave its endorsement to increasing the capacity of the federal courts to aggregate cases. The FCSC recommended that Congress "amend the multi-district litigation" legislation to enable consolidation for trial, as well as for pretrial proceedings, and to alter diversity jurisdiction requirements "to make possible the consolidation of

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Legal and Institutional Change ch 13 (Mass Torts and Collective Judicial Proceedings), at 383-440 (ALI, April 15, 1991).

Within the American Bar Association, a commission on mass torts issued a report in April of 1989, first numbered 126 and then renumbered 116 in February of 1990. At the annual meeting in 1989, the ABA Commission's proposals were not adopted. 58 LW 2109 (August 22, 1989). Thereafter, the Commission's report encountered substantial opposition, and (as noted on the report) the recommendations of the Commission are not the policy of the American Bar Association. For further discussion of the ALI's Complex Litigation Project, see Part IIC, at pp 39-45.

65. Prepared Statement of William W. Schwarzer, Concerning HR 3406, before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee of the Judiciary, US House of Representatives at 1 (November 15, 1989) (on file with author). See also Report of the Proceedings of the Judicial Conference of the United States at 22 (1988).

66. See Stephen Labaton, *Judges See a Crisis in Heavy Backlog of Asbestos Cases*, NY Times A1 col 3 (March 5, 1991); Linda Greenhouse, *Aid Sought from Congress to Ease Asbestos Caseload*, NY Times D2 col 5 (March 12, 1991). Report on file with the author, as is the opinion letter from Judith Resnik and Thomas D. Rowe, Jr., to the Honorable Thomas M. Reavley, Chair of the Ad Hoc Committee on Asbestos Litigation, on the constitutionality of that committee's recommendations. See also note 61 for discussion of the Ad Hoc Committee recommendation to reconsider Rule 23.

67. See Court Reform and Access to Justice Act, HR 4807, 100th Cong, 2d Sess (1988), 134 Cong Rec H7443 (September 13, 1988). See generally Robert N. Kastenmeier & Charles Gardner Geyh, *The Case in Support of Legislation Facilitating the Consolidation of Mass-Accident Litigation: A View from the Legislature*, 73 Marquette L Rev (forthcoming 1991). The bill passed the House on September 13, 1988, but the Senate enacted legislation without the provisions for multiparty, multiform jurisdiction. The final form of the bill was the Judicial Improvements and Access to Justice Act, Pub L No 100-702, 102 Stat 4642 (1988).

68. See HR 3406, The Multiparty, Multiforum Jurisdiction Act of 1990, approved by the House but not by the Senate. This bill provided for federal courts to have jurisdiction only if a series of prerequisites were met—including that the cause of action arose "from a single accident," the parties were minimally diverse, "at least 25 natural persons have either died or incurred injury in the accident at a discrete location," and each person suffered damages in excess of \$50,000. See section 2, proposed 28 USC § 1367, of Multiparty, Multiforum Jurisdiction Act of 1990, 136 Cong Rec H3116 (June 5, 1990).



major multi-party, multi-forum litigation”<sup>69</sup> in the federal courts. In 1991, the National Conference of Commissioners on Uniform State Laws began consideration of a Uniform Transfer of Litigation Act, which would permit transfer of cases across state and federal lines.<sup>70</sup> And these days, with some tort defendants in bankruptcy and the creation of facilities to distribute damages, the image of mass tort victims as co-claimants to a shared—and limited—fund dominates much of the discussion of how to handle mass torts.<sup>71</sup>

This somewhat lengthy introduction has been set forth in an effort to anchor my first point: that a profound change has occurred, in practice and in attitude, in a relatively short time about group litigation in general and about tort cases in particular. Major legal organizations and commentators disagree about the way in which federal court jurisdiction should be altered, about whether all “mass torts” or only “mass accidents” should be allowed easier entry to federal courts, and about how to resolve choice of law and other issues that arise once cases are aggregated. However, parsing the proposals for their differences may obscure the central shared consensus: most agree that aggregate processing—in some forum—and aggregate treatment of some mass torts in *federal* courts are essential. That agreement grows out of experiences over the past three decades in working on aggregated cases involving mass torts.

Mass torts as class actions provide one example of a growing interest in aggregate litigation. There are others, such as group procedures for certain kinds of tax claims,<sup>72</sup> consolidated litigation of problems related to the

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69. Report of the Federal Courts Study Committee 44 (April 2, 1990).

70. National Conference of Commissioners on Uniform State laws, Uniform Transfer of Litigation Act (February 7, 1991 draft, on file with author). For analysis of the jurisdictional issues raised by this proposal, as well as those of the ALI, ABA, the Multiparty, Multiforum federal legislation, and the FCSC Report, see Thomas D. Rowe, Jr., *Jurisdictional Proposals for Complex Litigation* (forthcoming as part of symposium in the Review of Litigation on Problems and Developments in Complex Litigation, and including papers presented at the January 1991 meeting of the Section on Civil Procedure of the American Association of Law Schools) (manuscript on file with author). For critical commentary about the jurisdictional aspirations of proposals that provide for federal jurisdiction, see Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 *Fordham L Rev* 169 (1990).

71. See, for example, Stephen Labaton, *Asbestos Trust Fund of Manville Queried*, *NY Times*, C1 col 3 (May 16, 1990) (concerns that the “multibillion-dollar trust set up by the company to compensate victims of asbestos-related diseases” will be unable to compensate claimants because of a short-fall of funds).

72. Prior to 1982, tax treatment of partnership items of income, loss, deductions and credits were made in separate proceedings with each partner. By virtue of the 1982 revisions of the Tax Equity and Fiscal Responsibility Act, Pub L No 97-248, §§ 6221-6232 (September 3, 1982), such issues are now determined, both at the administrative level and in Tax Court, “in a unified partnership proceeding.” 76 *Tax Focus* No 47 at 1 (CCH Standard Federal Tax Reports, November 8, 1989). Pursuant to IRC § 6231(a)(7) and Temp Reg § 301.6231(a)(7)1T(m)(2), either the partnership or the IRS designates a “tax matters partner” (TMP) whose functions include (sometimes with notice to other partners and sometimes not) decisionmaking about negotiation, settlement, and litigation. 76 *Tax Focus* at 2-4. My thanks to Bernard Wolfman for bringing these provisions to my attention.

collapse of saving and loan banks,<sup>73</sup> federal sentencing guidelines, and delegation of individualized decisionmaking to specialty courts or administrative bodies while federal courts announce only general principles of law. Multi-party, multi-claim litigations are increasingly a part of the landscape of litigation and increasingly viewed as fixtures of that landscape.<sup>74</sup> Moreover, in many instances, when individually-filed cases appear to overlap with other cases, judges and lawyers are eager to find ways to aggregate.<sup>75</sup>

Below, I describe more of the ways to aggregate cases—to demonstrate that class actions are a visible but probably not dominant form of aggregation<sup>76</sup> and to document that, whether or not proposals such as those of the ALI become law, the informal practice enables much of what those proposals would officially authorize. While I attempt to summarize all of the techniques of which I am aware, my focus will be on multidistrict litigation and on how warmly that innovation was received by the legal community—in contrast to the debate sparked by class action reform. Thereafter, I explore some of the lessons to be drawn when the many methods and sources of aggregation are seen as interrelated developments.

## II

### AGGREGATIVE TECHNIQUES

Before I offer description and analysis of the array of ways by which aggregation can occur, I need to say a word about what “aggregation” might

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73. See *In Re American Continental Corporation/Lincoln Savings and Loan Securities Litigation*, 130 FRD 475, 476 (JPML, 1990) (centralization appropriate for cases involving “the largest thrift failure in United States history”).

74. During 1989-90, the proposals of the ABA’s Commission on Mass Torts and the ALI’s Complex Litigation Project encountered serious opposition. While that turmoil reflects resistance to aggregation by members of the bar, the legal academy (see, for example, Trangsrud, *Joinder Alternatives*, 70 Cornell L Rev at 816-30 (cited in note 51)), and the judiciary, I think that, to borrow a phrase from Francis McGovern, the “horse is out of the barn.”

75. See Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit*, 50 U Pitt L Rev 809 (1989); Francis E. McGovern, *Management of Multiparty Toxic Tort Litigation: Case Law and Trends Affecting Case Management*, 19 The Forum 1, 5-9 (1983) (describing “trends toward less individualization”); but see Carter, *The Federal Rules*, 137 U Penn L Rev at 2189 (cited in note 49), discussing hostility to aggregation when sought by civil rights claimants.

I should note that I am not suggesting that the move toward aggregation is a departure from the premises of the 1938 Rules and 1966 amendments, both of which liberalized joinder rules. Rather, the change builds on those premises but also reflects altered perceptions of what pieces connect together to form a “case” or “the litigation” and on the propriety of insisting on such joinder. See generally, Bone, *Mapping the Boundaries of a Dispute*, 89 Colum L Rev 1 (cited in note 4); Geoffrey C. Hazard, Jr., *Forms of Action Under the Federal Rules of Civil Procedure*, 63 Notre Dame L Rev 628, 629 (1988) (one basic concept of the Federal Rules “made it possible for very complicated out-of-court transactions to be embraced in one lawsuit”).

76. Quantification is probably impossible; a single class action filed may be equal to many single filed cases that are subsequently aggregated by courts pursuant to a variety of procedures (discussed below). For what the numbers are worth, in 1987, of 238,982 civil cases filed, 610 had class action allegations. In the same year, 459 cases were transferred under multidistrict litigation (MDL) procedures, discussed below Part IIA2c, at pp 29-35, from 63 district courts to 24 transferee courts. Annual Report of the Director, Administrative Office of the United States Courts 27, 126 (1987). As of June, 1987, 15,926 cases were “subjected to” MDL proceedings. *Id.* at 126.

mean. Thus far, I have assumed that what counts as aggregation is straightforward, but it is not. One could describe aggregation as occurring in any case in which more than one person is either a plaintiff or a defendant.<sup>77</sup> This definition does not address the role entities play in cases; some plaintiffs, such as corporations, voluntary associations, or governmental units, are already aggregates before they enter the litigation world. Moreover, some cases proceed as individual cases but all the participants know that the legal question at issue has an aggregate impact.<sup>78</sup> Yet other cases are nominally brought by individuals but (and especially in the area of torts) are functionally cases by and against insurance companies. Indeed, insurance itself is a kind of aggregation, for it attempts to aggregate and then to distribute risk. Further, cases may be aggregated for certain purposes and not for others or can be aggregated at some stages and not at others.<sup>79</sup> And, as detailed below, individual litigants may have their “own” cases but others, such as lawyers or court personnel, may work on these cases in the aggregate.

I am not alone in wondering what is fairly described as aggregative litigation or in exploring the normative implications of what the departure from individualized case-processing might entail. While groups have been part of the litigation landscape for centuries, the debate among Benjamin Kaplan and his colleagues illustrates how tightly linked lawsuits have been to individuals. The tradition of English-United States litigation assumed that individuals owned “their” claims and saw the pursuit of litigation as a personally expressive event. Stephen Yeazell responds to the definitional problem posed by using the term “collective litigation” to refer to instances in which individual participants are not free to decline to participate and thus, for him, “collective litigation . . . involves some compromise of the autonomy of the individual litigant, some reduction in the freedom of choice she would have if separately represented.”<sup>80</sup> Robert Bone focuses on the possibility of personal participation in cases in which individuals’ actions and remedies are at the heart, and contrasts it with “impersonal” adjudication, in which is “subsume[d] litigative individuality in the anonymity of an impersonal class.”<sup>81</sup>

I am uncomfortable with these definitions in three respects: first, Yeazell assumes that collectivity diminishes individual litigants’ control and range of choices, while I take that assumption as one of the questions to be asked about

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77. Compare Yeazell, *Collective Litigation as Collective Action*, 1989 U Ill L Rev at 44 (cited in note 25) (rejecting the description of “collective litigation” as “any lawsuit with more than one person on either side of the ‘v’” because that broad definition makes the phenomenon “so commonplace as to warrant no discussion” and “masks an important distinction between voluntary joinder” and involuntary participation that brings with it questions of free riders and “kidnapped” participants).

78. The complex way in which habeas corpus cases, “individual” cases, have functioned as implicit injunctions to alter the way in which criminal defendants are treated is one example. See Robert M. Cover & Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L J 1035 (1977). Environmental litigation is another example.

79. See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 BU L Rev 659 (1989).

80. Yeazell, *Collective Litigation as Collective Action*, 1989 U Ill L Rev at 45 (cited in note 25).

81. Bone, *Personal and Impersonal Litigative Forms*, 70 BU L Rev at 218 (cited in note 13).

aggregation (that is, how does aggregation affect individual litigants, and, when they have them, their attorneys?<sup>82</sup>). Second, Yeazell's definition assumes that, if lawyers are officially identified in legal pleadings as representing individuals, those lawyers are shaping a lawsuit "tailormade to the litigant's (or to the lawyer's conception of the litigant's) interests" so that the "autonomy of the individual litigant" is enhanced.<sup>83</sup> I am reluctant to equate a one-on-one relationship between lawyer and client with individual lawsuits<sup>84</sup> and to assume either that it exists in individual cases or that it is necessarily lost in aggregation. Third, Bone's definition assumes that aggregation requires anonymity when that is a question to be posed about aggregation.

In the hopes of leaving the definitional qualities open until after more is known about the many iterations of the phenomenon, my current working definition of "aggregation" includes instances when more than one person is litigating, or when pre-existing entities are litigating, or when individual cases are grouped with others for some purposes or at some times but not necessarily throughout their life spans. In other words, my definition leaves open the questions of the relationship between aggregation and autonomy of individuals and of how that relationship might change over the course of a lawsuit. This definition is not taken from only the perspective of a litigant, nor do I rely on the embracing or involuntary nature of the aggregation or its impact on those litigants, lawyers, and judges joined together. For me, aggregation occurs under a range of conditions, such as when a number of participants are litigating together (officially or de facto), when an entity is participating, and when lawyers, judges, or other court personnel treat cases as a litigation. Of course, the change in attitudes toward aggregative case processing and the shifts in practice over the past three decades are not uniform across all variations of this inclusive definition.

Two other definitional comments are in order. My discussion of the movement from "cases" to "litigation" focuses on the change in acceptance of litigative forms. I am *not* making a doctrinal argument that a "case" (as specified in Article III of the United States Constitution) is a term of art that permits only a limited range of participants; a long line of legal literature

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82. See, for example, the 1965 comment on proposed section 1407 (which became Multidistrict Litigation, discussed in Part IIA2c, at pp 29-35), prepared by the Co-Ordinating Committee on Multiple Litigation and submitted to the Judicial Conference on March 2, 1965, at 20, in which the Committee contrasted what it envisioned for multi-district litigation with what class actions provided. "An advantage of [the proposed multi-district litigation statute] over alternative techniques, such as the class action, is that each action remains as an individual suit with the litigants retaining control over their separate interests." *Id* (on file with author).

83. Yeazell, *Collective Litigation as Collective Action*, 1989 U Ill L Rev at 45 (cited in note 25). Having disagreed about definitions, let me agree about the importance of Yeazell's focus on the role of lawyers and concur in his discussion of the change in focus in the 1960s "from the client to the case"—from the identification of lawyers with clients and their wishes to the idea that lawyers represent clients' "interests" and cases even more than clients. *Id* at 52-55.

84. See generally Lisa G. Lerman, *Lying to Clients*, 138 U Pa L Rev 660 (1990).

explores the expansive possibilities of the word “case.”<sup>85</sup> I am interested instead in how a shift in language (from “cases” to “litigation”) represents a change in perception about the interrelationship among actors and events and about the *desirability* of encompassing a broad array of issues and parties into a single unit for purposes of resolution. Of course, changes in attitudes toward litigative units can and in all likelihood will affect doctrine.<sup>86</sup>

Further, I divide my catalogue of aggregative litigation techniques into what I call “formal” and “informal” means of aggregation. For these purposes, “formal” means a technique set forth in a nationwide federal rule or statute, while “informal” techniques are those created by specific opinions, local rules or by individual judges, court officials, and lawyers.<sup>87</sup> Finally, let me explain the somewhat cursory treatment of some mechanisms for aggregation. Because much of this is familiar, because others have also summarized some of the forms of aggregation,<sup>88</sup> and because my focus here is on aggregation of mass torts, I will spend more time on the techniques less written about in the legal academic literature.

## A. “Formal” Mechanisms

### 1. *The Federal Rules of Civil Procedure*

a. *Class Actions.* Since my commentary began with a discussion of class actions, I start there. Under the 1966 revisions to the class action rule, a plaintiff can ask a court to certify a case as a class action. The rule requires that the party seeking certification show “numerosity” (too many people for joinder to be practical), “commonality” (common issues of law or fact), “typicality” (named plaintiffs present claims typical of the class), and “adequacy” of representation by the named parties of the group. In addition,

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85. See, for example, Susan Bandes, *The Idea of a Case*, 42 Stan L Rev 227 (1990); Richard A. Matasar, *Rediscovering “One Constitutional Case”: Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 Calif L Rev 1399 (1983).

86. One example is the suggestion to rework the requirements of standing in class actions that involve many people with small claims so as to permit attorneys to pursue claims obtained by means of an auction. See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U Chi L Rev 1, 79-84, 107-08 (1991).

87. Compare Yeazell’s description of two kinds of “collectivization”: “procedural” and “substantive.” Yeazell, *Collective Litigation as Collective Action*, 1989 U Ill L Rev at 59-68 (cited in note 25). Under the rubric of “procedural collectivization,” he discusses class actions and litigation by voluntary organizations, *id* at 56-64; examples of “substantive collectivization” include bankruptcy and the tort doctrine of market share liability. *Id* at 66-68.

88. Others have provided catalogues and commentary as well. See, for example, ALI, *Complex Litigation*, Tentative Draft No 1 at 27-48; Mark A. Peterson & Molly Selvin, *The Resolution of Mass Torts: Toward a Framework for Evaluation of Aggregative Procedures* (RAND, Institute for Civil Justice, 1988); Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 Va L Rev 845, 873-907 (1987); Jack B. Weinstein, *Preliminary Reflections on the Law’s Reaction to Disasters*, 11 Colum J Envir L 1, 22-50 (1986) (also providing an overview of disasters); Rubin, *Mass Torts and Litigation Disasters*, 20 Ga L Rev at 432-33, 438-40 (cited in note 60); Rowe & Sibley, *Beyond Diversity*, 135 U Pa L Rev at 14-27 (cited in note 63); Francis E. McGovern, *Management of Multiparty Toxic Tort Litigation: Case Law and Trends Affecting Case Management*, 19 Forum 1, 9-21 (1983); John McCoid, *A Single Package for Multiparty Disputes*, 28 Stan L Rev 707, at 708-728 (1976); Weinstein, *Some Problems in Class Actions*, 9 Buff L Rev at 433-454 (cited in note 19).

the party seeking certification must show a risk of inconsistent judgments, that the disposition of one case is in reality dispositive of all, and/or that common questions predominate and class action treatment is superior to individual treatment of the claims.

If a trial judge is satisfied that the criteria of the rule have been met, the judge may certify the case in whole or part as a class. That district court decision is not immediately reviewable as of right<sup>89</sup> but can be considered by an appellate court eventually. The class action rule also provides that, once a class action has been certified, notice may be directed to the class in some instances, and notice *must* be directed to the class when that class is certified under (b)(3) (a “damage class action”).<sup>90</sup> Members of (b)(3) class actions can—at least in theory—“opt out” of the class by filing a notice with the court and are thus not bound by the outcome.<sup>91</sup> Those who do not opt out are bound, as are participants in so-called “mandatory class actions,” those filed under subdivisions (b)(1) and (2) of Rule 23. Finally, the rule provides that a class action can be neither dismissed nor compromised without court approval.<sup>92</sup>

b. *Other Federal Rule-based Methods.* While the class action rule is a much-discussed mechanism in the Federal Rules of Civil Procedure for aggregation, it is not the only way under the Federal Rules for cases to be aggregated. A second technique is “consolidation.” Rule 42 of the Federal Rules authorizes a court to order a joint hearing or trial of any or all the matters in issue in actions “involving a common question of law or fact.”<sup>93</sup> Yet a third rule-based technique is interpleader, in which a would-be defendant files as a

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89. *Coopers & Lybrand v Livesay*, 437 US 463 (1978). Compare the ABA Section on Litigation, Report and Recommendation of the Special Committee on Class Action Improvements, 110 FRD 195 (1986) (proposing interlocutory appellate review of class certification or denial).

90. Fed R Civ P § 23(b)(3); *Eisen v Carlisle & Jacquelin*, 417 US 156, 177-78 (1974). Yeazell believes that the rule, as interpreted by the Court, has it backwards—that class actions involving damages are often actions in which the representative and the group all share an interest in receiving money and notice should probably not be required in all instances. Yeazell, *Interest, Class and Representation*, 27 UCLA L Rev at 1110-12 (cited in note 25). See also Kenneth W. Dam, *Class Action Notice: Who Needs It?*, 1974 Sup Ct Rev 97 (critical of Justice Powell’s majority opinion in *Eisen* and urging that the “central policy issue . . . [of] what the role of the plaintiff’s lawyer should be in the enforcement of regulatory laws” be faced). *Id.* at 125-36.

91. Some commentators believe that *Phillips Petroleum v Shutts*, 472 US 797 (1985), can be read as making unconstitutional mandatory class actions involving damages. For discussion of this issue, see Barbara Ann Atwood, *The Choice of Law Dilemma in Mass Tort Litigation: Kicking Around Erie, Klaxon, and Van Dusen*, 19 Conn L Rev 9, 12-13 (1986); ALI Complex Litigation, Tentative Draft No 1 at 37 (cited in note 64). Note also that the Anti-Injunction Act could be understood as precluding federal courts from requiring all litigation in the federal forum. See *In re Federal Skywalk Cases*, 680 F2d 1175 (8th Cir 1982), cert denied, 458 US 988 (1982). But see the discussion by Sherman, *Class Actions and Duplicative Litigation*, 62 Ind L Rev at 528-33 (cited in note 60) (arguing the need to enjoin duplicative cases and consolidate in a single forum).

92. Fed R Civ P 23(e). For discussion of current issues of the rule’s interpretation, see Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 Ind L J 597 (1987); Yeazell, *Interest, Class and Representation*, 27 UCLA L Rev 1067 (cited in note 25); Bone, *Mapping the Boundaries*, 89 Colum L Rev at 104-18 (cited in note 4).

93. Fed R Civ P 42. For example, twenty-four asbestos claims were consolidated for trial in *Neal v Carey Canadian Mines Ltd.*, 548 F Supp 357 (ED Pa 1982), aff’d, 760 F2d 481 (3d Cir 1985). See also Larry Picus & Molly Selvin, *The Debate over Jury Performance* (RAND, Institute for Civil Justice, 1987)

plaintiff and joins persons who have claims against the initiator, who hopes to avoid exposure to “double or multiple liability.”<sup>94</sup> Joinder is a fourth technique by which multiple parties (and claims) can be brought together.<sup>95</sup> A fifth mechanism is when outsiders intervene in an ongoing lawsuit.<sup>96</sup> A sixth, less obvious, rule-based device that might also be characterized as a quasi-informal mechanism for aggregation is Rule 53, which provides for the appointment of special masters or experts. This rule has been used (in asbestos litigation and other cases<sup>97</sup>) to enable a special master to work on a set of cases not officially combined but handled simultaneously.<sup>98</sup>

2. *Federal Statutory Mechanisms.* Federal statutes can enable aggregate litigation in a variety of ways. Statutes can authorize class-like actions when creating specific causes of action or can authorize procedures for group processing of cases invoking a range of legal rights. In addition, Congress can empower either private individuals or government officials to bring lawsuits on behalf of others.

a. *Claim-specific Groupings.* Federal statutes can provide both causes of action and authority for groups to pursue claims. One example is the Age Discrimination in Employment Act (“ADEA”),<sup>99</sup> under which employees who allege that they have been discriminated against may sue on behalf of

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(discussion of jury decisionmaking in *Newman v Johns-Manville*, Civ No M-79-124-CA (ED Tex 1984), in which 30 asbestos cases were consolidated, and four of them then tried together to a jury.)

Consolidation may occur when cases are pending in the same district. For inter-district consolidation, see the discussion of multidistrict litigation in Part IIA2c, at pp 29-35. Under 28 USC § 1404 (providing for changes of venue), a case can be transferred from one district to another, and then consolidated with others. For discussion of efforts of a federal trial court to consolidate arbitration, see *Baesler v Continental Grain Co.*, 900 F2d 1193 (8th Cir 1990).

94. Fed R Civ P 22.

95. Fed R Civ P 18-20. See generally Bone, *Mapping the Boundaries*, 89 Colum L Rev 1 (cited in note 4). Richard Freer argues that joinder rules are too permissive and should be revised to mandate joinder of parties in relatively small cases to “express vindication of the public interest in conserving scarce judicial resources.” Freer, *Avoiding Duplicative Litigation*, 50 U Pitt L Rev at 833 (cited in note 75) (footnote omitted).

96. Fed R Civ P 24.

97. Francis E. McGovern, *Towards a Functional Approach for Managing Complex Litigation*, 53 U Chi L Rev 440, 456-91 (1986). A special master can also be appointed in a case in which aggregation has occurred by other means. See, for example, Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, 53 L & Contemp Probs 79, 101-02 (Autumn 1990) (papers first presented at the Conference on Mass Settlements of Mass Torts, April 28-29, 1989). The coordinated appointment of a single special master in similar cases pending in state and federal courts may also be a means of consolidating cases across jurisdictional lines. See, for example, *In re New York City Asbestos Litigation*, (Sup Ct: All Counties within the City of New York), Index No 40000, Case Management Order, Amendment No 7 and *In re Joint Eastern and Southern District Asbestos Litigation*, Order (January 30, 1990), jointly authored by state and federal judges Helen E. Freedman and Jack B. Weinstein and jointly appointing Kenneth R. Feinberg as “Referee and Settlement Master.” Id at 4.

98. Fed R Civ P 53. Note that “reference” is supposed to “be the exception and not the rule.” Fed R Civ P 53(b). In the days before the individual case assignment, Judge Irving Kaufman recommended the use of special masters in “big cases” and praised the “dispatch in which the cases” were “readied for trial.” See Irving R. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 Colum L Rev 452, 465-68 (1958). See also Irving R. Kaufman, *Use of Special Pre-Trial Masters in the “Big” Case in Proceedings of the Seminar on Protracted Cases*, 23 FRD 572-83 (1959).

99. 81 Stat 602, as amended, 29 USC § 621 et seq (1982 ed & Supp V).

themselves “and other employees similarly situated.”<sup>100</sup> According to a recent Supreme Court interpretation, that statute gives federal trial courts discretion to facilitate the provision of notice of a pending lawsuit to potential plaintiffs, and such court involvement is appropriate to implement the statutory goals of “avoiding a multiplicity of duplicative suits and setting cut-off dates to expedite disposition of the action.”<sup>101</sup>

b. *Interpleader and Bankruptcy.* Two important federal statutes that provide procedural mechanisms for aggregate litigation that can involve an array of legal claims are interpleader and bankruptcy. In both, individuals or entities that could have been defendants in lawsuits may come forward as plaintiffs (in the sense of initiators) to commence proceedings in which they admit liability to some people for some amounts, not yet specified. A federal statute, with minimal diversity requirements (in addition to the federal rule, described above that relies upon ordinary jurisdictional requirements), provides for interpleader.<sup>102</sup> Federal bankruptcy law is another form of interpleader; the bankrupt is able to pull almost all would-be creditors into one lawsuit—as occurred in both the Johns-Manville and Dalkon Shield bankruptcy cases.<sup>103</sup> Bankruptcy law provides for an “automatic stay” of previously filed actions.<sup>104</sup> Thus, in contrast to class actions, in which federal courts can generally not stay or otherwise interfere with state court cases,<sup>105</sup> bankruptcy is a more powerful tool—for it can collect virtually all of the claims against the bankrupt and its or his/her assets in one forum.<sup>106</sup> The

100. 29 USC § 216(b) (1982).

101. *Hoffmann-La Roche Inc. v Sperling*, 110 S Ct 482, 486-87 (1989) (also invoking FRCP 16, which authorizes judicial management of the pretrial phase).

102. 28 USC § 1335.

103. See *In re Johns-Manville Corp.*, 36 BR 743 (SDNY 1984); *In re A.H. Robins Co.*, 63 BR 986 (ED Va 1986), aff'd sub nom *Grady v A.H. Robins, Co.*, 839 F2d 198 (4th Cir 1988); cert dismissed sub nom *Joynes v A.H. Robins*, 109 S Ct 201 (1988). See also Marianna S. Smith, *Resolving Asbestos Claims: The Manville Personal Injury Settlement Trust*, 53 L & Contemp Probs 27, 29 (Autumn 1990); Feinberg, *The Dalkon Shield Claimants Trust*, 53 L & Contemp Probs at 101 (cited in note 97).

104. 11 USC § 362. The bankruptcy stay is thus one of the exceptions recognized to the general Anti-Injunction Act prohibition against interference with pending state court proceedings. See 28 USC § 2283. Under current law, 11 USC § 362(a) provides for the filing of a bankruptcy petition to operate as a stay of most proceedings against the debtor. However, under § 362(b)(1)-(12), certain kinds of proceedings, including criminal cases, are not stayed.

In *Hill v Harding*, 107 US 631, 632-633 (1882), the Supreme Court interpreted section 5106 of the Revised Statutes, which provided that “[n]o creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor’s discharge shall have been determined . . . .” The Court held that, under the Supremacy Clause, state courts were bound not to enter judgment under this provision, and that the case was suspended pending the outcome in federal court.

Thus, via an exception to the Anti-Injunction Act, federal bankruptcy proceedings can stay most other proceedings, and via the Supremacy Clause, state courts are required to refrain from interfering with bankruptcy proceedings.

105. See Anti-Injunction Act, 28 USC § 2283; *In re Federal Skywalk Cases*, 680 F2d 1175 (8th Cir 1982), cert denied, 459 US 988 (1983).

106. Because not all debts are dischargeable in all forms of bankruptcy, not all creditors or claimants join in the bankruptcy proceeding. For example, in *Pennsylvania v Davenport*, 110 S Ct 2126 (1990), the Adult Parole and Probation Department of Bucks County did not file a proof of claim in the Davenports’ pending Chapter 13 bankruptcy and argued instead that the failure to pay restitution was not dischargeable in Chapter 13 proceedings. The United States Supreme Court disagreed;



effectiveness of bankruptcy as a mechanism of unification is exemplified by the Dalkon Shield litigation, in which, prior to the bankruptcy, two other efforts to aggregate had failed. In the early 1980s, a federal trial court certified a class action but was reversed by the Ninth Circuit.<sup>107</sup> In addition, some Dalkon cases were transferred for pretrial coordination under the multidistrict litigation statute<sup>108</sup> (discussed below) but then were returned to individual districts.<sup>109</sup> In contrast, via the bankruptcy proceedings initiated in 1985, the manufacturer of the Dalkon Shield was able to draw all filed claims into a single court and then to encourage other potential claimants to file as well.<sup>110</sup>

c. *Multidistrict Litigation.* Another statute of great importance in group litigation these days is section 1407 of Title 28—the provision for multidistrict litigation. I will spend more time talking about multidistrict litigation—“MDL” as it is known in the trade—than the other aggregative techniques described thus far. In part, my interest in MDL stems from its relative absence (until recently) from the academic literature on federal procedure.<sup>111</sup> Further, the history of MDL is relevant to the history of the revision of class actions and to the decision of the Advisory Committee members *not* to include mass torts under the rubric of class action litigation. The 1966 Advisory Committee note (and the memos circulated among the committee members during 1963 when they were working on Rule 23) make reference to the predecessor of MDL, “the Coordinating Committee on Multiple Litigation in the United States District Courts,” which in the 1960s was “charged with developing methods for expediting” cases involving damages (mass accidents

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distinguishing the exception to discharges in bankruptcies under Chapter 11 for debts that are “a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit” (11 USC § 523(a)(7)) from the general provision, set forth in 11 USC § 101(11), that bankruptcy discharges “debts,” the Court held that the absence of a similar exclusion in Chapter 13 meant that individuals who file pursuant to it can obtain discharges from “restitution obligations.” *Id.* at 2132-33. In addition to governmental fines and penalties, included on the statutory list of non-dischargeable debts for those who file for bankruptcy under Chapter 7 and Chapter 11 are tax claims (11 USC § 523(a)(1)); fraudulently incurred obligations (11 USC § 523(a)(2)); fiduciary fraud (11 USC § 523(a)(4)); spousal and child support (11 USC § 523(a)(5)); and education loans (11 USC § 523(a)(8)).

107. *In re Northern District of California “Dalkon Shield” IUD Products Liability Litigation*, 526 F Supp 887 (ND Cal 1981), vacated, 693 F2d 847 (9th Cir 1982), cert denied, 459 US 1171 (1983).

108. See *In re A.H. Robins Co., Inc. “Dalkon Shield” IUD Products Liability Litigation*, 406 F Supp 540 (JPMDL 1975), 419 F Supp 710 (JPMDL 1976), 438 F Supp 942 (JPMDL 1977).

109. *In re A.H. Robins Co., Inc. “Dalkon Shield” IUD Products Liability Litigation*, 453 F Supp 108 (JPMDL 1978), 505 F Supp 221 (JPMDL 1981).

110. See *In re A.H. Robins Co., Inc.*, 63 BR 986, 994 (ED Va 1986); McGovern, *Resolving Mature Mass Tort Litigation*, 69 BU L Rev at 675-88 (cited in note 79); Feinberg, *The Dalkon Shield Claimants Trust*, 53 L & Contemp Probs at 101, 105-09 (cited in note 97).

111. Recent articles that do consider MDL include Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U Pa L Rev 595, 662-705 (1987); Rowe & Sibley, *Beyond Diversity*, 135 U Pa L Rev at 12-14 (cited in note 63); Atwood, *The Choice-of-Law Dilemma*, 19 Conn L Rev at 41-43, 47-51 (cited in note 91); Trangsrud, *Joinder Alternatives*, 70 Cornell L Rev at 803-10 (cited in note 51). See also David F. Herr, *Multidistrict Litigation: Handling Cases Before the Judicial Panel on Multidistrict Litigation* xix (Little, Brown, 1986) (book designed to help “lawyers first faced with proceedings before this obscure judicial entity”).

as well as antitrust cases seeking damages).<sup>112</sup> The 1966 Advisory Committee note to Rule 23 stated that work by such committees—rather than changes in the federal rules—should be the vehicles for dealing with the burdens that mass accidents placed on federal court caseloads.<sup>113</sup> Moreover, as I suggested above and will detail below, although creation of the MDL panel and the revisions of the class action rule occurred at about the same time (the middle to late 1960s), responses to the two have differed dramatically—and intriguingly.

The background of MDL grows out of the federal judiciary's concern, dating from sometime after World War II, about "similar" and "protracted" cases filed in district courts across the country. In 1949, then Chief Justice Vinson appointed a committee, chaired by Judge E. Barrett Prettyman, called "The Committee to Study Procedure in Anti-Trust and Other Protracted Cases." In 1951, that committee issued a report<sup>114</sup> that the Judicial Conference of the United States adopted.<sup>115</sup> The report described the concern that a "protracted case" "might threaten the judicial process itself," and urged, as a response, that trial judges take control of such cases.<sup>116</sup>

During the 1950s, Chief Justice Warren appointed another committee, once again charged with considering the problems of "protracted cases." That committee, chaired by Judge Alfred Murrah, conducted seminars for federal judges and developed a *Handbook of Recommended Procedures for the Trial of Protracted Cases*.<sup>117</sup> Again, the theme of judicial control emerged; the seminars advocated that "[t]he judge assigned should at the earliest moment

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112. 1966 Advisory Committee Note to 23(b)(3). See also memo from Kaplan and Sacks, dated December 2, 1963 to Advisory Committee members, described in note 23. In turn, the Coordinating Committee for Multiple Litigation was briefed on the then-new Rule 23. See *The New Rule 23: Class Actions* (memo "compiled for the General Meeting of the Coordinating Committee for Multiple Litigation, Kansas City, Mo. November 3-4, 1967") (on file with author).

113. In turn, in its Report urging the adoption of the legislation that resulted in multi-district litigation, the Co-Ordinating Committee makes reference to the note accompanying the then-draft of Rule 23 that endorsed the need for coordination, even "when a number of separate actions are proceeding simultaneously." Report of the Co-Ordinating Committee on Multiple Litigation Recommending New Section 1407, Title 28, reprinted in Appendix to *In re Plumbing Fixture Cases*, 298 F Supp 484, 498 (JPML 1968), at 499.

114. Committee to Study Procedure in Anti-Trust and Other Protracted Cases, *Procedure in Anti-Trust and Other Protracted Cases*, 13 FRD 62 (1953).

115. *Id.* at 62 n1. For adoption of the Report by the Judicial Conference, see Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States 22-26 (September 24-26, 1951). See also Alfred P. Murrah, *Background of the Seminar* [From the Proceedings of the Seminar on Protracted Cases, August 25-30, 1958], 23 FRD 386, 387 (on the use of the Prettyman study).

116. *Procedures in Protracted Cases*, 13 FRD at 64 (cited in note 114).

117. 25 FRD 351 (1960); Alfred Murrah, *Foreword*, in Proceedings of the Seminar on Protracted Cases, 21 FRD 395 (1957). Murrah explained that, in addition to sessions on "protracted civil and criminal litigation," a session was devoted to "techniques of pre-trial procedure in the ordinary civil action." 23 FRD at 319 (also listing participants, at 321-24). See Proceedings of the Seminar on Protracted Cases, held at Stanford University, August 25-30, 1958, 23 FRD 319 et seq (1959) and Proceedings of the Seminar on Protracted Cases, held at NYU Law School, 21 FRD 395 et seq (1958).

take *actual control* of the case and rigorously exercise such *control* throughout the proceedings in such case."<sup>118</sup>

In the early 1960s, the United States government successfully litigated antitrust claims against electrical equipment manufacturers.<sup>119</sup> Thereafter, "more than 1800 separate damage actions were filed in 33 federal district courts."<sup>120</sup> In response, the Judicial Conference authorized the creation of a special subcommittee from its standing Committee on Pre-Trial Procedures and Practices, and, in 1962, Chief Justice Warren appointed Judge Murrah as the chair of that subcommittee, called the "Co-Ordinating Committee for Multiple Litigation of the United States District Courts."<sup>121</sup> This group of nine federal judges supervised nationwide discovery in these damage antitrust cases.<sup>122</sup> According to staff of the Committee, the nine judges decided to "facilitate communication" among the federal judges before whom the antitrust cases were pending and urged adoption of "uniform" pretrial orders.<sup>123</sup>

In other words, instead of transferring all the pending electrical cases to a single judge (for which no express statutory authorization arguably existed at the time<sup>124</sup>), the Committee attempted to have different judges behave

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118. Resolutions Adopted at the Seminar on Protracted Cases, 23 FRD 319 at 614-15 (emphasis in original). See generally testimony of Alfred Murrah, Hearings on Multidistrict Litigation, S3815, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, US Senate, 89th Cong 2d Sess, at 51-53 (October 20, 21, 1966) ("Senate Multidistrict Hearings").

Charles Clark argued that such judicial control was available under the Federal Rules of Civil Procedure: *Pre-Trial Orders and Pre-Trial as a Part of Trial*, 23 FRD 506. For discussion of the discretion afforded trial judges under the Rules, see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U Pa L Rev 909-1002 (1987).

119. Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 Am Bar Ass'n J 621 (July 1964). See also *The Impact of the Electrical Anti-Trust Cases upon Federal Civil Procedure, Third Circuit Proceedings*, 39 FRD 495 (1966).

120. Transfer of Pretrial Proceedings in Multidistrict Litigation, House Judiciary Committee Report No 1130, 90th Cong, 2d Sess at 2 (1968) ("HR Rep No 1130") (reprinted in 1968 *US Code Cong and Admin News* 1898, 1899, February 28, 1968). Note that Neal and Goldberg state that suits were filed in thirty-five districts, Neal & Goldberg, *The Electrical Equipment Antitrust Cases*, 50 Am Bar Ass'n J at 622, 623 (cited in note 119).

121. Neal & Goldberg, *The Electrical Equipment Antitrust Cases*, 50 Am Bar Ass'n J at 623 (cited in note 119).

122. *Id.* See also Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 FRD 575 (paper presented December 8, 1977). See also Senate Multidistrict Hearings at 4-5 (cited in note 118) (statement of Honorable Edwin A. Robson of the Northern District of Illinois).

123. Neal & Goldberg, *The Electrical Equipment Antitrust Cases*, 50 Am Bar Ass'n J at 623 (cited in note 119). For description of the litigation, the work of the Coordinating Committee, and the national pretrial orders issued, see Charles A. Bane, *The Electrical Equipment Conspiracies: The Treble Damage Actions* (Federal Legal Publications, 1973), especially chapter 8 (Pretrial Discovery), at 117-41. Bane was the chair of the plaintiff counsels' Steering Committee. *Id.* at 131 n161.

124. Transfer of venue was available under 28 USC § 1404, but at least when requesting congressional authorization for the multidistrict statute, the judges argued that that section permitted the transfer of only a specific case and not consolidation of cases pending nationwide. See Memorandum from the Co-Ordinating Committee on Multiple Litigation of the Judicial Conference of the United States, at 29 of Hearings on Judicial Administration on HR 3991, 6703, 8276, 16575, before Subcommittee No 5, of the Committee on the Judiciary, House of Representatives, Serial No 21, HR 3991, 6703, 8276, 16575 (1966) ("House Multiple Litigation Hearings"). See also Senate Multidistrict Hearings at 10-11 (cited in note 118) (statement of Phil Neal).

similarly towards cases over which they presided. In the electrical cases, national pretrial hearings were held at which several of the judges assigned to these cases sat together at arguments, conferred, and issued proposed orders that were then sent back to the more than thirty district courts in which the cases were pending.<sup>125</sup> Apparently, some of the procedures were crafted to avoid confronting questions about the authority of judges over each other (as well as over the cases). Again, in the words of the Committee's staff, "[t]he absence of a provision [for consolidation before a single judge] in the statutes or rules . . . was recognized at the outset," and efforts were made for "obtaining the voluntary co-operation of the judges concerned."<sup>126</sup> Cooperation of the lawyers was also elicited; a meeting of some eighty plaintiffs' lawyers resulted in the delegation of the logistics of taking depositions to a "steering committee."<sup>127</sup>

Much legal commentary describes the work of the Committee as successful. In March of 1964, the Judicial Conference adopted a resolution to continue to consider "discovery problems arising in multiple litigation with common witnesses and exhibits . . . so as to develop . . . general principles and guidelines . . . including any recommendations for statutory change."<sup>128</sup> Thereafter, according to legislative history, the Judicial Conference requested legislation to authorize transfer and consolidation of cases;<sup>129</sup> the Department

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125. Neal & Goldberg, *The Electrical Equipment Antitrust Cases*, 50 Am Bar Ass'n J at 624 (cited in note 119). During some of the national depositions, "[t]wenty judges from eighteen districts presided." Id at 627 n13.

126. Id at 623.

127. Id at 625, text accompanying n11. From the description, it is unclear exactly how the steering committee members were selected. According to Bane, who was the chair of that committee, eighty plaintiffs' lawyers met in September of 1962 and created the committee, but the method of selection is not detailed. Bane, *Electrical Equipment Conspiracies* at 131 (cited in note 123). According to another account, defendants also organized a "General Counsel's Group which met regularly and which was composed of national or co-ordinating counsel for each defendant." See Holmes Baldrige, *Problems Raised in Multiple Litigation*, 11 Antitrust Bull 635, 641 (1966).

128. Neal & Goldberg, *The Electrical Equipment Antitrust Cases*, 50 Am Bar Ass'n J at 628 n27 (cited in note 119).

129. See Note, *Consolidation of Pretrial Proceedings Under Proposed Section 1407 of the Judicial Code: Unanswered Questions of Transfer and Review*, 33 U Chi L Rev 558 (1966); see also excerpts of the Report of the Co-Ordinating Committee on Multiple Litigation, Recommending New Section 1407, Title 28, printed as Part I of an appendix to *In re Plumbing Fixture Cases*, 298 F Supp 484, 498 (JPML 1968). According to Phil Neal, who had been the secretary for the Co-Ordinating Committee for Multiple Litigation, that committee drafted the bill and presented it to the Judicial Conference. House Multiple Litigation Hearings at 21 (cited in note 124) (statement of Phil C. Neal). That draft (subsequently revised) had required "consent of the district court" prior to transfer. Id.

of Justice<sup>130</sup> and eventually members of the American Bar Association supported the proposal.<sup>131</sup>

In 1968, Congress responded with the multidistrict litigation statute ("MDL"), which authorized a single judge to preside, during the pretrial phase, in the mandatory consolidation of cases pending in federal courts throughout the country. MDL is thus a statutorily-based (rather than rule-based) mechanism for consolidation of lawsuits. MDL is a possibility when "civil actions involving one or more common questions of fact are pending in

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130. HR Rep No 1130, reprinted in 1968 *US Code Cong and Admin News* at 1900-02 (cited in note 120). While the bill that was enacted is quite similar to that drafted by federal judges, some modifications were made. The Justice Department requested that, when litigating antitrust actions, it be exempt from the proposed legislation. See letter, Ramsey Clark, then Deputy Attorney General, to Emanuel Celler, Chair of the House Judiciary Committee, appended to HR Rep No 1130, id at 1904-05, which was followed by the codification at 28 USC § 1407(g) that states: "Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws." For a discussion of when the "United States" is a party, see *In re Uranium Industry Antitrust Litigation*, 458 F Supp 1223, 1227 (JDML 1978) (Tennessee Valley Authority is not exempted from MDL under this provision). The Justice Department also succeeded in another revision of the proposed legislation; the Judicial Conference version had included a provision that enabled the transferor judge to veto the transfer, and that provision was dropped at the urging of the Department of Justice. See Senate Multidistrict Hearings (cited in note 118) at 56 (Murrah testimony); id at 24-25 (Becker Testimony); id at 54-55 (Tydings testimony).

131. The American Bar Association's Section of Antitrust Law was the principal institutional voice recorded in the legislative history as having raised objections to the bill. See statement of Marcus Mattson, Chairman of the Section of Antitrust Law, House Multiple Litigation Hearings at 33-26 (cited in note 124); Senate Multidistrict Litigation Hearings at 87-90 (cited in note 118). Mattson had also been a member of the plaintiffs' steering committee in the Electrical Equipment cases. See Bane, *Electrical Equipment Conspiracies* at 131 n161 (cited in note 123). See also the Statement of the American Bar Association, William Simon, Senate Multidistrict Hearings, Part 2, January 24, 1967 at 117-29, which includes the Report and Recommendation of the Antitrust Section. The Section's criticisms included the claims that the same judge should be involved in the pretrial and trial process, that transfer to distant districts generated undue expense, that the electrical cases were aberrational and should not be the basis for new legislation, and that changes in federal practice, if needed, should be made by the Advisory Committee process. Senate Multidistrict Hearings, Part 1, at 89-90 (cited in note 118). Subsequently, the Section changed its mind. According to Report No 2 of the Section of Antitrust, Recommendation of the Section of Antitrust Law to the House of Delegates of the American Bar Association on S159, 90th Cong (January 19, 1978), the 1966 bill as passed by the Senate, made improvements over the earlier draft, that had been opposed and "greater need for this legislation" had been shown. Id at 3 (on file with author).

The Section's earlier opposition was undercut at the time by other ABA affiliated witnesses who testified at the hearings. Edward R. Johnston argued that, although approved by the House of Delegates, the resolutions of the Antitrust Section were not debated; "I therefore cannot attach too great importance to the resolution. . . . I do not regard it as being at all the expression of opinion of the American bar." Senate Multidistrict Hearings, Part I at 42, 46-47. See also the testimony of Charles A. Bane, chair of a committee of the Section on Antitrust, at 38; and the commentary of Judge William H. Becker, at 24-25; testimony of Judge Alfred P. Murrah, at 51, 55; and the sparring between Simon and Senator Tydings, all in Senate Multidistrict Hearings, Part 2 at 120-29, and the appended explanation of procedures, 136-38; and in House Multiple Litigation Hearings (cited in note 124), Robson and Becker Memorandum at 29-32.

Another opponent was Phillip Price, of Dechert, Price, and Rhoads (a Philadelphia firm that had represented defendants in the electrical cases), who expressed "strong disapproval" of the legislation. He argued that the proposal was overbroad, that aggregation imposed unnecessary costs on the litigants by requiring them to participate in hearings far from their homes, and that the proposed legislation gave few standards and invested judges with far too much discretion, too many occasions for off the record decisionmaking, and too little supervision. See Appendix C to Part I, Senate Multidistrict Hearings at 95-98 and Part 2, Senate Multidistrict Hearings at 103-16, 134-35. See also Appendix to Part 2 at 133-34 and 138-40 (Milton Handler letter in opposition to the bill as "premature"; Memorandum from Cravath, Swaine & Moore).

different districts.”<sup>132</sup> The other statutory criteria are that the transfer must be “for the convenience of the parties and witnesses” and must “promote the just and efficient conduct of such actions.”<sup>133</sup> Obviously, these criteria enable many categories of cases to be subject to MDL treatment, and MDL records indicate that cases that have been consolidated pursuant to section 1407 include antitrust, air disasters, contracts, common disasters, copyright and patents, employment, and trademark.<sup>134</sup>

Either by motion of the court or of the parties, cases that are candidates for consolidation are sent to “the panel” on MDL. That panel consists of seven circuit and district judges appointed by the Chief Justice of the United States. The panel either decides to authorize the cases for MDL treatment and to designate a judge to handle them or to decline to permit MDL treatment. No direct appeal of that decision is possible; under the statute, “review of any order of the panel” is available only “by extraordinary writ” pursuant to the provisions of the All Writs Act, and “[t]here shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.”<sup>135</sup> After cases have been transferred, subsequently filed cases (called “tag-along actions” that involve “common questions of fact” with cases already transferred) can also be sent to the designated transferee judge.<sup>136</sup> The MDL statute also authorizes the panel to promulgate rules “not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure,”<sup>137</sup> and thereby permits nationwide federal procedural rulemaking outside the Rules Enabling Act process.

Under section 1407, cases in any federal district court can be transferred<sup>138</sup> but are only consolidated “pretrial,” for decision of issues such

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132. 28 USC § 1407(a). See generally Patricia D. Howard (“Clerk of the Panel”), *A Guide to Multidistrict Litigation*, 75 FRD 577 (1977) (Howard, “1977 Multidistrict Guide”), and the January 26, 1989 revised version, at 124 FRD 479 (1989) (Howard, “1989 Multidistrict Guide”).

133. 28 USC § 1407(a). Two categories of cases are excluded by statute: antitrust actions brought by the United States (see section 1407(g)) and, unless consented to, securities cases filed by the Securities and Exchange Commission. See 15 USC § 78u(g).

134. Howard, *1989 Multidistrict Guide*, 124 FRD 479 (cited in note 132).

135. 28 USC § 1407(e). See John F. Cooney, *Comment, The Experience of Transferee Courts under the Multidistrict Litigation Act*, 39 U Chi L Rev 588, 590, 607-09 (1972).

136. Judicial Panel on Multidistrict Litigation, Rules of Procedure, Rules 1, 12, 13; 120 FRD 251, 252-53, 258-59 (1988). I am informed by Patricia Howard, Clerk of the Multidistrict Panel, that the panel has tried to avoid the nomenclature of “MDL judge” or “MDL court” because of the potential to confuse the judge who transfers a case to another district (the “transferor judge”) and the judge to whom cases are transferred (the “transferee judge”) with the MDL panel or a member of that panel. Letter of October 25, 1989, at 4.

137. 28 USC § 1407(f). The Panel’s current Rules of Procedure, as revised, are at 120 FRD 251 (1988). In 1968, the Panel published provisional rules (see 44 FRD 389 (1968)), with subsequent revisions set forth at 47 FRD 377 (1970); 50 FRD 203 (1971); 53 FRD 119 (1972); 78 FRD 272 (1978).

The Ad Hoc Administrative Practices Committee of the Panel has also prepared a set of “Suggested Procedures for Multidistrict Litigation” as a guide to transferee and transferor courts. A first set was published in 1970. (This is, at least for me, unfindable, but is mentioned both in 75 FRD 589 and 124 FRD 488.) Revisions are set forth at 75 FRD 589 (1978) and at 124 FRD 488 (1989). See also Howard, *1977 Multidistrict Guide*, 75 FRD at 583, 589 (cited in note 132); Howard, *1989 Multidistrict Guide*, 124 FRD at 483 (cited in note 132).

138. Without regard to the requirements of the general venue transfer statute, 28 USC § 1404.

as summary judgment, discovery, and the like. Formally, cases are supposed to be “remanded” to the originating courts at the conclusion of the “pretrial proceedings.”<sup>139</sup> However, transferee judges have upon occasion used either the parties’ consent or the general change of venue statute to transfer the cases to themselves for “subsequent proceedings”—that is, trial.<sup>140</sup> Further, many cases are disposed of by the transferee judge during the “pretrial” process. As one member of the MDL panel stated in 1977, “[i]n point of fact, slightly less than five percent of the actions transferred by the Panel have been remanded. Most actions are terminated either in the transferee district (often by settlement) or are transferred by the transferee judge to the transferee district or to another district for trial pursuant to sections 1404(a) or 1406.”<sup>141</sup> Further, several commentators (judges included) have criticized the MDL statute for being too limited;<sup>142</sup> some urge expanding the reach of MDL—to include, officially, the transfer of cases for trial as well as for pretrial proceedings.<sup>143</sup>

d. *Government Litigation.* Aggregate litigation also occurs when statutes authorize a government official to pursue litigation on behalf of a group.<sup>144</sup> A myriad of federal statutes create such opportunities. For example, the Civil Rights of Institutionalized Persons Act of 1980 authorizes the Attorney

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139. Cases brought under section 4(c) of the Clayton Act, 5 USC § 15(c), can be consolidated for pretrial and trial. 28 USC § 1407(h). On remands in general, see Julian O. von Kalinowski, *The Power of a Transferee Judge to Transfer Liability and Damages Trial*, 38 J Air L & Commerce 197 (1972); Cooney, *The Experience of Transferee Courts*, 39 U Chi L Rev 558 (cited in note 135); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 Harv L Rev 1001 (1974).

140. Weigel, *The Judicial Panel*, 78 FRD at 583-85 nn64-65 (cited in note 122). On consent, see *In re Alien Children Education Litigation*, 501 F Supp 544 at 551 n7 (SD Tex 1980); Cooney, *The Experience of Transferee Courts*, 39 U Chi L Rev at 607-09 (cited in note 135).

141. Weigel, *The Judicial Panel*, 78 FRD at 583 (cited in note 122). It might be helpful to place the five percent remand figure in the context of civil litigation in general. In 1977, of 117,150 civil cases terminated, 11,604 (or 10.1%) were tried to completion. Data from the Administrative Office of the US Courts, Annual Reports of the Director, 1977, Table C1/C8.

Patricia D. Howard, Clerk of the Multidistrict Litigation Panel, provides updated data on remands. She examined the more than 16,700 cases coordinated or consolidated under the MDL statute from 1968 to 1988. Of some 14,600 terminations, 2,600 (or about 18%) were “remanded by the Panel and 160 actions reassigned to transferor judges within the transferee district.” Howard, *1989 Multidistrict Guide*, 124 FRD at 480 (cited in note 132). Technically, and in “the absence of unusual circumstances,” the Panel—and not the individual judge in charge of a set of cases—has the authority to remand an action or claim not terminated in the transferee district. 28 USC § 1407(a) and Rule 14(b) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation. On choice of law, the transferee court must apply the substantive law of the transferor’s court, including conflict rules. See cases cited by Weigel, *The Judicial Panel*, 78 FRD at 584 n70 (cited in note 122).

142. See, for example, Rubin, *Mass Torts and Litigation Disasters*, 20 Ga L Rev at 439, 442-43 (cited in note 60).

143. See George T. Conway, III, *The Consolidation of Multistate Litigation in State Courts*, 96 Yale L J 1099, 1100 (1987) (MDL should be able to “direct litigation to and from state courts”); Weinstein, *Preliminary Reflections*, 11 Colum J Envir L at 16, 23 (cited in note 88); Chesley & Kolodgy, *Mass Exposure Torts*, 54 U Cinn L Rev at 538 (cited in note 53).

144. Statutes may also authorize individuals to litigate on behalf of others. See the Age Discrimination in Employment Act of 1967, 81 Stat 602, as amended, 29 USC § 621, 216(b) (employees may bring collective age discrimination cases on “behalf of . . . themselves and other employees similarly situated,” as interpreted in *Hoffmann-La Roche, Inc. v Richard Sperling*, 110 S Ct 482, 486 (1989) (district courts may implement ADEA by “facilitating notice to potential plaintiffs”).

General of the United States to sue states on behalf of institutionalized individuals, allegedly harmed by “egregious” or “flagrant” conditions in state facilities that violate constitutional rights.<sup>145</sup> The “Parens Patriae” amendments to the antitrust laws enable states to sue on behalf of consumers injured by alleged antitrust violations.<sup>146</sup> The Labor Management Reporting and Disclosure Act gives the Secretary of Labor the power to sue unions that violate obligations of fair election procedures.<sup>147</sup> Sometimes the federal government (or agencies of it) has exclusive authority to litigate; sometimes individuals may litigate concurrently or subsequently. The allocation of authority for rights enforcement between public and private actors was the subject of the debate that helped shape the 1966 amendments to the class action rule<sup>148</sup> and continues to influence current conversations. As is described below, aggregation that relies upon the government as a representative is similar to class action aggregation; the political judgments are readily perceived, and the popularity of such activity fluctuates with visions of the appropriate role for government and courts in regulatory activities.

## B. “Informal” Mechanisms

I turn now from statutory and rule-based mechanisms (which I have called “formal”) to the myriad of informal activities that are generating aggregative proceedings. I provide some categorization of these mechanisms, but, as always, overlap exists.

1. *Case Law.* Doctrine relating both to the process by which cases are decided and rules on the merits can create aggregation. For example, rulings on collateral estoppel and res judicata can function in a given series of cases to make a prior ruling apply to subsequent decisions or to abort further decisionmaking.<sup>149</sup> Legal rules, such as “law of the case”<sup>150</sup> and stare decisis,<sup>151</sup> may also create aggregation, either simultaneously or sequentially. Further, expansive or narrow construction of joinder rules and of

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145. Pub L No 96-247, 94 Stat 349 (1980), codified at 42 USC § 1997.

146. Pub L No 94-435, Title III, § 301, 90 Stat 1394-96 (1976), codified at 15 USC § 15(c).

147. The Labor Management Reporting and Disclosure Act of 1959, 29 USC §§ 401, 402. See generally *Trbovich v United Mine Workers*, 404 US 528 (1972).

148. See Kalven and Rosenfield’s discussion of why government regulation was inadequate and private “bounty hunters” were needed. Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U Chi L Rev at 686-87 (cited in note 13).

149. For detailed consideration, see Abraham, *Individual Action and Collective Responsibility*, 73 Va L Rev 845 at 873-76 (cited in note 88); Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 Iowa L Rev 141, 172-214 (1984); Elinor P. Schroeder, *Relitigation of Common Issues: The Failure of Nonparty Preclusion and an Alternative Proposal*, 67 Iowa L Rev 917 (1982).

150. A kind of internal res judicata that a judge in a particular case invokes when declining to reconsider issues already determined in that proceeding; if a party in a multi-party case obtains a ruling on a given issue, that ruling can result in preclusion of others in the case raising that argument. See Steinman, *The Law of the Case*, 135 U Pa L Rev at 622-27 (cited in note 111).

151. Abraham, *Individual Action and Collective Responsibility*, 73 Va L Rev at 880-83 (cited in note 88).



jurisdictional doctrines such as ancillary and pendent jurisdiction can affect aggregative capacities.<sup>152</sup> Finally, liability rules such as enterprise or proportional liability can also produce aggregation.<sup>153</sup>

2. *Court-based Processing.* Many courts have devised ways to process a group of cases simultaneously—without either class certification, rule-based joinder of parties or claims, or MDL designation. The linchpin here is centralization via assignment to a single judge.<sup>154</sup> Sometimes a judge is assigned all cases that involve a particular event or a specific defendant. One vehicle for discovery of the “relatedness” of new cases to those already pending is the federal civil cover sheet, a form that must accompany the filing of all civil complaints. The person who files a complaint is required to state whether the case being filed is “related” to any pending cases. Once such a statement of relatedness is provided, courts often assign the newly-filed case to the same judge who has the “related” case. Local court rules or standing orders may augment the civil cover sheet requirements. According to the Report of the Local Rules Project on the Local Rules of Civil Practice,<sup>155</sup> “[t]wenty-five jurisdictions have local rules concerning the procedure used to notify the court that a newly-filed case involves complex or multidistrict litigation, or that it is related to another pending case.”<sup>156</sup> Most of these rules place the burden on lawyers, when filing pleadings, to notify the court of complex issues and related cases.<sup>157</sup> Once judges have a set of cases, whether officially designated “related” or not, judges may order “joint discovery,” joint pretrial conferences or other forms of standardized, shared proceedings, as well as assign cases to magistrates or special masters for pretrial work.<sup>158</sup> Further, informal cooperation between judges may enable joint processing of cases officially in different jurisdictions, such as those pending in state and federal courts.<sup>159</sup>

152. See Freer, *Avoiding Duplicative Litigation*, 50 U Pitt L Rev at 815-17 (cited in note 75); *Finley v U.S.*, 490 US 545 (1989) (narrow construction of pendent party possibilities).

153. Yeazell, *Collective Litigation as Collective Action*, 1989 U Ill L Rev at 66-68 (cited in note 25).

154. In some instances, other court personnel are also assigned to handle a set of cases. See Deborah R. Hensler, William L. F. Felstiner, Molly Selvin, and Patricia A. Ebener, *Asbestos in the Courts: The Challenge of Mass Toxic Torts* 63-64 (RAND, 1985).

155. Received from Mary P. Squiers, Director, Local Rules Project (June 1989) (according to the cover letter, the Project was completed in April of 1989) (on file with author).

156. Local Rules Project, ch 1 at 60 (cited in note 155). Compare the local rules in the District of Columbia, which have narrow definitions of relatedness. DC District Rule 404, *District of Columbia Federal Courts Handbook* 367, § 2.310 (1989 Supp).

157. Local Rules Project at 61-62 (cited in note 155).

158. See generally Hensler, et al, *Asbestos in the Courts* (cited in note 154) (discussing both state and federal courts' practices); Jacqueline M. Orlando, *Asbestos Litigation and the Ohio Asbestos Litigation Plan: Insulating the Courts from the Heat*, 3 J Dispute Res 399 (1988). But see *Wyeth Laboratories v US District Court*, 851 F2d 321 (10th Cir 1988) (district court may not set up “litigation library” in litigation about DTP vaccine).

159. See, for example, the work of Judge Helen E. Freedman, of New York State's Supreme Court, and of Judge Jack B. Weinstein, of the United States District Court for the Eastern District of New York, in “All Brooklyn Navy Yard” asbestos cases (*In Re New York City Asbestos Litigation*, Index No 40000, documents on file with author). See generally Francis E. McGovern, *The Boundaries of Cooperation Among Judges in Mass Tort Litigation* (1991 manuscript on file with author).

Yet another mechanism, often but not always generated as the result of litigation and with the involvement of a judge, is the creation of a "facility" that processes claims and that in many ways is akin to a case-specific agency.<sup>160</sup> For example, for a period of time, a group of asbestos defendants agreed to join in a kind of alternative dispute resolution plan, called the Asbestos Claims Facility.<sup>161</sup> After the demise of that collective, the Manville Settlement Trust was created to process claims against Manville. In the Dalkon Shield case, the trial judge approved the creation of a claims facility to provide payments to claimants, and a variety of procedures, including settlement and arbitration, are in the midst of being developed, to process the claims.<sup>162</sup>

3. *Lawyer-based Processing.* Another linchpin (can there be two linchpins?) is a lawyer. Lawyers can collect cases in a variety of ways. With court agreement, lawyers can denominate one complaint as a "master complaint," file cases individually for many people, and have each complaint incorporate by reference the "master" complaint.<sup>163</sup> Alternatively (and to avoid the costs of filing and the accumulation of multiple "cases"), judges may permit the inclusion of many plaintiffs on a single complaint.<sup>164</sup> While not technically a class, the cases may be dealt with by the court as a joint action, with a single set of rulings governing all proceedings.

Aggregation can also occur without a judge working simultaneously on a set of cases; lawyers can have a "stable" or "warehouse" of plaintiff-clients, or represent a defendant sued by many plaintiffs. While in theory and in form each case is separate, in practice lawyers on both sides deal with the cases as a group, sometimes making "block settlements"—in which defendants give a lawyer representing a group of plaintiffs money that is then allocated among a set of clients.<sup>165</sup> Defense lawyers may also pool resources to defend; some of the claims facilities discussed above are those created by defendants interested in coordinating their activities.

Knowledge about these informal mechanisms often comes from direct participants or from social scientists. For example, one well-known plaintiffs'

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160. See generally Francis E. McGovern, *Foreword, Symposium on Mass Settlement of Mass Torts*, 53 L. & Contemp Probs 1 (Autumn 1990); Deborah R. Hensler, *Assessing Claims Resolution Facilities: What We Need to Know*, 53 L. & Contemp Probs 175 (Autumn 1990); Mark A. Peterson, *Giving Away Money: Comparative Comments on Claims Resolution Facilities*, 53 L. & Contemp Probs 113 (Autumn 1990).

161. See Peterson & Selvin, *Resolution of Mass Torts* (cited in note 88).

162. Feinberg, *The Dalkon Shield Claimants Trust*, 53 L. & Contemp Probs at 105-10 (cited in note 97). See also, *Settlement of IUD Cases Includes Provision for Future Arbitration*, 3 ADR Report 227 (July 6, 1989); and the Newsletters of the Dalkon Shield Trust Claims Resolution Facility (on file with author).

163. See, for example, Pretrial Order No 10: Order on the Filing and Service of Process of the Master Complaint, *In re San Juan Dupont Plaza Hotel Fire Litigation* (MDL-721) (copy on file with author). See generally Diana E. Murphy, *Unified and Consolidated Complaints in Multidistrict Litigation*, 132 FRD 597, 609 (paper presented at the XXIII Meeting of Transferee Judges sponsored by the Judicial Panel on Multidistrict Litigation, October 25, 1990, and calling for more attention to be paid to "the issues surrounding the use of a unified complaint.")

164. Hensler, et al, *Asbestos in the Courts* at 72 (cited in note 154).

165. *Id.* at 95.

attorney, Paul Rheingold, has written about the range of efforts, deployed by plaintiffs' attorneys, to coordinate in mass tort cases.<sup>166</sup> A variety of techniques have evolved—newsletters that keep individual attorneys abreast of case developments, shared discovery, shared experts, and “schools” for training lawyers to try cases of a particular genre.<sup>167</sup> In addition, lawyer-based or lawyer-related institutions, such as the Center for Auto Safety and other consumer monitoring groups, may work in conjunction with lawyers to help them identify injuries, find experts, and work with (or against) regulatory agencies.

The informal techniques of aggregation, whether based upon case law interpretation (not all of which is published) or upon courts and lawyers as the coordinators, are less visible to the academy than are the formal mechanisms. The references to such activities are more often found in legal newspapers and conferences of lawyers and judges than in academic journals. Both the informal and formal mechanisms have spawned a set of guidelines or rules, the *Manual for Complex Litigation*,<sup>168</sup> which is an effort to encourage judges to use similar rules in aggregate litigation while tailoring those rules to the particular kind of case presented.<sup>169</sup> But even these guidelines do not capture the breadth of activity and innovation. In the world of aggregation, the rules (to the extent that term is apt) are found in the files of particular cases and in the minds of judges, special masters, magistrates, and lawyers, who formulate procedures as a litigation evolves.

### C. Contemporary Perceptions

The aggregate techniques, both formal and informal detailed above, result in a federal litigation landscape that is filled with ways to conduct group litigation. While such litigation does not dominate numerically, it is increasingly common and increasingly acceptable. Moreover, a good deal of contemporary commentary urges that there be more of it—formally and informally, voluntary and mandatory. One of the most sustained efforts is that of the American Law Institute, which has taken on the question of adjudication in general<sup>170</sup> and the issue of aggregation in particular. The ALI

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166. Paul D. Rheingold, *The Development of Litigation Groups*, 6 Am J Trial Advocacy 1 (1982). One oft-cited relatively early (1960s) instance of informal coordination grew out of lawsuits against William S. Merrell Company. After a grand jury indictment of that company for providing false information to the Food and Drug Administration about a drug claimed to reduce cholesterol levels, some 1500 plaintiffs filed lawsuits in state and federal courts. Defense counsel asked the Coordinating Committee for Multiple Litigation (the predecessor of the MDL panel) to “take control,” but the Committee declined. Although the defense opposed “actual joinder,” it “tolerat[ed]” plaintiffs’ working as a de facto group for discovery. Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 Cal L Rev 116, 121-27 (1968).

167. Rheingold, *Development of Litigation Groups*, 6 Am J Trial Advocacy at 5-8 (cited in note 166).

168. *Manual for Complex Litigation, Second* (West, 1985).

169. See Andrew J. Simons, *The Manual for Complex Litigation: More Rules or Mere Recommendations?*, 62 St Johns L. Rev 493, 493-94 (1988).

170. See Thomas D. Rowe, Jr., *American Law Institute Study of Paths to a “Better Way”: Litigation, Alternatives, and Accommodation, Background Paper*, 1989 Duke L J 824 (see also 1989 Duke L J 808-823 for description of the project).

has an ongoing "Complex Litigation Project." The thrust of the project is to devise methods to expand the ways in which courts can collect cases. The materials from the 1960s Advisory Committee on the Federal Rules of Civil Procedure provided a window into attitudes of the legal community toward aggregation at that time. The working papers, drafts, and debates of the ALI's Complex Litigation Project over the past few years enable insight into contemporary conversations, into what aggregation is claimed to accomplish, and into how different modes of aggregation appear more politically loaded than others.<sup>171</sup>

1. *The Proposals of the ALI's Complex Litigation Project.* The Reporter for the group is Arthur R. Miller of Harvard Law School; the Associate Reporter is Mary Kay Kane of Hastings College of Law. Nineteen judges, lawyers, and law professors serve as "advisers"; another six state court judges comprise the "state court judges advisory committee," and the ALI "members consultant group" includes more than 150 members who receive invitations to meetings and copies of materials.<sup>172</sup> The Project is comprised of a series of papers, which include a preliminary working paper and then a series of drafts, presented at ALI annual meetings for approval over a period of years.

The 1987 "Preliminary Study of Complex Litigation" reviewed the current techniques for aggregation and found them insufficiently comprehensive. The Study concluded that:

there is much fertile soil the American Law Institute might plow to develop proposals that would improve the resolution of complex litigation. . . . The most profitable major lines . . . are (1) [c]onsider means of increasing the consolidation of related cases . . . ; (2) [e]xplore means of promoting the more efficient handling of common issues in large consolidated actions . . . ; (3) [e]valuate the possibility of encouraging the consolidation of related actions dispersed among state courts as well as federal courts in a single federal or state court . . . ; (4) [s]tudy the possibility of establishing a federal choice of law rule . . . ; (5) [i]nvestigate methods for expanding . . . the preclusive effects of judgments . . . .<sup>173</sup>

All these efforts were to obtain the "achievement of greater efficiency," which (according to the Study) "will require extremely bold steps, many of which come close to encroaching on traditional countervailing policies of fairness and federalism."<sup>174</sup>

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171. Another ALI Project, Enterprise Responsibility for Personal Injury (formerly called "Compensation and Liability for Product and Process Injuries"), has also addressed "Mass Torts and Collective Judicial Procedures." See Reporters' Study, Volume II, at 383-440 (cited in note 64). Unlike the Complex Litigation Project, the Enterprise Responsibility Project is not at a point for presentation to the ALI membership; like the Complex Litigation Project, however, the Reporters' Study endorses aggregate litigation of mass torts. See Reporters' Study, Vol II at 13 ("we recommend reversal of the current presumption against class actions in tort"); at 26 ("We endorse the proposal advanced" by the ALI Complex Litigation Project); and at 412-39 (detailing two models for "expanded collective process").

172. For a listing of the participants (of which I am one), see ALI, Complex Litigation Project, Tentative Draft No 2 at v-xi (cited in note 64).

173. ALI, *Report: Preliminary Study of Complex Litigation* 238-41 (March 31, 1987).

174. *Id.* at 240.

In May of 1989, the ALI Reporters offered a first set of proposals, entitled Tentative Draft No 1, at the annual meeting of the Institute, which generally approved the draft.<sup>175</sup> The three “overriding concerns” that framed the Draft were: (1) “basic principles of federalism”; (2) “new business should not be added to federal court dockets without a demonstrated need for doing so”; (3) “and perhaps most importantly, the fundamental procedural rights of litigants must not be compromised.”<sup>176</sup> The Draft enthusiastically endorsed aggregation, or in the Draft’s term, “consolidation.” The explanation provided was that “[r]epeated relitigation of the common issues in a complex case unduly expends the resources of attorney and client, clogs already overcrowded dockets, delays recompense for those in need, and brings our legal system into general disrepute.”<sup>177</sup> “Even a cursory examination of the problems caused by complex litigation leads to the conclusion that both state and federal courts should develop comprehensive new procedures to consolidate the units of a complex dispute.”<sup>178</sup> The Draft’s proposal was to follow the route and model of the MDL rather than the class action—to go to Congress rather than to the Advisory Committee with a draft proposal for legislation to create a “Complex Litigation Panel” that would decide whether cases should be consolidated for “pretrial proceedings or trial, or both,”<sup>179</sup> and “where to send them.”<sup>180</sup> The purpose of the proposed revision of current federal legislation is “to facilitate the broadest consolidation possible consistent with efficiency and fairness.”<sup>181</sup>

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175. The Complex Litigation Project’s Tentative Draft No 1 was approved, subject to the discussion, to editorial discretion in making improvements, and to items open for further consideration in subsequent phases of the project. 1989 ALI Proceedings at 398 (cited in note 61). At that meeting, a representative of the ABA’s Commission on Mass Torts announced its “support for the efforts of” the Tentative Draft No 1. *Id.* at 367 (statement of Francis E. McGovern, May 19, 1989). As noted, the ABA’s Commission on Mass Torts has not itself been endorsed by the ABA. See note 64.

176. ALI, Complex Litigation Project: Tentative Draft No 1, at 6 (cited in note 64). The Draft does not give details of these concerns but ALI, Complex Litigation Project, Tentative Draft No 2 has a chapter, entitled Federal-State Intersystem Consolidation, and provides further discussion of the “serious federalism issues.” *Id.* at 29 (cited in note 64). During 1990 and 1991, one aspect of those issues—the problem of choice of law—resulted in sufficient controversy that the Complex Litigation Project delayed its draft to enable further study and to bring its proposal before the Council during the fall of 1991. See Mary Kay Kane, *Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts* 19 (paper presented at AALS, Section on Civil Procedure, 1991 and forthcoming in Symposium in Review of Litigation)) (manuscript on file with author).

177. ALI, Complex Litigation Project, Tentative Draft No 1 at 11 (cited in note 64).

178. *Id.* at 24.

179. ALI, Complex Litigation Project, Tentative Draft No 2 at 2 (cited in note 64), and commentary at 4-5 (explaining the desire to give the Panel discretion over the issues and extent of consolidation ordered).

180. ALI, Complex Litigation Project, Tentative Draft No 1 at 48-49 (cited in note 64). The ALI proposal would build on the model of MDL but would augment the power of the consolidators and expressly authorize consolidation for trial as well as pretrial proceedings. See ALI, Complex Litigation, Tentative Draft No 2 at 1-26 (cited in note 64) for commentary on the 1990 revisions of the 1989 proposal.

181. ALI, Complex Litigation Project, Tentative Draft No 1 at 49 (cited in note 64). The proposal included some alteration of personal jurisdictional rules and choice of law provisions so as to “achieve the goal of nationwide transfer for consolidation” and to “ensure swift and effective consolidation of complex cases in the federal system.” *Id.* at 195-96. “[P]articular cases” may be

In May of 1990, the Complex Litigation Project presented the next phase of its work, Tentative Draft No 2, which included a "revised statute for federal intrasystem consolidation" and a statute for "federal-state intersystem consolidation."<sup>182</sup> New additions included provisions that incorporate aspects of the current MDL statute. Specifically, the exemption currently enjoyed by the United States, which is not subject to MDL treatment when the United States is a complainant in antitrust cases and equitable actions in securities cases, would be maintained.<sup>183</sup> Further, as in the current MDL statute, the proposed new Complex Litigation Panel would have authority to promulgate nationwide rules outside the framework of the Rules Enabling Act but such rules could not be "inconsistent" with federal rules or statutes.<sup>184</sup>

But the ALI proposal moved beyond MDL by not only enhancing the possibility of expediting claims but also by enabling the filing of claims not yet brought. Under the draft, transferee courts would be given "maximum flexibility to design and structure the litigation."<sup>185</sup> Transferee courts would be empowered to decide "the source or sources of the applicable substantive law."<sup>186</sup> Interlocutory appeal of severed issues of liability would be available as of right.<sup>187</sup> A federal personal jurisdiction rule would be created to avoid "the vagaries of state long-arm statutes," and a nationwide subpoena power would be conferred.<sup>188</sup> Removal jurisdiction would be expanded to enable state court actions, arising "from the same transaction, occurrence, or series of transactions or occurrences" as those already in federal courts, to be consolidated in federal court.<sup>189</sup> Transferee courts would be instructed to exercise, with discretion, their jurisdictional powers over ancillary and

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exempt from transfer and consolidation "in the interest of assuring fairness to individual litigants." *Id.* at 198.

The 1989 proposal was "phase one" of the project; the 1990 proposal ("phase two"), discussed at text accompanying notes 182-83, 203-04, addressed "consolidation and coordination between litigation units that are dispersed both in the federal and the state courts." The plan had been that phase three was to consider lawsuits "dispersed among multiple state courts but no federal courts," and phase four to address procedural issues such as choice of law, preclusion, and "a variety of other smaller items thought germane to complex litigation." Comments of Arthur R. Miller, 1989 ALI Proceedings at 359 (cited in note 61). As a result of discussions at the 1989 meeting, choice of law moved up on the agenda. See ALI, Complex Litigation Project, Reporters' Preliminary Memorandum on Chapter 6 ("subject covered: choice of law in complex actions") (April 6, 1990). However, as noted above, choice of law proved to be more controversial than expected, and thus its consideration is a two year project, with the hopes of a presentation to the ALI membership in the spring of 1992. Conversation with Mary Kay Kane, April 25, 1991.

182. ALI, Complex Litigation Project, Tentative Draft No 2 (cited in note 64). Future topics included choice of law and "state-to-state transfer and consolidation." *Id.* at xix.

183. ALI, Complex Litigation Project, Tentative Draft No 2 at 6 (cited in note 64). See note 130 above, on the Justice Department's successful efforts in the 1960s to obtain the exemption that now exists for it in the current MDL statute.

184. ALI, Complex Litigation Project, Tentative Draft No 2 at 12-13 (cited in note 64).

185. *Id.* at 14.

186. *Id.* at 17, 139. This provision would exempt cases aggregated under the proposed statute from the rule of *Van Dusen v Barrack*, 376 US 612 (1964).

187. ALI, Complex Litigation Project, Tentative Draft No 2 at 21-23 (cited in note 64).

188. *Id.* at 24-26, 138-39.

189. *Id.* at 33-61, 133-37. However, if "all of the parties as well as the appropriate state judge object to removal of a particular action, then that action shall not be removed." *Id.* at 34, 134.

pendent parties and claims;<sup>190</sup> transferee courts would also have enhanced powers to enjoin related proceedings in state or federal courts.<sup>191</sup> And, importantly, non-parties would be notified of the pendency of an action—to invite intervention and to warn those non-parties of the possibility of issue preclusion.<sup>192</sup>

2. *The Emphasis Shifts.* The two recent ALI drafts illustrate the differences between the voices of the 1960s and contemporary commentary. In the 1960s, aggregation was the exceptional circumstance to which special responses were needed; those special responses were discussed in the context of concerns about individualization and local decisionmaking. For example, the MDL statute included a provision to remand proceedings for trial; the legislative history explains this provision as responsive to the needs of parties and witnesses and also states that, “in most cases there will be a need for local discovery.”<sup>193</sup> The evil then stated to be avoided was “the possibility for conflict and duplication in discovery and other pretrial procedures.”<sup>194</sup>

By the late 1980s and early 1990s, the focus has changed. In general (and not only in aggregate litigation), more attention is paid to the pretrial phase of cases—in recognition of the fact that, in the vast majority of cases, the pretrial is all there is.<sup>195</sup> Further, the experiences of tort litigation involving asbestos and the Dalkon Shield make these problems seem more national than local; the perceived “nationalization” of tort is part of more general acceptance of the interdependencies of localities.<sup>196</sup> A variety of problems—such as acid rain, the homeless migrating in search of warmth and shelter, and hazardous waste disposal—seem to demand national rather than local decisionmaking.<sup>197</sup> And aggregation itself seems decreasingly like a foreign intruder in the legal tradition. Redundancy is now the “evil” to be wiped out.

190. *Id.* at 76-80, 131-33. Compare *Finley v United States*, 490 US 545 (1989), to which the Federal Courts Study Committee also objected (FCSC Report at 47 (cited in note 69)) and which was modified by the 1990 Judicial Improvements Act, codified at 28 USC § 1367.

191. ALI, *Complex Litigation*, Tentative Draft No 2 at 83-86, 143-45 (cited in note 64). Compare the current Anti-Injunction Act at 28 USC § 2283. The Federal Courts Study Committee recommends “further study” of the Anti-Injunction Act, as well as of removal and abstention law. FCSC Report at 48 (cited in note 69).

192. ALI, *Complex Litigation*, Tentative Draft No 2 at 99-100, 145-46 (cited in note 64). The parameters of that section were discussed at the 1990 Annual Meeting of the ALI. See ALI, 1990 Annual Proceedings at 369-78 (May 18, 1990).

193. House Report No 1130, reprinted in 1968 *US Code Cong and Admin News* at 1901-02 [12795-1 House Misc. Reports on Public Bills, 90th Cong, 2d Sess at 4 (February 28, 1968)].

194. *Id.* at 2.

195. See, for example, the 1983 revisions to Rule 16 (on the pretrial process) of the Federal Rules of Civil Procedure. See generally Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U Chi L Rev 494 (1986).

196. See Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U Chi L Rev 671, 687-90 (1989).

197. Compare ALI, *Study of the Division of Jurisdiction Between State and Federal Courts* 378-79 (ALI, 1969), which stated that

[T]he simple fact that more cases might be better—or more efficiently—tried in a federal court is not of itself sufficient justification for such jurisdiction. The problems involved here [in the discussion of multi-party-state diversity] do not relate simply to trial efficiency at large, but grow out of the multi-state nature of our Union . . . . To the extent that the need

The ALI Complex Litigation Project's proposals create and reflect contemporary views. The central problem is said to be "duplicative relitigation of identical or nearly identical issues."<sup>198</sup> To the extent "individuals" appeared as a topic in Tentative Draft No 1, the concerns were twofold: one was about delay—that "someone who is poor and seriously injured may find" her or himself unaided by the system.<sup>199</sup> The second was to "offer a better system than now exists to deliver individual justice in the complex litigation setting."<sup>200</sup> Further, when explaining why the draft refused to have consolidation depend upon parties' requests rather than upon judicial control, the drafters stated that "making transfer and consolidation decisions depend on party consensus ignores systemic values"—to wit, "judicial economy" and "the rational allocation of judicial business."<sup>201</sup> Unlike the commentary of decades recently past, "systemic values" do not include a "sense of individualization that is very important in the administration of justice."<sup>202</sup>

Tentative Draft No 2 discussed individual interests a bit more. The proposed statute for the "complex litigation panel" includes an opportunity for "an individual litigant . . . to demonstrate why the inclusion of a particular action presents a special hardship or inconvenience so that it should be excluded from the consolidated proceedings," but warns that "exclusions

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for a federal forum to handle these multi-state cases is great enough, such incursion must of course be accepted. The problem thus becomes one of balance, and of judgments that can perhaps be better made in somewhat more specific contexts . . .

with ALI Complex Litigation, Tentative Draft No 2 at 49-50 (cited in note 64), which argued for expanded federal removal jurisdiction and stated that the "Tenth Amendment protects state sovereignty only when doing so is not inconsistent with the national government's exercise of its enumerated powers." See also comments made at the 1990 ALI Annual Proceedings at 351 (cited in note 192) ("we ought to solve our national problems as the national problems").

198. ALI, Complex Litigation Project, Tentative Draft No 1 at 12 (cited in note 64). See also Tentative Draft No 2's discussion of the "inefficiency of litigating" individual nonparty's claims when such nonparties decline to intervene (at 118-19, cited in note 64) and that current MDL law "implicitly recognizes that some inconvenience to individual parties is to be tolerated in order to achieve convenience and efficiency on a larger scale." *Id.* at 122.

199. ALI, Complex Litigation Project, Tentative Draft No 1 at 21 (cited in note 64).

200. *Id.* at 26. Tentative Draft No 1 also raised the problem of what it termed the "sometimes devastating impact of complex litigation . . . suffered by large defendants." *Id.* at 17.

201. *Id.* at 85. See also Tentative Draft No 2 at 86 (cited in note 64) (transferee courts need the power to enjoin litigants from proceeding elsewhere, because "[l]itigants and lawyers may resist aggregation and seek to continue their individual litigation for numerous reasons, some valid, some not.")

202. Hazard, *The Effect of the Class Action Device*, 58 FRD at 308 (cited in note 47). Further, when the ALI Tentative Draft No 1 considered issues of damage trials in mass torts, the draft noted the possible desirability of group processing (by keeping cases in the centralized court rather than remanding) in many instances. The draft stated that if factual determinations are linked to already-decided issues, efficiency commands continued centralization. Further, "there may be a justice interest in harmonizing the size of damage awards among multiple plaintiffs." "[T]he most serious injuries" or greatest "loss of revenues should receive the most significant compensation. That principle is likely to be abused severely when numerous plaintiffs have their damage cases heard in different courts before different juries." The countervailing concern mentioned by the draft is not individuals' interests in control over cases, but "unmanageable" cases. Thus disaggregation is proposed not on behalf of individual interests (autonomy, control, identification of individuals and cases), but on behalf of court management concerns. ALI, Complex Litigation, Tentative Draft No 1 at 163-64 (cited in note 64).



should be the exception.”<sup>203</sup> Mention is made of the possible need to pursue issues “individually.”<sup>204</sup> But the animating assumption—that aggregation is to be pursued, even over individual objection—remains in place.<sup>205</sup>

As noted above, the Complex Litigation Project is not alone in its current conception of the desirability for aggregation. Several other groups, including the Reporters for the ALI’s Enterprise Responsibility Project,<sup>206</sup> the ABA Commission on Mass Torts,<sup>207</sup> the Judicial Conference of the United States,<sup>208</sup> the Federal Courts Study Committee,<sup>209</sup> and the National Conference of Commissioners on Uniform State Laws<sup>210</sup> have all endorsed proposals to expand courts’ capacity (sometimes via expansion of federal court jurisdiction) to permit greater consolidation. Many of these proposals may never be enacted but may be implemented informally.

In short, perceptions have shifted. The debate in the 1990s, shaped by those working in mass tort cases, is not whether to aggregate mass torts but what if any limits to impose. In the 1960s, aggregation proponents drew the line at most mass torts, deemed inappropriate for group treatment. In 1990, a new line has been suggested: participants at the ALI agreed that consolidation of actions “that involve only a common question of law” was not appropriate.<sup>211</sup> I think that such a limit will not be longstanding, for the perceived attractiveness of aggregate processing will not easily be cabined. Further, that line is already illusory, given that agency adjudication is a form of aggregation in which the participants of that special dispute resolution mechanism are tied together by common questions of law, and claims facilities created as a part of a mass tort litigation are akin to small agencies, set up to distribute funds after common questions of law have been resolved.

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203. ALI, Complex Litigation Project, Tentative Draft No 2 at 9 (cited in note 64).

204. *Id.* at 17. See also comments on the needs of a “poor” plaintiff to be exempt from proposed removal provisions. *Id.* at 53 (Reporters’ note f).

205. See, for example, the discussion of federal-state intersystem consolidation. *Id.* at 29-31 (“Once the advantages of proceeding in a consolidated fashion become clear, most individuals will take advantage of the opportunities provided . . . [but] the transferee court must be given sufficient power to encourage the participation of those who are recalcitrant . . .”). See also the provision that “opting out” of removal cannot occur at state litigants’ behest alone, but depends upon the concurrence of a state judge. *Id.* at 54.

206. See Reporters’ Study (cited in note 64).

207. See note 64.

208. Approving the Ad Hoc Committee on Asbestos (cited in note 61), and in the 1988 Report of the Proceedings of the Judicial Conference at 22 (cited in note 65). Note that ALI, Tentative Draft No 2 at 27-38 (cited in note 64), did not endorse altering the original jurisdiction of the federal courts but rather altering removal jurisdiction. Were diversity jurisdiction to be abolished, however, the Draft noted that it would consider providing federal original jurisdiction in “complex cases.” *Id.* at 38.

209. FCSC Report at 44-46 (cited in note 69).

210. National Conference of Commissioners on Uniform State laws, Uniform Transfer of Litigation Act (cited in note 70).

211. 1990 ALI Annual Proceedings at 333 (cited in note 192) (comments of Norman J. Chachkin to which Reporter Arthur Miller responded that he was “[a]bsolutely willing” to revise the draft to reflect that understanding); see also 1990 ALI Annual Proceedings at 350 (comments of Allan D. Black).

## III

## ENABLING AND EXPEDITING LITIGATION

Having chronicled the growth of techniques to aggregate and the change in attitude toward aggregation, I turn now to consider two functions of aggregation: enabling the pursuit of claims not yet made and expediting those already pending.<sup>212</sup> Some aggregate proponents have stressed the importance of enabling claims while others have focused on the utility of expediting claims. What turns on how aggregation is characterized? Can the two functions be pursued separately? The answers to these questions come, in part, from consideration of the overlapping histories of class actions and MDL, the two major aggregation innovations of the 1960s. These two provisions—enacted within two years of each other—have had a great impact on federal courts' capacity to treat cases in the aggregate and on contemporary understandings of when aggregation is appropriate. But the legal community greeted the two phenomena quite differently and, despite their enactment back-to-back and their similarities, did not seem to pay much attention to the interrelationship between class actions and multidistrict litigation.

As detailed above, the 1966 class action rules were greeted with controversy, while the 1968 MDL statute was met with warm praise. The comments of two federal judges, speaking around the same time (in the 1970s), are illustrative of the varying receptions of the two aggregation techniques. About class actions, Judge William Becker explained in 1976:

From the judicial viewpoint, it appears that unremitting social and economic warfare is being waged in the class action field.<sup>213</sup>

In contrast, Judge Stanley Weigel stated that, given

creative use of their broad powers [under MDL], transferee judges have developed salutary solutions to many of the staggering problems associated with complicated and intricate multidistrict litigation . . . [thereby] contribut[ing] immeasurably to the public welfare and to the capacity of the federal judiciary to carry its ever increasing burden of litigation.<sup>214</sup>

What explains the different responses to provisions that in practice have proven so similar?<sup>215</sup> First, class actions were expressly aimed at “enabling”

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212. See Yeazell, *The Modern Class Action* at 218 (cited in note 13) (describing the two opportunities presented by group litigation as consolidation of cases already pending and as enabling the pursuit of litigation that, in the absence of the group, could not occur).

213. William H. Becker, *The Class Action Conflict: A 1976 Report*, 75 FRD 167, 168. Judge Becker was an enthusiast of MDL. See Memo from William H. Becker to the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary of the US Senate, “Comments on Memorandum for Subcommittee on Improvements in Judicial Machinery of the Committee of the Judiciary of the United States, by Cravath, Swaine, and Moore, dated February 10, 1967” at 1-2 (March 18, 1967) (on file with author). Judge Becker seemed receptive to the possibility of class actions for certain kinds of mass torts. See Becker, 75 FRD at 187-88.

214. Weigel, *The Judicial Panel*, 78 FRD at 585 (cited in note 122). Judge Weigel was then a member of the Judicial Panel on Multidistrict Litigation.

215. For further comparison and analysis, see Judith Resnik, tentatively entitled *Multidistrict Litigation and Class Actions: Apolitical and Political Rulemaking* (manuscript with author).

litigation—or, to repeat Kaplan's words, "even at the expense of increasing litigation, to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents to court at all."<sup>216</sup> In contrast, the MDL statute was set forth as a vehicle only to "expedite" litigation already filed.<sup>217</sup> The statute, designed with pending cases in mind, was not cast as a reform to enable those "without effective strength" to litigate but rather as a "management" tool. Unlike class actions, MDL did not become identified as enabling plaintiffs (such as consumers, school children, or prisoners) to file lawsuits otherwise beyond their resources and information. While affecting the outcomes of cases, shifting power among lawyers, clients, and judges, MDL retained its expediting aura. As such, it has been a "sleeper"—having enormous effect on the world of contemporary litigation but attracting relatively few critical comments.

But note one aspect of MDL's management capacity. Unlike Rule 23(b)(3) class actions, in which litigants have a right to exclude themselves,<sup>218</sup> multidistrict litigation is involuntary. Once consolidated via MDL, no litigant has an opportunity to opt out.<sup>219</sup> One might think that such a provision would have triggered great opposition. But that brings me to a second formal difference between class actions and MDL. A class action, once certified, is assumed (absent decertification) to be an aggregate litigation until disposition. In contrast, officially MDL is only a temporary aggregation, because cases can be returned to the originating districts for trial—although, as noted above, few cases actually are so remanded.<sup>220</sup> The distinction between aggregation for trial and aggregation for pretrial made MDL appear to do less than it does. The commentary in the 1960s and 1970s suggests that MDL managed, in its early years, both to convey an image that it was bringing cases together but that litigants remained separate and separately represented by individual attorneys<sup>221</sup> and that MDL was a "technical," managerial innovation without political overtones.

During the 1970s and 1980s, the import of a distinction in aggregation for trial and aggregation for pretrial waned. Not only are trial rates for civil cases in the federal courts under six percent<sup>222</sup> and the prospects of gargantuan trials particularly unappealing in aggregate cases,<sup>223</sup> but "the pretrial"

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216. Kaplan, *A Prefatory Note*, 10 B C Indus & Comm L Rev at 497 (cited in note 36).

217. See Weigel, *The Judicial Panel*, 78 FRD at 585 (cited in note 122).

218. This right apparently is not often exercised in practice. See Macey & Miller, *The Plaintiffs' Attorney's Role*, 58 U Chi L Rev at 19-20 (cited in note 86).

219. In practice, to avoid MDL, a litigant has to avoid the federal courts.

220. See text accompanying notes 139-143.

221. Compare Yeazell, *Collective Litigation as Collective Action*, 1989 U Ill L Rev at 45 (cited in note 25) (in "many class actions the represented class member surrenders virtually all autonomy over the litigation").

222. See, for example, 1990 Annual Report of the Director of the Administrative Office of the United States Courts, extrapolated from Table C at 133 and Table C.7 at 161.

223. The Agent Orange settlement is one example. See *In re "Agent Orange" Product Liability Litigation*, 818 F2d 145, 166 (2d Cir 1987) ("Indeed, a settlement in a case such as the instant litigation, dramatically arrived at just before dawn on the day of trial after sleepless hours of bargaining, seems almost as inevitable as the sunrise."). But trials in aggregate cases do occur. See,

emerged (in academic writing and in the experience of lawyers and judges) as the centerpiece of federal litigation.<sup>224</sup> Given the shift in appreciation of the pretrial, one might have expected that, in the 1980s, MDL would have begun to encounter the same critical commentary as class actions. But other shifts occurred, including a growing appreciation for group litigation from filing to disposition.

Current proponents of aggregation have learned some lessons from their predecessors in the 1960s. What the ALI's Complex Litigation Project proposes could easily be described as a revision of the class action rule. With the inclusion of a provision to "invite" intervention at the price of possible issue preclusion,<sup>225</sup> the ALI Complex Litigation Project's Tentative Draft No 2 has offered another version of mandatory class actions. However, the Complex Litigation Project does not claim it wants to enable litigation by proposing a statutory class action mechanism but rather that the Project seeks to expand the much more popular expediting model of MDL. Tentative Draft No 1 speaks of "dispersed actions" that are "gathered."<sup>226</sup> The Complex Litigation Project thus portrays itself as dealing with managerial processing problems and attempts to avoid some of the controversy that surrounds class actions. As in the 1960s, the protective coating helps to obscure the ever-present political implications of aggregation. With its MDL-like provisions, the Complex Litigation Project has thus far received tentative approval from the ALI membership.<sup>227</sup>

But the ALI's Complex Litigation Project may not need to avoid class action nomenclature much longer. Within the last decade, the co-existence of class actions and multidistrict litigation have affected appraisals of both. When faced with mass torts, some judicial hostility to class actions melts, as the class action becomes to be perceived more as a management tool than as a

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for example, the *DuPont Plaza Fire Litigation*, tried in phases as described in *In re Allied-Signal Inc.*, 891 F2d 967 (1st Cir 1989) (mandamus to recuse trial judge; discussion of "phase one") and in Marcia Coyle, *Both Sides Are Claiming Victory: Dupont Fire Litigation*, Natl LJ 3 at C1 (October 15, 1990) (second phase tried over some 15 months, with nine of the 107 defendants remaining as this phase of the litigation went to the jury).

224. See Rowe, *Better Way*, 1989 Duke LJ at 874-75 (cited in note 170); Judith Resnik, *Managerial Judges*, 96 Harv L Rev 374 (1982); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 Calif L Rev 770 (1981).

225. ALI, Complex Litigation Project, Tentative Draft No 2 at 97-129 (cited in note 64). As noted by Thomas Rowe, unlike many of the contemporary proposals for large scale litigation, Tentative Draft 2 is the only one to include a provision directed at not-yet-filed claims and to respond with "court-ordered intervention and issue (but not claim) preclusion." Rowe, *Jurisdictional Proposals*, at 24-25 (cited in note 70).

226. ALI, Complex Litigation Project, Tentative Draft No 1 at 27 (cited in note 64).

227. Final approval awaits completion of the project, and the membership will have the opportunity to review the entire work and to approve or disapprove it. 1990 ALI Proceedings at 357-58, 361 (cited in note 192).

In contrast to the MDL remodeling of the Complex Litigation Project, the ALI's Reporters' Study for the Enterprise Responsibility Project has frankly embraced the class action model and has thus far been too controversial (about a range of issues) to have its proposals sent to the membership for approval. See Reporters' Study, Vol. II, at cover page and at 412-29 (cited in note 64). See also Jerry J. Phillips, *Comments on The American Law Institute Study of Enterprise Liability for Personal Injury* (1991) (on file with author) (detailing disagreement with several aspects of the study).

tool for political empowerment. Because many mass tort victims (particularly those injured in a “mass accident”) have stakes sufficient to attract contingency fee lawyers, use of a class action in such cases can be viewed more as a way of conserving judicial resources than as a means of access to court for those who have not yet filed (nor might ever file) lawsuits. Further, when using MDL in mass torts, its inability to reach unfiled, potential claims becomes a limitation. When seeking to settle mass torts, judges and lawyers have learned that, absent “global peace” (preclusion of all future claims), settlements are hard to achieve.<sup>228</sup>

Thus, two parallel developments are occurring. The first is to reframe the class action rule to enable certification of mass torts as mandatory class actions. The Advisory Committee on Civil Rules is in the midst of considering Rule 23 amendments to authorize such a practice.<sup>229</sup> The second is to retool MDL—to enable aggregation for trial as well as for pretrial and to “invite” potential claimants to join. That is the tack taken by the ALI Complex Litigation Project. Because joinder of claims (class actions) and joinder of cases (MDL) overlap, efforts are underway at the formal level to reflect what is understood by the participants, that the two functions of aggregate litigation—expediting and enabling—are sufficiently intertwined that one begets interest in the other, and both are related to a desire to dispose of pending and newly-created claims in their entirety. While in theory distinct, claim expedition and claim enabling are not severable in practice.

What has been less explored in the enthusiasm for MDL’s expediting function and in the changing reception to class actions is that both the enabling and expediting functions of aggregate litigation have political content. Consolidation of lawsuits already filed is not a neutral act, at least in this non-neutral world, in which some litigants are richer than others, some have claims of more potential economic value than others, some have more time to spend on litigation, and some lawyers have more resources than do others. While judges complained that “class action under Rule 23 is subject to abuse, [such as] solicitation” of clients, MDL also offers occasions for similar attorney behavior. Positions on plaintiff steering committees, common in MDL, often rest on the number of clients represented. Whether aggregated for “efficiency” or for “justice,” aggregation is a normative phenomenon with political and social content. When the MDL panel decides to group one hundred cases into a litigation unit, that act alters the resources, incentives, and interactions of participants; just as when a class is certified, power shifts occur. The many and complex effects of aggregation require detailed analysis;<sup>230</sup> the point here is that the focus on class actions as political

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228. See generally Feinberg, *The Dalkon Shield Claimants Trust*, 53 L & Contemp Probs 80-92 (cited in note 97).

229. Conversation with Paul Carrington, Reporter for the Civil Rules Advisory Committee (April 1991).

230. See Deborah Hensler & Judith Resnik, tentatively entitled *Disaggregating Aggregation* (manuscript on file with authors).

moments has obscured the political import of the many other procedural reforms that have similar content.

#### IV

#### AGGREGATION AND THE FEDERAL COURTS

Scholars have begun to examine the impact of aggregation on tort law,<sup>231</sup> and while I am also intrigued by such questions, that task requires more length than this paper can bear. I am also interested in assessing the effects of aggregate processing on litigation—the enabling of the pursuit of some claims and the discouragement of others; the building and then the capping (by virtue of settlement pressures) of a “pot”; the debate about whether and how the value of claims is altered; the role of insurance; the impact of the United States as a litigant; and the concentration of power in lawyers, judges, and other specially-created auxiliary institutions such as claims facilities and special masters. Each of these issues merits detailed examination, again not appropriate for this article. My concerns in this section are limited to the impact of the movement from cases to aggregate litigations on the conception of the work appropriate for the federal courts. Below I outline the primary lessons to be drawn from the thirty year history of the formal and informal ways in which aggregation can occur.

##### A. From “Rights” to “Interests”; From “Cases” to “Litigation”

Several commentators have explored the change in adjudication from a “rights” based ideology to an “interest” based approach.<sup>232</sup> A concomitant movement has occurred as cases themselves lose their boundaries and become part of a “litigation.” The many ways over the past thirty years by which aggregation has been created demonstrate this new bundling of claims and parties. While few directly criticize individual treatment of cases, the focus of discussions of federal procedure in the late 1980s and 1990s has been on “centralization,” “coordination,” and “consolidation,” all part of “complex litigation” that (it is hoped) will vanquish “redundancy,” “repetition,” and “duplication”—the by-products of the “old” individual case based system. Despite continued invocation of the “deep-rooted historic

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231. See, for example, David H. Rosenberg, *Comment, Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 BU L Rev 695 (1989); Schuck, *Agent Orange on Trial* at 255-97 (cited in note 57); Robert L. Rabin, *Tort System on Trial: The Burden of Mass Toxic Litigation*, 98 Yale L J 813 at 828-29 (reviewing Schuck's book and commenting that tort law has “lost its *raison d'être*”); Abraham, *Individual Action and Collective Responsibility*, 73 Va L Rev at 845 (cited in note 88); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L Rev 439 (1990); Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 Yale L J 1643 (1985).

232. See, for example, Bone, *Personal and Impersonal Litigative Forms*, 70 BU L Rev at 232-304 (cited in note 13); Yeazell, *Collective Litigation as Collective Action*, 1989 U Ill L Rev at 52-55 (cited in note 25); Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstitution of the Judicial Subject*, 66 Denver U L Rev 437 (1989).

tradition that everyone should have his own day in court,"<sup>233</sup> insistence on that moment is declining. Given limited resources and declining trial rates, the idea that trials demonstrate that the justice system is paying attention to individuals seems decreasingly plausible. As case law pressures have grown and managerial techniques seem all the more imperative, the conclusion emerges that "[i]ndividual litigants just to some degree have to be collectivized because of the exigencies of the system . . . ."<sup>234</sup>

As Stephen Yeazell describes it: "Our legal system has shown signs of a gradual, almost surreptitious, movement toward collective litigation."<sup>235</sup> While the "gradual, almost surreptitious" description toward aggregation may be apt given the time frame (medieval law to the present) that Yeazell has analyzed, such description does not capture the dynamic changes of the past thirty years. Although concerns about individual participation remain very much a part of contemporary conversations and Yeazell's questions about free riders and "kidnapping" of involuntary participants must be asked,<sup>236</sup> the enthusiasm for aggregation has begun in certain contexts to overshadow such concerns.<sup>237</sup> As Deborah Hensler describes, "a consensus has emerged calling for substantial modifications in traditional court processes to improve the efficiency and equity of the mass claims resolution process"<sup>238</sup> in tort cases.

What has happened in mass torts is illustrative of a wider trend—an interest in "substantial modifications of traditional court processes" in a variety of cases.<sup>239</sup> By phrases such as the "asbestos litigation" and the

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233. *Martin v Wilks*, 490 US 755, 762 (1989), quoting Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *18 Federal Practice & Procedure* 417, § 4449 (1981) (holding that white firefighters who had neither intervened nor been joined in a case brought by blacks alleging employment discrimination were not bound by an earlier consent decree and could collaterally attack it).

234. 1990 ALI Proceedings at 356 (cited in note 192) (comments of Arthur Miller in response to a protest by Emmet J. Bondurant, II, who objected to the involuntary nature of the ALI's Complex Litigation Proposal and commented that a plaintiff may "involuntarily be forced to trial in a distant forum, effectively be represented by a lawyer not of his own choosing, his testimony never appearing before the fact finder except in a deposition, which a district judge will always promise to read but never read, and lose all of the individual characteristics that make up a trial"). *Id.* at 355.

235. Yeazell, *Collective Litigation as Collective Action*, 1989 U Ill L Rev at 43 (cited in note 25).

236. *Id.* at 44.

237. As recognized by the Supreme Court in *Martin v Wilks*, 490 US at 762 n2, in which the majority speaks of "an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party" which then permits "legal proceedings [to] terminate pre-existing rights if the scheme is otherwise consistent with due process." Cited as examples are the federal class action rule, bankruptcy, and probate. The doctrinal question is what will be interpreted as "consistent with due process."

238. Deborah R. Hensler, *Resolving Mass Torts: Myths and Realities*, 1989 U Ill L Rev 89, 89-90; see also Peterson & Selvin, *Resolution of Mass Torts* at 1-19 (cited in note 88).

239. Albert Alschuler refers to the "'collectivist' bent . . . to describe the process of viewing a collectivity of things or people all at once . . ." For Alschuler, the aggregate impact of a legal rule, not how it operates in particular cases, now dominates discussion of whether such a rule is justified. Albert W. Alschuler, "Close Enough for Government": *The Exclusionary Rule after Leon*, 1984 Sup Ct Rev 309, 346. Alschuler argues that "[m]ore than other governmental agencies, courts reinforce a sense of individual worth and individual entitlement." Albert W. Alschuler, *Mediation with a Mugging: The Shortage of Adjudicative Services and the Need for a Two Tier Trial System in Civil Cases*, 99 Harv L Rev 1808, 1810 (1986). He criticizes courts for abandoning their role of "assuring individuals that their claims

“Savings and Loan litigation,” we link individuals and their interests with the image that courts and lawyers could and should interact with such a “litigation” as an interrelated whole. The primacy of the individual in relation to her or his own case has declined.<sup>240</sup>

## B. Centralization and Federalization

From the descriptions and practices of consolidation of cases into a litigation unit comes the prescription for more of it, sometimes in courts, sometimes in agencies.<sup>241</sup> Jack Weinstein believes that the “basic legal and factual decisions governing disaster claims should be made in a single forum;”<sup>242</sup> he proposes consideration of a Federal National Disaster Court.<sup>243</sup> Judge Weinstein’s comments are illustrative of the many proposals to centralize litigation. While some (specifically, the National Conference of Commissioners on Uniform State Law<sup>244</sup> and the second Tentative Draft of the ALI Complex Litigation Project<sup>245</sup>) have included consideration of centralization in state courts, most of the focus is on the federal courts.<sup>246</sup> To

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of injustice will be heard, considered, and judged on the merits.” Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 Harv L Rev 1436, 1454 (1987).

See also Schroeder, *Corrective Justice*, 37 UCLA L Rev at 470-71 (cited in note 231) (“we have long since passed the time when on-going judicial administration of group remedies seems unusual . . .”); Peter Hay & Richard Marcus, *Introduction*, 1989 U Ill L Rev 35 (Symposium: Conflict of Laws and Complex Litigation, Issues in Mass Tort Litigation) (“[T]he individualistic cast of the American society and economy has been eroding for over a century.”). For discussion of increased use of doctrines of preclusion, see Judith Resnik, *Tiers*, 57 So Calif L Rev 837 (1985).

240. This is not to say that the battle about that primacy is over. The ABA’s recent refusal to approve its Commission on Mass Torts’ Report (cited note 64) exemplifies the strength and the complex incentives of those who support both aggregate and individual case models. See also 58 USLW 2477 (February 20, 1990) (House of Delegates of ABA rejects proposal to support expansion of diversity jurisdiction for multiparty, multiforum tort claims arising out of a single event or occurrence); Robert A. Sedler & Aaron D. Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 Marquette L Rev 76 (1989).

Further, the outcome of the ALI’s Complex Litigation Project’s work is not certain. Final approval of the work of the project will not occur until its completion, and, as Stephen Burbank commented, “[t]here are a number of people . . . who have a basic philosophical problem with the entire project . . .” 1990 ALI Proceedings at 377 (cited in note 192). Arthur Miller noted the pressures on the Project and that it had “backed off” on some of its proposals. *Id.* at 344. However, objectors were not successful in limiting that Project to “single-event claims.” *Id.* at 359-61.

241. For criticism of those that claim agencies to be better than courts in assessing risk of injury, see Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U Pa L Rev 1027, 1031 (1990) (“ambitious proposals to increase the scope of agency authority at the expense of judicial scrutiny are remarkably premature”) (footnote omitted).

242. Weinstein, *Preliminary Reflections*, 11 Colum J Envir L at 16 (cited in note 88); Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U Ill L Forum 1201, 1215.

243. Weinstein, *Preliminary Reflections*, 11 Colum J Envir L at 44-47 (cited in note 88).

244. Draft of Uniform Transfer of Litigation Act (cited in note 70).

245. ALI, Complex Litigation Project, Tentative Draft No 2 at 27-31 (cited in note 64) (“Even if fairness and efficiency suggest that certain litigation would benefit from being transferred and consolidated in a single tribunal, the question remains which court system offers the most appropriate forum.”).

246. Even the Reagan administration, often identified with states’ rights, proposed a products liability bill that would have enlarged federal court jurisdiction. HR 5471, 99th Cong, 2d Sess (1986) (Product Liability Reform Act of 1986); S1999, 99th Cong, 1st Sess (1985) (Product Liability Voluntary Claims and Uniform Standards Act).



accomplish such centralization, many rely on expansive understandings of the authority of Congress to confer jurisdiction on the federal courts and argue that the federal courts will need the authority to divest state courts of jurisdiction over pending cases.<sup>247</sup>

In some respects, the proposals for federal control over tort litigation are remarkable. Centralization of tort cases is not intrinsically linked to *federalization* of such cases. Many of the tort cases in federal courts (federal statutory claims aside) have been based upon state law claims brought into federal court by virtue of diversity jurisdiction and, in this century at least, are therefore perceived as having a weak claim to federal resources.<sup>248</sup> Commentators have long been advocating the diminution or abolition of diversity jurisdiction.<sup>249</sup> Congress recently increased the monetary amount required for diversity from \$10,000 to \$50,000.<sup>250</sup> The Supreme Court has repeatedly interpreted the statutory authorization of diversity jurisdiction in a restrictive manner.<sup>251</sup> In April of 1990, the Federal Courts Study Committee proposed eliminating diversity jurisdiction, "subject to certain narrowly defined exceptions."<sup>252</sup>

Yet, in mass tort litigation, courts strive to preserve federal jurisdiction, and in many instances do so by liberal interpretations of diversity jurisdiction.<sup>253</sup> Further, many of the recent proposals for additional ways to aggregate cases include provisions for enlarging or reformulating diversity jurisdiction—to expand upon the model provided by bankruptcy and interpleader and to relax diversity requirements so as to bring all the cases together in a single forum.<sup>254</sup> While the Federal Courts Study Committee

247. See Rowe & Sibley, *Beyond Diversity*, 135 U Pa L Rev at 49-58 (cited in note 63); Sherman, *Class Actions and Duplicative Litigation*, 62 Ind L Rev at 540-59 (cited in note 60). See also *In Re Baldwin-United Corp.* (Single Premium Deferred Annuities Insurance Litigation), 770 F2d 328 (2d Cir 1985) (upholding injunction against filing in state court under All Writs Act, at least when possibility of unified settlement existed).

248. "To put it simply—the continuation of diversity jurisdiction despite the current state of the docket of the federal courts is unjustifiable, and should not be countenanced any longer." Wilfred Feinberg, *Is Diversity Jurisdiction an Idea Whose Time Has Passed?*, New York State Bar J 16 (July 1989).

249. See generally Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 Harv L Rev 963 (1979); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 Harv L Rev 317 (1977). Compare John P. Frank, *The Case for Diversity Jurisdiction*, 16 Harv J Legis 403 (1979).

250. Pub L No 100-702, § 201, 102 Stat 4642, 4648 (November 19, 1988), codified at 28 USC § 1332.

251. *Snyder v Harris*, 394 US 332 (1969); *Zahn v International Paper Co.*, 414 US 291 (1973); *Owen Equipment & Erection Co. v Kroger*, 437 US 365 (1978).

252. FCSC Report at 38-39 (cited in note 69).

253. See, for example, *In re A.H. Robins*, 880 F2d 709, 723-25 (4th Cir 1989), cert denied, 110 S Ct 377 (1989) (the "legal certainty" that each claimant did not have the requisite \$10,000 claim had not been established and the case could proceed as a diversity action, and cases cited therein). See also the Pretrial Order No 18 in *In Re San Juan Dupont Plaza Hotel Fire Litigation*, MDL-721 (October 20, 1987) (if non-diverse parties are included, then order finds them misjoined and the remaining parties litigate in federal court) (on file with author). See generally, Mullenix, *Complex Litigation Reform*, 59 Fordham L Rev at 195-96 (cited in note 70).

254. Rowe & Sibley, *Beyond Diversity*, 135 U Pa L Rev at 8 (cited in note 63). See also Feinberg, *Diversity Jurisdiction*, New York State Bar J at 8 (cited in note 248) ("[O]f course, there are big, sprawling cases that involve multistate litigation—mass disasters, for example—and other cases

urged abolition of diversity in general, it sought to preserve federal court jurisdiction over some mass torts and other complex multi-party, multi-forum cases.<sup>255</sup> Similarly, the hostility<sup>256</sup> of many on the federal bench to class actions has eroded—at least in the context of mass torts. When approving the class action certification of a portion of the Dalkon Shield litigation, the Fourth Circuit surveyed the courts that have approved class actions and claimed that a “liberal construction” of the class action rule was an appropriate response to the “avalanche of mass products liability suits.”<sup>257</sup>

Thus, a by-product of the interest in enhancing federal authority over mass torts is the revitalization of at least one form of diversity jurisdiction and of class actions themselves.<sup>258</sup> While centralization has not yet resulted in a renaissance of interest in the federal government as representative of aggregates, that role may also reemerge. Statutes that empower the federal

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where special rules for federal court jurisdiction make sense because no one state can obtain jurisdiction to handle them properly.”).

As Arthur Miller described the ALI Complex Litigation Project, “we have not proposed any original subject matter jurisdiction for complex cases.” 1990 Annual Proceedings at 338 (cited in note 192). For discussion of the constitutional problems with expanding the reach of federal jurisdictional statutes while not enacting legislation that provides standards of conduct or authorizing the development of federal common law, see Mullinex, *Complex Litigation Reform*, 59 *Fordham L Rev* at 173, 196-223 (cited in note 70).

255. FCSC Report at 38-40, 44-46 (cited in note 69) (Congress should make “the federal forum more readily available in certain complex cases—some product liability litigation, for example—involving scattered events or parties and substantial claims by numerous plaintiffs.”).

256. See Carter, *The Federal Rules*, 137 *U Pa L Rev* 2179 (cited in note 49).

257. *In re A.H. Robins*, 880 F2d at 725-29.

258. Aggregation may also affect a variety of other legal doctrine. One illustration is judicial disqualification. In 1988, 28 USC § 455 was amended to permit a federal judge with a small economic stake to remain as the presiding judge if “substantial judicial time has been devoted to the matter.” 28 USC § 455(f), Pub L No 100-702, Title S, section 1007, 102 Stat 4667. The example given to justify the change was the *In re Cement and Concrete Antitrust Litigation* in which a judge discovered, after some time presiding, that his spouse owned a very small amount of stock in one of the many corporations that was a party to the litigation. His recusal was explained in 515 F Supp 1076 (D Ariz 1981), aff’d, 688 F2d 1297 (9th Cir 1982), for want of a quorum aff’d as if by an equally divided Court sub nom *Arizona v US Dist Ct*, 459 US 1191 (1983). Given the size of the stakes in the case, the many parties, and the time when the problem of the judge’s “financial interest” emerged, many criticized the requirement of judicial disqualification, and the statute was changed.

Case law may also reflect views that judicial ties to litigants should be treated differently in large cases than small, because, in large cases, such connections become difficult to avoid. For example, in the *DuPont Plaza Fire Litigation*, some defendants challenged the trial judge and sought to have him recused because of his law clerks’ family ties to litigants’ attorneys. The trial judge declined, and the First Circuit denied the petition for mandamus—in part by noting the “special circumstances” of the “highly complex mass tort litigation” that “involves hundreds of lawyers, thousands of parties, and hundreds of millions of dollars in potential damages.” *In re Allied-Signal Inc.*, 891 F2d 967, 968, 971 (1st Cir 1989), cert denied sub nom *ACW Airwall, Inc. v US District Court of Puerto Rico*, 110 S Ct 2561 (1990). Further, “the federal bar in Puerto Rico is small . . . . The number of Puerto Rican lawyers involved in this case is large . . . . The risk that a law clerk, or some other staff member, will have a brother or sister or some other family member involved in this case is a likely concomitant of trying such a large case in such a small district.” *In Re Allied-Signal*, 891 F2d at 971. In the petition for certiorari, defendants framed the first question presented as whether the appellate court erred by “holding that 28 USC § 455 imposes a variable standard of judicial propriety that is defined by the size of the case, its location, and the judge’s asserted need . . . .” *ACW Airwall, Inc. v US District Court for the District of Puerto Rico*, Petition for Certiorari at i (March 20, 1990), 58 USLW 3684 (April 24, 1990) (full petition on file with author). See also *In re New York City Asbestos Litigation* (joint state and federal order) denying motion to disqualify settlement master-referee Kenneth Feinberg (Index No 40000, May 15, 1990).

government to litigate on behalf of allegedly injured victims may once again become popular.<sup>259</sup>

Federalization reflects the growing perception that the problems raised in many litigations are about harms suffered by people all over the country. The interest in altering federal jurisdiction to capture these claims is accompanied by proposals either to impose federal law or to permit federal courts to choose which state's law to apply.<sup>260</sup> The individual case system was linked to legal rules that assumed the primacy of a single state's relationship to a particular dispute or set of disputants.<sup>261</sup> Increasingly, judges and legal theorists have trouble justifying why to pick one state law over another to govern mass torts and have begun to advocate nationwide choice of law rules for such cases.<sup>262</sup>

The perceived utility of centralization is overwhelming the few voices that argue for the desirability of continuing to have multiple and overlapping cases and court systems. Maintaining such redundancy across cases and courts, they claim, has much to teach for such redundancy can engender a dialogue among the participants in a federated system and uncover both the divergences and agreements extant in a federated system.<sup>263</sup> Further, no single authority should hold such sweeping power to respond to problems for which there is no single answer.<sup>264</sup> The centralization of power in the hands of a very few judges and lawyers is just-emerging as a vivid attribute of contemporary large scale litigation, not as yet accompanied by concomitant changes to guide the exercise of such authority.<sup>265</sup>

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259. Compare the efforts by the Carter administration to amend Rule 23 by legislation that would have enabled the federal government to function as a representative of plaintiffs under certain circumstances. See Daniel J. Meador, *Proposed Revision of Class Damage Procedures*, 65 ABA J 48 (January, 1979).

260. ALI, *Complex Litigation*, Tentative Draft No 2 is illustrative of the many suggestions to enable the federal court handling complex litigation to choose what law to apply. Id at 139 (cited in note 64); ALI, *Complex Litigation*, Tentative Draft No 1 at 199-214 (cited in note 64); and forthcoming as the next phase in the project (see Reporters' Preliminary Memorandum, April 6, 1990, Tentative Draft No 2 at xvii-xix). See also Atwood, *The Choice-of-Law Dilemma*, 19 Conn L Rev 9 (cited in note 91); Rowe & Sibley, *Beyond Diversity*, 135 U Pa L Rev at 37-41 (cited in note 63); Steinman, *Law of the Case*, 135 U Pa L Rev 595 (cited in note 111). Compare the Supreme Court, in 1964, in *Van Dusen v Barrack*, 376 US 612 (1964) (rejecting the idea that transferred cases in an airplane crash to a particular district permitted the transferee court to choose what law to apply).

261. As late as 1977, the Clerk for the Multidistrict Litigation Panel described the unlikelihood of that panel's being interested in "actions arising from purely local matters, actions which relate solely to state matters . . ." Howard, *1977 Multidistrict Guide*, 75 FRD at 580 (cited in note 132).

262. For example, Linda Mullenix argues that Congress should provide both jurisdiction over such cases and either "a substantive tort law provision or a federal common law of mass torts." Mullenix, *Complex Litigation Reform*, 59 Fordham L Rev at 197 (cited in note 70).

263. See, for example, Abraham, *Individual Action and Collective Responsibility*, 73 Va L Rev 845 (cited in note 88); Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 Wm & Mary L Rev 639 (1981); Martha Minow, *The Supreme Court, 1986 Term, Foreword: Justice Engendered*, 101 Harv L Rev 10 (1987). See also Resnik, *Dependent Sovereigns*, 56 U Chi L Rev at 742-58 (cited in note 196).

264. See Gillette & Krier, *Risks, Courts, and Agencies*, 138 U Pa L Rev at 1099-1109 (cited in note 241).

265. See generally, for example, the description of Agent Orange, in Schuck, *Agent Orange on Trial* (cited in note 57); and the discussion at the 1990 ALI Proceedings at 328-30 (cited in note 192) (the importance of picking the judge who will run large scale cases and the risk of judicial excesses).

But even if one shares the view that nationwide responses are necessary to asbestos, other product liability problems, environmental harms, and mass accidents, enhancing the jurisdiction of the federal courts is not the only possible nationwide response available. Not only could the national government regulate, but one could also imagine administrative agencies being invested with authority or the creation of other courts to handle such problems. Further, given the many voices that have insisted that diversity cases are inappropriate for federal courts, why not consider the establishment of inter-state courts to handle tort cases in which litigants come from different states?<sup>266</sup>

Such a proposal returns one to the question of the desirability of redundancy. The current set of proposals on aggregation use the federal courts as the central forum. Such centralization will increase federal court power and, in the context of mass torts, will shift the task of developing tort law from state to federal courts. An alternative proposal, to create a third set of courts run by a consortium of the states, is premised upon four assumptions: that the federal courts have no special competence in or claim on tort law development, that federal court resources are scarce, that augmenting federal court authority is not necessarily desirable, and that having multiple court systems is preferable to having a single court system.

Of course, the idea of the creation of yet another set of courts seems “hard” and “impractical.” The state courts are strapped for resources; the coordination problems are great, and much is already *in place* at a federal level. Law firms are national; federal judges are everywhere, and mechanisms currently exist that just need a bit of expansion, a little tinkering. Thirty years ago it seemed “unnatural” to think about mass torts and federal court class actions. Today, even as opponents of diversity jurisdiction seem to be gaining center stage, it seems “unnatural” to think about not using the federal courts as the place for mass tort litigation.

One other explanation of the reliance on the federal courts to centralize mass tort litigation needs to be underscored. As detailed in Part II, many of the formal and informal techniques in the federal courts that enable aggregation exist with little or no legislation. Agency adjudication, the creation of a new set of interstate courts, and the promulgation of federal tort standards all require Congress and vivid political action. The Judicial Conference has called for congressional action—in the context of asbestos litigation—but many commentators are not optimistic about the chances that the requisite deals will be struck among the array of interested parties (manufacturers, insurance companies, unions, and lawyers). So lower visibility change occurs, via default and via accommodation of existing mechanisms, to wit, the federal courts.<sup>267</sup>

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266. Compare the Draft Proposal of the National Conference of Commissioners on Uniform State Laws (cited in note 70), which proposes using states as transferor or transferee courts.

267. As detailed in Weinstein & Hershenov, *The Effect of Equity*, 1991 U Ill L Rev at 1202-07 (cited in note 242).

Contemporary limits on centralization thus come not from an ideological commitment to multiplicity but from politics. The absence of consensus on what the underlying standards of conduct should be restrains aggregation at the legislative level.<sup>268</sup> Similarly, the major stumbling block (as yet not faced) for the ALI's Complex Litigation Project is choice of law. While the absence of a political consensus constrains the options and blocks formal revisions, the goal remains centralization and the current vehicle is informal innovation in the federal courts.

### C. Changing Roles for Article III Judges

The simultaneously-made arguments that the federal courts are not the appropriate venue for individual tort cases but are the venue for big, complex tort cases raise the question about the relationship between the number of parties, the size and scale of a case, and the availability of federal court jurisdiction in general. The subject of federal court jurisdiction has recently received comprehensive review by the Federal Courts Study Committee ("FCSC"). In many respects, the work of the FCSC is to be applauded; some fifteen individuals, appointed by the Chief Justice, authored (during less than fifteen months of their tenure) what is in essence a book about federal court jurisdiction.<sup>269</sup>

Like the topic of the impact of aggregation, the work of the FCSC is deserving of discussion in and of itself. As the press release notes, the panel "proposed over one hundred changes in the administration and operation of the federal court system."<sup>270</sup> Relevant to this article is the FCSC Report's efforts to identify cases that have special claims on the federal judiciary.<sup>271</sup> Noting that "the federal judiciary is composed most importantly of Article III judges"<sup>272</sup> and that their number must be kept small,<sup>273</sup> the FCSC recommends parsing federal court jurisdiction in some respects and reallocating work between Article I and Article III judges and between state and federal judges.<sup>274</sup>

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268. In this respect, Linda Mullenix errs when she concludes that the complex litigation proponents "do not wish to pay the price of true complex litigation reform, which is to federalize both the problem and the solution." Mullenix, *Complex Litigation Reform*, 59 *Fordham L Rev* at 222 (cited in note 70). It is not an absence of desire but rather the inability to figure out how to make the deal.

269. The legislation that created the FCSC is set forth at 28 USC § 331 "note," Pub L No 100-702, Title I, 102 Stat 4644 (November 19, 1988).

270. Federal Courts Study Committee, News Release 1 (April 2, 1990) (on file with author). For a summary of the major recommendations, see William K. Slate II, *Report of the Federal Courts Study Committee: An Update*, 21 *Seton Hall L Rev* 336 (1991).

271. FCSC Report at 39 (cited in note 69). ("The basic criterion for creating federal jurisdiction is that a particular kind of dispute needs a federal forum.")

272. *Id.* at 69.

273. *Id.* at 8. ("1,000 [judges] is the practical ceiling" for the Article III judiciary, and that number represents the "limits on the natural growth of the federal courts.")

274. See, for example, *id.* at 39 ("Given all the demands on the federal courts, there is little reason to use them for contract disputes or automobile accident suits simply because the parties live across state boundaries . . .").

One thread that runs through several recommendations of the Report is that civil cases filed by individuals, under federal statutory causes of action or state law and involving relatively small dollar amounts, are not cases for which Article III judges should presumptively be provided.<sup>275</sup> A related theme, based on current Supreme Court doctrine<sup>276</sup> about the constitutionality of adjudication by Article I judges, is to retain lawmaking authority in the Article III judiciary but to delegate factfinding to non-Article III judges.<sup>277</sup> These aspects of the FCSC Report should be read in the context of the movement toward aggregate procedures.

When a group problem is presented, such as the Dalkon Shield litigation (rather than a particular woman's lawsuit against A.H. Robins), that litigation is named "complex," and, as such, appropriate for decision by the most powerful in a hierarchy (in this context Article III judges). Once a litigation or "big case" is a part of the framework, "little cases" may seem more "routine," less demanding of special skill or authority.<sup>278</sup> But neither "big" or "little," "novel" or "routine" cases exist as absolutes; we understand the import of cases in the context of others. The pursuit of group-based processes for courts alters the perception of the utility, desirability, and value of responding—with Article III judges—to individual, "small" value cases.

As the end of this century approaches and the next begins, the issue emerging in the federal courts will be to justify *individual* civil litigation in certain contexts, including how to explain the devotion of time and attention

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275. See, for example, the proposal (with dissents) for a disability court. Id at 55-59 ("these new Article I bodies will provide a more thorough and expert examination of the facts than federal district courts can provide, given the other demands on their time;" id at 56); the proposal for administrative decisionmaking in cases filed under the Federal Employer Liability Act and the Jones Act (id at 62-64); removal of federal tort claims under \$10,000 (id at 81); an experimental program to arbitrate—if both parties consent—claims of employment discrimination. Id at 61. Interest in removing claims of small dollar value may come from concern about the costs imposed by federal litigation. During hearings on the December draft of the proposal, some members of the FCSC stated that the removal of small dollar claims from federal court jurisdiction was appropriate to avoid imposing the high costs of federal practice on litigants unable to afford them. Partial transcript of Hearing, San Diego, January 31, 1990 (on file with author). See also the proposal to forbid removal from state to federal court of ERISA claims under \$10,000 ("Many of these removed cases involve claims for relatively small sums of money. Persons asserting small claims often have limited means. . . .") FCSC Report at 43 (cited in note 69).

Not all of the Report's recommendations for limiting federal court jurisdiction rely upon the small monetary value of the claims. For example, the FCSC also proposed eliminating most of federal courts' diversity jurisdiction. Many of those cases involve large sums of money. Id at 38-42. The "back-up proposal" is to limit diversity in a variety of ways and to raise the amount in controversy requirement to \$75,000 and to index that amount. Id at 42.

276. See, for example, *Crowell v Benson*, 285 US 22 (1932); *Commodities Futures Trading Commission v Schorr*, 478 US 833 (1986).

277. See, for example, FCSC proposal to create an Article I tax trial court but an Article III tax appellate court. FCSC Report at 69-72 (cited in note 69); to create an Article I disability court but reserve "pure questions of law" for Article III judges. Id at 55-56. Further, magistrates must continue to be "supportive and flexible" to assist Article III judges but not become "autonomous" actors. Id at 79.

278. For discussion of "routine" and "salient" litigation, see the exchanges among Geoffrey C. Hazard, Jr., *Authority in the Dock*, 69 BU L Rev 471, 471-76 (1989); H. Lee Sarokin, *A Comment on Geoffrey Hazard's "Authority in the Dock,"* 69 BU L Rev 477-79 (1989); and Stephen C. Yeazell, *The Salience of Silence: A Comment on Professor Hazard's "Authority in the Dock,"* 69 BU L Rev 481-86 (1989).

of Article III judges to the claims of a sole tort victim or of other particular kinds of grievants. Aggregation has begun to shift the burden of proof—so that it is the individualized system that is beginning to be required to justify its being. For example, concurrent with the interest in aggregation have come suggestions to abolish appeal as of right in civil cases. While the federal system began without a guarantee of appeal in all cases, Congress added such rights almost one hundred years ago—out of fear of the unchecked power of individual trial judges. Although that alteration of federal jurisdiction predated the “due process revolution” of the 1960s and the Supreme Court has never included appellate review as part of the “process due,” many procedural systems include such review, and many proceduralists began to take for granted the propriety of such a structure.

Challenges to this tradition have emerged over the last two decades.<sup>279</sup> In the middle of the 1980s, (then) Justice Rehnquist complained that “we have an obsessive concern that the result reached in a particular case be the right one.”<sup>280</sup> He argued that we pay too great a price, “in terms of lawyers’ time, speedy disposition and finality,” and he proposed that in the federal system “the time has come to abolish appeal as of matter of right from the district courts to the courts of appeal and allow such review only when it is granted in the discretion of a panel of appellate judges.”<sup>281</sup> Only some, deserving cases would receive full appellate review.

The question, of course, becomes how to define what is a case to which the most “important” members of the judiciary should attend. Proposed definitions come from many commentators. Some prominent members of the bench and bar advocate sending the “routine” and “trivial” cases to magistrates, to agencies, to specialized courts, to arbitration, to less visible, less well-resourced, and less prestigious institutions. For example, Robert Bork has argued that cases involving social security, food stamps, federal employers’ liability, and consumer products be sent away from the Article III judiciary. In his words, welfare “programs may have great social importance but the issues presented are in large measure legal trivia,” and “someone far less qualified than a judge”<sup>282</sup> can decide them. Justice Antonin Scalia strikes a similar chord. In his view, in 1960, the

federal courts . . . were forums for the “big case”—major commercial litigation under the diversity jurisdiction and federal actions under such law regulating interstate commerce as the Sherman Act, the Securities Exchange Act, and the National Labor Relations Act. They were not the place where one would find many routine tort and employment disputes. They had FELA

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279. Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 Sw L J 1151 (1981) (advocating limitations to preserve appellate rights, claimed to be weakened by caseload problems). In response, see Paul D. Carrington, *The Function of the Civil Appeal: A Late Century View*, 38 S Car L Rev 411 (1987).

280. Address by Justice William Rehnquist at the 75th anniversary of the University of Florida College of Law and the Dedication of Bruton-Geer Hall at 9 (September 15, 1984) (on file with author).

281. *Id.* at 9-10.

282. Robert H. Bork, *Dealing with the Overload in Article III Courts*, 70 FRD 231, 238-39 (1976).

and Jones Act cases, to be sure—but those seemed to be an exception proving the rule, a touch of the mundane in a docket that was at least substantially exotic.<sup>283</sup>

While small tort cases are not perceived as desirable, large, major litigations, even those involving tort claims, are perceived to be tasks appropriate for the Article III judiciary.<sup>284</sup> Thus, not only has aggregation in the mass tort context lent new prestige to lawyers who work on personal injury cases (at least in large scale cases), aggregation has also drawn large tort cases into the circle of salient cases that should occupy the time of Article III judges.<sup>285</sup>

#### D. Problems of Self-Definition

A change in valuation is not necessarily bad. Further, federal court jurisdiction has long used dollars as one measure of the value of cases. But a change that makes individual civil cases less appealing work for Article III judges could pose a problem *for* those judges. Aggregate cases—decisionmaking en masse of a variety of forms—exposes vividly what is true but often less visible, that application of rules of law to given cases is law-generative and hence that courts are (of course) lawmakers. Law making is difficult, especially in response to sprawling records, often unclear statutes and Supreme Court precedents, and problematic reconstructions of events over the course of several years and across a multitude of actors. As a consequence, alternatives to adjudication become ever more attractive. Judges become eager to encourage settlement, arbitration, negotiation, claims facilities—anything that would obviate the necessity of judicially-authored decisionmaking on the merits of claims. If the parties can agree to something, then that decision can at least be rationalized as in service of the parties' interests. Judges and lawyers may become willing to ignore or downplay the problems of self-interest (of attorneys, representatives, special masters, or others) in the eagerness to centralize authority and dispose of the mega-cases that they have created.<sup>286</sup>

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283. Antonin Scalia, *An Address by Justice Antonin Scalia, United States Supreme Court*, 34 Fed B J 252 (1987). For commentary disputing Justice Scalia's recollection of what cases predominated in the federal courts in 1960, see Marc Galanter, *The Life and Times of the Big Six; or The Federal Courts Since the Good Old Days*, 1988 Wisc L Rev 921, 927 (in 1960 tort cases were 38% of the civil docket, as compared to 17% in 1986).

284. See 1990 ALI Proceedings at 348 (cited in note 192) (comments of Eric H. Zagrans, urging "the federalization of state-originated cases . . . only [when] those cases . . . present serious, rather than trivial, controversies").

285. Not all federal judges are enthusiastic. See, for example, the comments of Judge Mark L. Wolf, at the 1990 ALI Proceedings, at 343-44 (cited in note 192) (raising concern that federal judges' "job satisfaction" comes in part from being a "generalist" and the large cases intrude on that opportunity).

For discussion of the growing competition among dispute resolution centers for "good" cases, see Bryant Garth, *The Emerging System of Privatized Justice: A Framework for Analysis and a Preliminary Assessment* 20 (1991 manuscript on file) ("Judges pretty clearly prefer claims involving the major economic and political powers. [Those who litigate such cases] help create the desired working conditions that attract and retain high quality judges . . .").

286. See generally Macey & Miller, *The Plaintiffs' Attorney's Role*, 58 U Chi L Rev 1 (cited in note 86). See also Feinberg's discussion of "The Problem of Mass Tort Litigation: Incentives to Settle"



But with the growth of alternative dispute resolution, the creation of institutions such as claims facilities and special masters, and the increased reliance upon magistrates<sup>287</sup> come other problems for the Article III judiciary—problems of how to define themselves, of what work to call their own, of when to allow delegation and when to insist upon control, of how to legitimate and justify what they do. In the 1930s, when a question of the constitutionality of agency-based decisionmaking arose, a majority of the Supreme Court could talk (with apparent belief in the coherency of the statement) about something called the “essential attributes of judicial power.”<sup>288</sup> While a deputy commissioner of the United States Employees’ Compensation Commission could make certain kinds of factual decisions, it would be unconstitutional, said the Court, to permit too much delegation. Congress could not divest the federal courts of all factfinding, for to do so “would be to sap the judicial power as it exists under the federal Constitution, and to establish a government of a bureaucratic character alien to our system.”<sup>289</sup>

During the intervening half century, agency adjudication grew. The institution of federal magistrates came into existence. Bankruptcy judges gained new jurisdiction. In the early 1980s, when the United States Supreme Court considered the constitutionality of the bankruptcy court, a plurality of justices tried to invoke the “essential attributes of judicial power”<sup>290</sup> that must remain in Article III courts, but had a difficult time explaining what those were. The justices discussed the importance of federal judges making the “informed, final determination,”<sup>291</sup> having a breadth of jurisdiction, and exercising enforcement authority. The sources of the understanding of “essential attributes of judicial power” were history and tradition; so-called “private rights” cases were the example of the quintessential moment for the exercise of Article III judicial power. Federal judges were described as generalists, as having both civil and criminal jurisdiction, of having final authority coupled with the power to compel obedience by the exercise of the contempt power.<sup>292</sup>

By the later part of the 1980s, history and tradition had even less to teach. When the question of the constitutionality of the adjudicatory powers given to the Commodity Futures Trading Commission came before the Supreme Court, the Court attempted a balancing test in which the questions addressed

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and his discussion of how to achieve “a comprehensive settlement,” in *The Dakon Shield Claimants Trust*, 53 L & Contemp Probs at 84-92 (cited in note 97).

287. See *Raddatz v United States*, 447 US 667 (1980). Compare *Gomez v United States*, 490 US 858 (1989).

288. *Crowell v Benson*, 285 US 22, 51 (1932).

289. *Id.* at 57.

290. *Northern Pipeline Construction Co. v Marathon Pipe Line Co.*, 458 US 50, 77-87 (1982) (Justice Brennan, for the plurality, quoting *Crowell*).

291. 458 US at 84-85. See generally Judith Resnik, *The Mythic Meaning of Article III*, 56 Colo L Rev 581 (1985).

292. *Northern Pipeline Construction Co.*, 458 US at 70-81. See also *D.C. Court of Appeals v Feldman*, 460 US 462, 477, 479 (1982) (“A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.”) (citations omitted).

included the powers held by the new adjudicatory body, the authority retained by Article III courts, the nature of the rights involved, and the "concerns that drove Congress"<sup>293</sup> to fashion non-Article III adjudicatory decisionmaking. In 1989, the power of non-Article III judges to conduct jury trials was left murky.<sup>294</sup> By 1990, the Federal Courts Study Committee did not attempt to articulate what degree of delegation of Article III authority to magistrates was permissible; rather, the FCSC urged more study of what could constitutionally be given to magistrates.<sup>295</sup> A few months later, the Ninth Circuit's Study of Magistrates concluded that "magistrates now possess the authority to handle, under appropriate circumstances, virtually any matter normally decided by district judges, except for felony trials and sentencing."<sup>296</sup>

This loss of meaning of the idea that something belongs specifically to the Article III judiciary (and to judges in general) is related to the growth of adjuncts to federal judges and to the wealth of federal adjudicatory power that resides outside the federal courts.<sup>297</sup> The movement from "cases" to "litigation" has played an important role, for it both adds new work for Article III judges<sup>298</sup> and generates pursuit of non-adjudicatory modes of decisionmaking (settlement, alternative dispute resolution), delegation of Article III powers (for the day-to-day management of the very large litigations), and of judicial involvement in cases to facilitate their disposition.<sup>299</sup>

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293. *Commodities Futures Trading Commission v Schorr*, 478 US 833, 851 (1986). See generally Richard Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv L Rev 915 (1988). The most recent Supreme Court discussion of Article III is in *Granfinanciera v Nordberg*, 109 S Ct 2782, 2796 (1989) (Congress can assign "public rights" to non-Article III tribunals, which lack the "essential attributes of the judicial power" (not defined except by a cite to *Crowell*)).

294. *Granfinanciera v Nordberg*, 109 S Ct 2782 (1989). See also *In Re Ben Cooper, Inc.*, 896 F2d 1394 (2d Cir 1990), vacated and remanded, 111 S Ct 425 (1990), reinstated, 924 F2d 36 (2d Cir 1991).

295. FCSC Report at 79-81 (cited in note 69). The issue of magistrates' authority over the voir dire was before the Supreme Court in *Gomez v United States*, 109 S Ct 2237 (1989) (determining that, as a matter of statutory interpretation, magistrates did not have authority to conduct jury selection in felony cases) and then again in *United States v France*, in which, by an equally divided Court (see 111 S Ct 805 (1991), the Ninth Circuit's decision was upheld. See *United States v France*, 886 F2d 223 (9th Cir 1989) (applying *Gomez* despite the defendant's lack of objection to magistrate's conducting jury selection). See generally Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 Ind L J 291 (1990).

296. Report of the Ninth Circuit Judicial Council's United States Magistrates Advisory Committee, Study of Magistrates within the Ninth Circuit Court of Appeals at 9 (April 15, 1990) (recommending that magistrates have additional authority and that the public be educated about their qualifications) (on file with author).

297. For example, the Social Security Administration disposes of more cases than do federal trial judges on their civil docket; administrative law judges vastly outnumber authorized federal trial judgeships. See Jeffrey S. Lubbers, *Federal Agency Adjudication, Trying to See the Trees and the Forest*, 31 Fed Bar & News J 383 (1984).

298. See 1990 ALI Proceedings at 324 (cited in note 192) (language of ALI Complex Litigation Proposal clarified to remove "ambiguity" and make clear that the proposed "Complex Litigation Panel" is "an Article III court") (comments of Arthur Miller).

299. See Marjorie Silver's call for federal trial judges to notify potential plaintiffs of pending litigation, in Marjorie Silver, *Giving Notice: An Argument for Notification of Putative Plaintiffs In Complex Litigation*, 66 Wash L Rev (forthcoming, 1990 manuscript on file with author).

The issue for federal courts is whether Article III trial judges want to lay claim to particular tasks or activities.<sup>300</sup> The pressures to abandon individual case decisionmaking—either by turning to alternative dispute resolution in search of quick, inexpensive decisions in individual cases or by aggregation and the creation of a “litigation”—raise that issue. On one hand, judges try to act more like arbitrators, mediators, settlers, and managers. And, in the few cases in which judges may believe that the energy and resources needed for adjudication is merited, the unit of the case is often so large that the claim to adjudication—to deliberate factfinding and law application based upon a circumscribed limited record—weakens. Increasingly, the line between agency and court and the line between court and its alternatives, such as mediation and arbitration, blurs. Further, in aggregative cases, courts start structuring new adjudicatory structures, delegate to mini-agencies (called “claims facilities”), are lobbied by special interest groups (called “lawyers’ committees”), and thus mimic efforts by legislatures to construct decisionmaking systems.

Ben Kaplan saw the issues some twenty years ago. He wrote then:

There are some who are repelled by these massive, complex, unconventional lawsuits because they call for so much judicial initiation and management. We hear talk that it all belongs not to the courts but to administrative agencies. But by hypothesis we are dealing with cases that are not handled by existing agencies, and I do not myself see any subversion of judicial process here but rather a fine opportunity for its accommodation to new challenges of the times.<sup>301</sup>

In the 1960s and 1970s, in the context of class action civil rights litigation, commentators on the federal courts debated the propriety of using courts for such group cases.<sup>302</sup> In the 1980s and 1990s, mass torts have raised similar problems—albeit without as much challenge along the legitimacy lines as the civil rights litigation has provoked.

Whatever the options in the 1960s when Benjamin Kaplan and his colleagues faced the issue of aggregation, today the possibility of refusing to permit group litigation seems implausible. Whether by subversion or by evolution, aggregation is here. The problem is not whether it should be here, but how to name it and what to do with it and with the rest of the federal docket. I began this article with a story of sorts—about *what* Ben Kaplan said to John Frank some thirty years ago. They worried about individual cases, and they seemed to assume that federal judges would deal with such cases. The rest of this article has sketched the course of change in workload, procedures, and responses. The experiences of the last decades teach how difficult it is to know where the “action”—a few years hence—will be. Less

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300. For detailed discussion of the “quiet revolution taking place” in federal trial courts, see Wolf Heydebrand & Carroll Seron, *Rationalizing Justice: The Political Economy of Federal District Courts* (SUNY Press, 1990).

301. Kaplan, *A Prefatory Note*, 10 B C Indus & Comm L R at 500 (cited in note 36).

302. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv L Rev 1281 (1976); Owen M. Fiss, *The Supreme Court—Foreword, The Forms of Justice*, 93 Harv L Rev 1 (1979).

than thirty years ago, many of the wisest of federal court commentators did not link mass torts and class actions. Today, many within the legal community want to claim these cases as “federal,” as demanding the time and attention of a unique set of judges and seek to federalize tort litigation and give Article III judges control over it, rather than to send that category of litigation to non-Article III actors.

Further, the changes over these last decades teach that what has been understood as an “individual’s” case can be reconceived as a problem belonging to a group; that cases once called “protracted” can later be seen as “complex”; that the federal judiciary has the capacity to shift its understanding of what is rightfully its work; that courts are a social construct into which meaning is poured; and the question is what meanings should be accorded. “The recommendation of value . . . not only promotes but goes some distance toward *creating* the value of that work.”<sup>303</sup> A “federal case” is an expression that something of possible national import is at stake; the question is what should be given that label—and why.

## V

### INDIVIDUALS, AGGREGATION, AND CIVIL JUSTICE

We get angry at and on behalf of individuals but are indifferent to wrongs that seem to affect too many people at large. . . . That is why unjust court decisions rankle more than unfair laws. They generally afflict an individual litigant, not a faceless group.<sup>304</sup>

To underscore the changes that have occurred over the last three decades and to assess their impact on federal courts, I have stressed the weakening of the link between individuals and lawsuits. With that emphasis, I could be read as objecting to aggregation *per se*, which I do not. The purposes of this article have been to document and analyze important shifts that occurred and to outline their effects on the federal court system, rather than to join either aggregation proponents or opponents or to try to untangle the many effects of aggregate litigation. But there is one aspect of the movement from cases to litigation that requires some comment before the next installment:<sup>305</sup> the interaction between aggregation, individual case processing, and the political functions of the civil justice system.

This section begins with a quote from political philosopher Judith Shklar, who in her 1990 book, *The Faces of Injustice* reflects the general impression of what happens in courts. Shklar’s enterprise is to examine the difference “between the unjust and the unfortunate.”<sup>306</sup> Although her “real subject is personal and political injustice” and not “legal justice” itself,<sup>307</sup> her essay

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303. Barbara Herrnstein Smith, *Contingencies of Value* 10 (Harvard U Press, 1988) (emphasis in original).

304. Judith N. Shklar, *The Faces of Injustice* 109 (Yale U Press, 1990).

305. See note 230.

306. Shklar, *The Faces of Injustice* at 9 (cited in note 304).

307. *Id.* at 13-14.

provides an illustration of how courts are assumed to function (that is, in relationship to specific cases), with the further assumption that a “case” belongs to an individual. Shklar’s vision of United States courts is linked to her understanding of the United States polity: “[w]hat stands out most [in the beliefs of Americans] is their absolute concentration on individuals in making judgements.”<sup>308</sup> Shklar’s aspiration is for the polity to recognize and attempt to stop injustice rather than to participate in passive injustice.<sup>309</sup>

This commentary underscores the expressive nature and the political role of adjudication. One political aspect, debated by Stephen Yeazell and Robert Bone,<sup>310</sup> is how cases enable the expression of litigant autonomy and individual participation. A related concern is what some have called “social grievance redress.”<sup>311</sup> Another aspect, much discussed by tort scholars, is the role of tort adjudication in deterrence, compensation, and corrective justice.<sup>312</sup> A fourth is the legitimacy of judicial decisionmaking, traditionally tied to specific and limited events that form the bases of judicial explanations of what animated their exercises of power. A fifth aspect is how lawsuits enable third parties—the citizenry/audience—to use cases as a means of understanding the rules of government and their implementation.<sup>313</sup> The claim is that something special is knowable when rules of law are exposed when applied to the very particular events of individual disputes.

Aggregation poses challenges to these functions of adjudication. As explained above,<sup>314</sup> definite judgments about the impact of aggregation require more knowledge of how aggregate cases proceed, in practice, and of how different forms of aggregation affect litigant autonomy and participation, compensation, deterrence, corrective justice, judicial authority, and audience understanding. But the outlines of the kinds of concerns raised by aggregate processing can be sketched. First, as to the issues of litigant autonomy and direct participation, aggregation pools litigants; the assumption is that with that pooling comes a reduction in the capacity of individual litigants to be effective on their own behalves. As for the goals of tort law, the fear is that with aggregation come both the loss of causal connections between victim and harm-doer and inaccurately measured compensation when it is awarded. Moving to the role of the judge, the assumption is that the sweep of judicial power so broadens in aggregate proceedings that such power can rarely be justified by the record developed. Finally, to the extent the citizens of the United States conceptualize problems in terms of individuals and courts play a role in enabling insight into and mobilizing against injustice, aggregation may dim our capacity to see injustice. The question becomes whether aggregation

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308. Id at 110.

309. Id at 125-25.

310. See notes 77, 80; see also note 81.

311. See Reporters Study, Volume 1, *The Institutional Framework*, at 26-27 (cited in note 64).

312. Id at 24-32.

313. See generally Judith Resnik, *Due Process: A Public Dimension*, 39 U Fla L Rev 405 (1987).

314. See text at p 50.

can provide the immediate and compelling examples of injustice that the individual case system seems, upon occasion, to do.

An individually-based adjudication system offers windows of access and modes of participation: to develop and to learn the detailed descriptions of the problems of individuals in conflict with others, to observe lawyers as they develop narratives to press their clients' claims, to watch trial judges and jurors who make decisions on records developed in public and to hear whether appellate courts lend their weight to those decisions or reverse them. Popular culture, both via press coverage and in the fictions of television, are filled with "law stories." But the individualized adjudication system is far from perfect. The windows are sometimes narrowed or totally obscured, as lawyers ignore and silence clients, judges do much of their work outside public purview, and cases are rarely tried by either judges or juries or reviewed on appeal. I am not one who believes that the "traditional tort system" is the paradigm against which to measure all changes. As many have documented, that system's commitment to litigant autonomy, attorney fidelity, fair and accurate decisionmaking, and public interaction has not been uniformly borne out in practice nor made available to many would-be litigants.<sup>315</sup>

Indeed, the creative activity around aggregate litigation over the last three decades may be evidence in support of the view that adjudication is a moment in which we mobilize to right injustice. The rule drafters in the 1960s revised the class action rule in part to provide a "means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."<sup>316</sup> Many of the most recent efforts to aggregate grow out of horror—at the number of injured, uncompensated individuals, at the existence of victims who have not yet sought redress but for whom no resources may remain, and at the length of the queue of those seeking to be heard on claims for redress.

Aggregation may thus be seen as one response to the inadequacies of the individualized system, and as such, offers an opportunity to improve upon those failings. But aggregation also comes with risks—of stunning concentrations of power in a very few people who, if lawyers, may become exceedingly powerful as gatekeepers and compensation distributors and who, if judges and their appointees, do much of their work at inaccessible settlement conferences and claims facilities. Thus, while not enamored of the "old fashioned" tort system, I am also skeptical of the claimed success that aggregation-proponents have already begun to make about processes that are being invented as I write.

But because that invention is on-going, the aspirations of the aggregators are critical. The focus of expanding modes of aggregation over the last three

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315. See generally Hensler, *Myths and Realities*, 1989 U Ill L Rev at 92-104 (cited in note 238); Rosenberg, *Class Actions for Mass Torts*, 62 Ind L J 586-93 (cited in note 51); Richard L. Abel, *A Critique of Torts*, 37 UCLA L Rev 785, 791-831 (1990).

316. Kaplan, *A Prefatory Note*, 10 B C Indus & Comm L Rev at 497 (cited in note 36).

decades has been on the two functions of aggregation sketched above—enabling and expediting claims. Assuming that adjudication should continue to enable litigant autonomy and participation, judicial legitimacy, accurate compensation, sufficient deterrence, and public engagement, then contemporary procedural innovators need to look at their work product with more than enabling and expediting claims in mind.

Can aggregate litigation attend both to individuals and to groups? Can it offer adequate means of finding and assessing liability? Can it cabin and legitimate the power it creates? Can it invite public participation? Can it generate the narratives that translate into shared stories that become social and political reference points? The nomenclature that surrounds aggregation is not promising in its valuation of individuals' claims, nor is there much indication of self-conscious efforts to constrain the authority of judges and lawyers or to invite the public in. Lawyers have "stables" or "warehouses" of clients. The principals proliferate, but increasingly the principals are the representatives not of litigants but of lawyers and judges. In one large case, judges and lawyers close to the litigation did not know how to pronounce the lead plaintiff's name. In another, the participants at the bargaining table included the "plaintiffs' lawyers' lawyer"—indicating that it was plaintiffs' lawyers (who often have far more financially at stake than any individual client) who were critical stakeholders.<sup>317</sup> Judges act by reliance on special masters, experts, monitors, and other court-appointed assistants, chosen by judges to act as their special emissaries. The entire arena of this kind of litigation itself—once called "protracted"—is now blanketed with the title "complex litigation."<sup>318</sup> With the label "complex" comes an implicit judgment that individual cases are "simple," "routine," "run-of-the-mill," "garden variety" claims to which little (or at least less) attention should be paid.

The question is whether such terminology and the ideology it reveals are inevitable aspects of aggregation, and the answer will come from the work of today's procedural innovators. Those leaders of the bench and bar, who generated the aggregate techniques catalogued here, could be creative once again. If concerned about autonomy, participation, and the social grievance functions of adjudication, they could consider how to design aggregative procedures that enable participation and illuminate those grievances. If committed to the value of government officials attending to individual claims, they could recognize that "large scale" litigation is not necessarily synonymous with "complexity" and that both large and small cases may require exacting and careful treatment. They could insist that their energy go

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317. In recognition of that fact, Jonathan Macey and Geoffrey Miller propose letting attorneys pursue claims as principals. See Macey & Miller, *The Plaintiffs' Attorney's Role*, 58 U Chi L Rev at 117 (cited in note 86).

318. In 1990, a group of law professors formed the Complex Litigation Committee of the Civil Procedure Section of the American Association of Law Schools. Statement of Richard Marcus, April 1991 (on file with author).

toward working on small as well as large cases,<sup>319</sup> that high-prestige attorneys and judges spend personal time in attending to claims of injustice of particular individuals as well as of groups, that litigant voice and public access be built into the aggregation procedures being created, and that the public be welcomed in, so as to enable “citizens [to] point to specific acts by public officials, judges and civil servants”<sup>320</sup>—in large scale and individual cases—as being either just or unjust.

Aggregate litigation emerges from dashed hopes about what individual, case by case adjudication can provide. Aggregate litigation should aspire to do what, occasionally and erratically, the best efforts of the individual case system has done—compelled a sense of commitment to just process and outcomes, empowered litigants, lawyers, and judges to bring them about, and included the citizenry in the unfolding events.

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319. See, for example, Clark Byse, *Suing the “Wrong” Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 Harv L Rev 40, 60 (1963) (“surely law reform should seek to eliminate infrequent injustices in ‘little’ cases as well as recurring injustices in ‘big’ cases . . .”).

320. Shklar, *The Faces of Injustice* at 112 (cited in note 304).